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Special Forces' Wear of Non-Standard Uniforms*

W. Hays Parks**

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.”¹ The reports sparked debate within the NGO community and among military judge advocates about the legality of such actions.² 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.³ The discussion was unclassified, and many in the room were not

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¹ See, for example, Michelle Kelly and Morten Rostrup, *Identify Yourself: Coalition Soldiers in Afghanistan Are Endangering Aid Workers*, *Guardian* (London) 19 (Feb 1, 2002).

² The judge advocate debate is exemplified by Maj. William H. Ferrell, III, USMC, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict* (unpublished paper, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, US Army 2002) (on file with author); Lt. Col. H. Allen Irish, USAR, *Are Soldiers in Civilian Clothes Protected under Geneva-Hague?* (unpublished paper, 2002) (on file with author); and Maj. Robert J. Drone, USAF, *Nontraditional Uniforms Do Accord Prisoner of War Status for Special Operations Forces* (unpublished LLM thesis, George Washington University, 2003) (on file with author).

³ In the debate that ensued over the next year, it was my observation that those most strident in their criticism were most distant from Special Forces ground operations or were judge advocates not serving with or familiar with the missions of Special Forces units.

privity to information regarding Operation ENDURING FREEDOM,⁴ Special Forces,⁵ its special mission units,⁶ or the missions assigned them.

⁴ ENDURING FREEDOM was the US designation for military operations against al Qaeda and Taliban forces in Afghanistan that commenced following the al Qaeda terrorist attack on the World Trade Center and the Pentagon on September 11, 2001. See, for example, Robin Moore, *The Hunt for Bin Laden: Task Force Dagger* (Random House 2003).

⁵ In official US terms, *Special Operations Forces* are “[t]hose Active and Reserve Component forces of the Military Services designated by the Secretary of Defense and specifically organized, trained, and equipped to conduct and support special operations.” Department of Defense, Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms* 493 (April 12, 2001, as amended through May 7, 2002), available online at <<http://www.dtic.mil/doctrine/jel/doddict>> (visited Oct 6, 2003). Within the US military, this includes US Army Special Forces, Psychological Warfare units, and Civil Affairs units; Naval Special Warfare forces; and Air Force Special Operations forces. *Special Operations* are defined as:

Operations conducted by specially organized, trained, and equipped military and paramilitary forces to achieve military, political, economic, or informational objectives by unconventional means in hostile, denied, or politically sensitive areas. These operations are conducted across the full range of military operations, independently or in coordination with operations of conventional, non-special operations forces. Political-military considerations frequently shape special operations, requiring clandestine, covert, or low visibility techniques and oversight at the national level. Special operations differ from conventional operations in degree of physical and political risk, operational techniques, mode of employment, independence from friendly support, and dependence on detailed operational intelligence and indigenous assets.

Id at 492–93.

In the US military, special forces (in the more generic sense of the term) include US Army Special Forces, US Naval Special Warfare units (in particular, SEALs (Sea, Air, Land)) and Air Force Special Tactics units. *Special forces* are “US Army forces organized, trained, and equipped specifically to conduct special operations. Special forces have five primary missions: unconventional warfare, foreign internal defense, direct action, special reconnaissance, and counter-terrorism. Counter-terrorism is a special mission for specially organized, trained and equipped special forces designated in theater contingency plans.” Id at 491. *Naval special warfare forces* are “[t]hose Active and Reserve Component Navy forces designated by the Secretary of Defense that are specifically organized, trained and equipped to conduct and support special operations,” while *naval special warfare* is defined as “[a] designated naval warfare specialty that conducts operations in the coastal, riverine, and maritime environments. Naval special warfare emphasizes small, flexible, mobile units operating under, on, and from the sea. These operations are characterized by stealth, speed, and precise, violent application of force.” Id at 361. Naval Special Warfare includes SEALs, Swimmer Delivery Vehicle Teams, and Special Boat Teams. A *special tactics team* is a:

US Air Force special operations task-organized element that may include combat control, pararescue, and combat weather personnel who are organized, trained, and equipped to establish and control the air-ground interface at an airhead in the objective area. Functions include assault zone reconnaissance and surveillance, establishment, and terminal control; combat search and rescue; combat casualty care and evacuation staging; and tactical weather observations and forecasting.

Id at 495.

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

For the history of US Army Special Forces, see Col. Aaron Bank (Ret.), *From OSS to Green Berets: The Birth of Special Forces* (Presidio 1986) (on file with author), and Alfred H. Paddock, Jr., *U.S. Army Special Warfare: Its Origins* (Kansas rev ed 2002) (on file with author). For the SEALs and their Underwater Demolition Team predecessors, see Cdr. Francis Douglas Fane, USNR (Ret.) and Don Moore, *The Naked Warriors: The Story of the U.S. Navy's Frogmen* (Appleton-Century-Crofts 1956) (reprinted by Naval Institute Press 1995); Orr Kelly, *Brave Men, Dark Waters: The Untold Story of the Navy SEALs* (Presidio 1992); T.L. Bosiljevac, *SEALs: UDT/SEAL Operations in Vietnam* (Paladin 1990); and James Douglas O'Dell, *The Water Is Never Cold* (Brassey's 2000). For Air Force Special Tactics Units, see Col. John T. Carney, Jr. and Benjamin F. Schemmer, *No Room for Error: The Covert Operations of America's Special Tactics Units from Iran to Afghanistan* (Ballantine 2002). Coalition special forces that served in Afghanistan have a lineage and missions similar to those of US special forces. See, for example, Philip Warner, *The Special Air Service* (William Kimber 1971); John Strawson, *A History of the S.A.S. Regiment* (Secker & Warburg 1984); Tony Geraghty, *Who Dares Wins: The Story of the SAS, 1950–1992* (Little, Brown, 3d rev ed 1992); David Horner, *SAS: Phantoms of the Jungle: A History of the Australian Special Air Service* (Allen & Unwin 1989); W.D. Baker, "Dare to Win": *The Story of the New Zealand Special Air Service* (Spa 1987), and other references contained in the State Practice sections of this article (Section IV.B. and Appendix). In this article, *special forces* ("SF") includes US Army Special Forces, Naval Special Warfare SEALs, Air Force Special Tactics Units, and coalition special forces, while *special operations forces* ("SOF" or "Special Operations") includes Special Forces, UA Army Psychological Operations units, and Civil Affairs units.

While the Marine Corps until recently (and at the time of the NGO complaint) was not a part of the special operations community, Marine Corps personnel from 2nd Intelligence Battalion, II Marine Expeditionary Force, assigned to 4th Marine Expeditionary Brigade were operating in Afghanistan in non-standard uniform (indigenous attire with *pakol* and Northern Alliance scarf), as described on pp 5–9, in late winter 2001 and spring 2002. Discussion with Lt. Col. Joseph H. Wheeler III, USMC, Warfighting Faculty, Marine Corps Command & Staff College (September 5, 2003) and e-mail from Lt. Col. Wheeler to author (September 8, 2003), who provided photographs for this author's files. The Marine Corps move to develop a limited special operations capability is described in Lt. Col. Giles Kyser, *Fix Recon, USSOCOM, and the Future of the Corps: Food for Thought*, 87 Marine Corps Gazette 16–21 (July 2003).

⁶ *Special mission unit* is "[a] generic term to represent a group of operations and support personnel from designated organizations that is task-organized to perform highly classified activities." Joint Publication 1-02 at 492 (cited in note 5). It should be noted that increased (higher) classification is not a method for engaging in activities beyond the law. As noted in the definition of Special Operations in the preceding paragraph, special operations involve "political-military considerations [that] frequently shape special operations, requiring clandestine, covert, or low visibility techniques and oversight at the national level." *Id.* (emphasis added). It has been the author's personal experience in providing legal support for special missions units for a quarter of a century that special mission unit operations receive more policy and legal oversight—up to the national level—than virtually any other military unit or operation. Because of their sensitive nature and potential risk to individuals operating in denied areas, access to information relating to special mission unit operations necessarily is limited. The judge advocates most strident in their criticism of Special Forces wearing non-standard uniforms were not privy to this information. Those with access necessarily could not discuss the issue in an open forum.

- I. What are the facts?
- II. What are the legal issues?
 - A. Is it lawful for combatants to wear civilian clothing or non-standard uniforms in combat?
 - B. If so, are there legal or other considerations in use of either?
 - C. Are there any unique law of war considerations, such as risks, a commander should balance in making his decision?
- III. What is the nature of the armed conflict and its armed participants?
 - A. Was there something unique about Operation ENDURING FREEDOM with respect to application of the law of war?
 - B. If so, how would application of the law of war differ?
- IV. What is the relevant law of war?
 - A. What is the applicable treaty law and legislative history?
 - B. What is state practice, including court decisions?

I. 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 ("JAG") School, US Army, in Charlottesville. 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, some rushed to judgment based on less-than-reliable sources.

There are two fundamental issues. The first is what was being worn, and by whom. The second is the motive for the NGO complaints.

In response to the September 11, 2001 al Qaeda terrorist attacks against the World Trade Center and the 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, who was 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 the 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.⁷ As will

⁷ 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, *Blackhawk Down: A Story of Modern War* (Atlantic Monthly 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 they 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. Jeremy Wilson, *Lawrence of Arabia: The Authorized Biography of T.E. Lawrence* 1043 n 4 (Athenaeum 1990); Robert D. Kaplan, *The Arabists: The Romance of an American Elite* 55–56 (Free Press 1993). The author thanks Max Boot for bringing this to his attention. Knowledge of the circumstances of Captain Shakespear's death prompted T.E. Lawrence to wear Arab clothing as he lead the Arab revolt against Ottoman rule that began June 5, 1916, and to incorporate the lesson into Articles 18–20 of his *Twenty-Seven Articles* published in August 1917 as lessons learned. Wilson at 960, 1043 n 4. Articles 18–20 are discussed below in note 73.

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. Frank Mills, Robert Mills, and John W. Brunner, *OSS Special Operations in China* 300, 321 (Phillips 2002) (on file with author).

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.

be seen in my 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.⁸

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 group of US Special Operations Forces—Army Civil Affairs⁹—began to enter Afghanistan. In November 2001, the US Army Central Command (“ARCENT”)¹⁰ had established the Coalition and Joint Civil Military Operations Task Force (“CJCMOTF”) using soldiers from the 377th Theater Support Command (“TSC”), the 122nd Rear Operations Center, and the 352nd 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 96th Civil Affairs Battalions, who were beginning to operate throughout Afghanistan. CJCMOTF also was the liaison with the US Embassy, and coordinated coalition humanitarian assistance contributions.

The ARCENT Commanding General made the uniform decision, favoring civilian clothing over DCU. His rationale was based on two factors: (a) the

In the south, Special Forces wear of indigenous attire and its distinguishing devices was encouraged by Hamid Karzai 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.

⁸ 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: 5th 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.

⁹ *Civil affairs* refers to “[d]esignated Active and Reserve component forces and units organized, trained and equipped specifically to conduct civil affairs activities and to support civil-military operations,” while *Civil affairs activities* are defined as “[a]ctivities performed or supported by civil affairs that (1) enhance the relationship between military forces and civil authorities in areas where military forces are present; and (2) involve application of civil affairs functional specialty skills, in areas normally the responsibility of civil government, to enhance conduct of civil-military operations.” Joint Publication 1-02 at 86 (cited in note 5).

¹⁰ US Army Central Command is Third US Army, Fort McPherson, Georgia, when not forward deployed.

ability of soldiers to perform humanitarian assistance operations; and (b) the safety of Civil Affairs personnel—that is, force protection.¹¹ A strong desire

¹¹ In *Are Soldiers in Civilian Clothes Protected under Geneva-Hague?* at 31 (cited in note 2), 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 performing humanitarian assistance in operations short of international armed conflict have been authorized to wear civilian clothing. Civil Affairs personnel have worn standard uniforms only in international armed conflict. 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. From the enemy standpoint (particularly the Taliban and al Qaeda), humanitarian assistance to Afghan civilians may constitute as much a threat as a soldier engaged in offensive operations.

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, p 4-40 (on file with author), 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 force protection, while noting that wearing civilian clothing “[g]reatly increases the possibility of fratricide.”

Notwithstanding the eloquence of Lieutenant Colonel Irish’s arguments and the outstanding work Civil Affairs units have performed in Afghanistan and Iraq (the latter in Operation IRAQI FREEDOM, the 2003 coalition effort to remove dictator Saddam Hussein), there is no law of war basis for Civil Affairs personnel to wear anything other than standard uniform in an international armed conflict.

The Bush Administration decision to regard Operation ENDURING FREEDOM as an international armed conflict was not made until early February 2002. It is an example of how good-faith differences may occur between how an on-scene commander views a conflict and the way it may be regarded in Washington. In this case, the Combatant Commander and his subordinate commanders saw the mission as one short of international armed conflict. This difference is commonplace, though the positions of the participants (Washington and the field commander) usually are in reverse. For example, on December 4, 1983, a US Navy air strike was launched against terrorist-related targets in the Beka’a Valley in Lebanon. Poorly executed, two aircraft were lost, and the Syrians captured one serviceman. In a press conference on December 20th, President Ronald Reagan was asked if the man was a prisoner of war. He replied:

existed at US Central Command (“USCENTCOM”) headquarters (Tampa) to present a non-confrontational face, as well as a belief that NGOs were reluctant to be seen working with uniformed soldiers. Additionally, 96th Civil Affairs Battalion personnel, who initially operated in Islamabad, Pakistan, were ordered by the United States Ambassador to Pakistan to wear civilian clothing rather than their uniforms, reflecting the sensitive, 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.¹²

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.¹³ NGO involvement during those conflicts was virtually non-existent (World War II)¹⁴ or extremely limited (Vietnam).¹⁵

The Syrians claim that he's a prisoner of war. Well, I don't know how you have a prisoner of war when there is no declared war between nations. I don't think that makes you eligible for the Geneva accords [sic].

The White House, *The President's News Conference of December 20, 1983*, 19 Weekly Comp Pres Docs 1729 (Dec 20, 1983). The day after the operation, however, this author had cleared on a State Department cable forwarding a demarché to the United States ambassador in Damascus, demanding prisoner of war protection for the captured aviator. Upon receipt of that demarché, the Syrians complied. See Department of State, 3 *Cumulative Digest of United States Practice in International Law, 1981–1988* at 3456 (1995). The one-hour air strike probably did not meet the general criteria for a *war*, but it did cross the threshold for application of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. Similarly, during the 1999 NATO Kosovo air operations, Serbian forces captured three US Army soldiers. The initial response of the Secretary of State was that these men were not prisoners of war, a point with which every member of the Department of Defense Law of War Working Group strongly disagreed. The Secretary of State subsequently agreed that the men were prisoners of war, another indication that there is more than one threshold. W. Hays Parks, *The United States Military and the Law of War: Inculcating an Ethos*, 69 *Social Research* 981, 1000 (2002).

¹² 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.

¹³ See, for example, F.S.V. Donnison, *British Military Administration in the Far East, 1943–46* (Her Majesty's Stationary Office (“HMSO”) 1956); F.S.V. Donnison, *Civil Affairs and Military Government: North-West Europe, 1944–1946* (HMSO 1961); C.R.S. Harris, *Allied Military Administration of Italy, 1943–1945* (HMSO 1957); and F.S.V. Donnison, *Civil*

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 relevant state parties to a conflict.¹⁶ 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 NGO absence 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 more significant players in areas of armed conflict over the past decade.¹⁷ A service NGO's emphasis is on mission

Affairs and Military Government: Central Organization and Planning (HMSO 1966) (each is a part of the official British History of the Second World War, United Kingdom Military Series). US Army Civil Affairs operations in World War II are the subject of Harry L. Coles and Albert K. Weinberg, *Civil Affairs: Soldiers Become Governors* (US Army in World War II, Special Studies series) (Department of the Army 1964) and Earl F. Ziemke, *The U.S. Army in the Occupation of Germany, 1944–1946* (Army Historical Series) (US Army Center for Military History 1975). For Vietnam history, see, for example, Capt. Russel H. Stolfi, *U.S. Marine Corps Civic Action Efforts in Vietnam, March 1965–March 1966* (Historical Branch, US Marine Corps 1968); Capt. William D. Parker, *U.S. Marine Corps Civil Affairs in I Corps, Republic of Vietnam, April 1966 to April 1967* (Historical Division, US Marine Corps 1970).

- ¹⁴ While the International Committee of the Red Cross does not regard itself as a non-governmental organization, it is in many respects the quintessential NGO and one of few NGOs operating during World War II. For its role in that conflict, see *Report of the International Committee of the Red Cross on Its Activities during the Second World War, September 1, 1939–June 30, 1947* (International Committee of the Red Cross 1948).
- ¹⁵ See Maj. Gen. George S. Prugh, *Law at War: Vietnam, 1964–1973* at 65–66, 68–72, 76, 78, 116 (Department of the Army 1975), which mentions only work with the International Committee of the Red Cross. The only other NGO seen by this author during his Vietnam service (1968–1969) was the American National Red Cross, which played a limited but important role.
- ¹⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art 10 (1949), 6 UST 3516. "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). See also Dietrich Schindler and Jiří Toman, eds, *The Laws of Armed Conflicts* 504 (Martinus Nijhoff 3d ed 1988).
- ¹⁷ The author distinguishes between service NGOs, whose primary purpose is to provide humanitarian assistance in areas of strife and/or natural disaster, and advocacy NGOs, which are solely political action groups (self-proclaimed "human rights groups"). Examples of the former include the International Committee of the Red Cross, *Médecins*

performance following the principles of humanity, impartiality, independence and neutrality. These 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 territories. In contrast, advocacy NGOs see CA's engagement in assistance activities as driven by political and security objectives.

The US military leadership was not entirely successful in seeking dialogue, much less working relationships, 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 concern was NGO image and market share. NGOs that 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 the use of humanitarian projects in support of a military campaign.

The CJCMOTF served as liaison to the interim government and supervised the humanitarian assistance for US Army Civil Affairs teams beginning to operate throughout Afghanistan. Civil Affairs personnel were deployed across Afghanistan to assess 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, the 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 them. Moreover, due to security concerns, NGOs were in the main cities but not in the villages where Civil Affairs teams operated. Going directly to local contractors increased the fear of some NGOs that they would lose "market share."

There was friction also with respect to fiscal accountability. US Army Civil Affairs is expected to account for 100 percent of the funds it is allocated. A substantial amount of NGOs' funding—sometimes as much as 60 percent—is directed to "overhead," preventing its allocation toward the designated project and hindering accountability. NGOs resent scrutiny of their financial affairs and high overhead. This resistance increased tension between US Army Civil Affairs and the NGOs.

Social reform was another source of tension. Contrary to claims of neutrality and impartiality,¹⁸ many NGOs in Afghanistan moved into advocacy

sans Frontières (Doctors Without Borders), and Vietnam Veterans of America Foundation. Primary examples of the latter are Human Rights Watch and Amnesty International.

¹⁸ The International Committee of the Red Cross ("ICRC") defines *neutrality*: "In order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature."

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 NGOs' agendas on non-humanitarian issues.

An amicable although uneven relationship evolved between CA and NGOs at the working, "grassroots" level. This contrasts with the poor relationship at higher levels due to the conflicts identified above. NGOs' 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.¹⁹ 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 19th, following its review, USCENCOM supported CJCMOTF's decision. Guidance and authority were provided to ground force commanders to establish uniform policies based upon local threat conditions and force protection requirements.

As a result of the NGOs' complaints the issue of military wear of civilian clothing was reviewed within the Department of Defense ("DoD"). Following DoD-Joint Chiefs of Staff coordination, guidance was forwarded to

Impartiality means that "[the ICRC] makes no discrimination as to nationality, race, religious beliefs, class or political opinions." *International Red Cross Handbook* 17 (ICRC 12th ed 1983). These are fundamental principles of the ICRC, approved by governments at the XX International Conference of the Red Cross, Vienna, 1965. Offering the ICRC definitions is not intended to suggest that the comments contained in the main text sentence are directed at the ICRC.

¹⁹ 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) (hereinafter "MSF"), made it clear that the NGO complaint was directed only at US Army Civil Affairs personnel operating in proximity to NGOs. 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.

USCENTCOM in May 2002 that was consistent with CJCMOTF guidance issued on April 7, 2002. As a result of CENTCOM/CJCMOTF guidance, the number of Civil Affairs and other Special Operations Forces (“SOF”) personnel in civilian clothing had diminished substantially prior to DoD-JCS action or the aforementioned USSOCOM Legal Conference.²⁰

²⁰ Six months later the Commanding General, US Army Special Forces Command (“USASFC”) issued an order reinstating standard uniform and grooming practices that received wide media coverage. See, for example, Kitty Kay, *Close Shave for Special Forces*, Times (London) Overseas News 17 (Sept 13, 2002); Mike Mount, *Close Shave for Special Ops Forces in Afghanistan*, CNN (Sept 13, 2002), available online through <<http://www.cnn.com>> (visited Oct 17, 2003); and Headquarters CJSOTF Afghanistan Memorandum, Subject: Uniform and Appearance Standards Policy – Rescinding of Relaxed Grooming Standards (Sept 6, 2002). 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, US Central Command). 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. The author is indebted to Lieutenant Colonel Margaret M. Bedard, JA, USA, and Captain Robert A. Broadbent, JA, USA, US Army Special Forces Command, and Lieutenant Colonel Kevin H. Govern, JA, USA, for the information contained in this footnote.

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 protect them from identification 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, *Lawrence of Arabia* at 552 (cited in note 7).

As somewhat of an aside and a comparative precedent, the reader is invited to examine the photograph of a bearded Captain Leon de Meis, US Army, a member of OSS Team IBEX in Hainan, northern China, in 1945, which shows him shirtless and in non-standard trousers, with a bandoleer of ammunition across his chest. Bank, *From OSS to Green Berets* at 62–63 (photo section) (cited in note 5). Similarly, British military personnel assigned to Special Operations Executive, changed from civilian clothing into uniform as their individual missions transitioned from clandestine operations into the paramilitary guerrilla phase. Douglas Dodds-Parker, *Setting Europe Ablaze* 145 (Springwood 1983). Similarly, OSS Operational Teams in China wore US uniforms, Chinese uniforms, Chinese Puppet Army (enemy) uniforms, or indigenous civilian attire, depending on the tactical situation. Mills, Mills, and Brunner, *OSS Special Operations in China* at 12, 90, 213–14, 217–18, 234, 270, 281, 284, 287, 294, 392 (cited in note 7). 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

II. 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:

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

Other questions had to be answered prior to answering the above questions.

III. 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 80 percent of Afghanistan. This was open to debate until the collapse of the Taliban, at which time it ceased to be an issue. Until the collapse of the Taliban regime in December 2001, a strong case could be made that this was an internal conflict between non-state actors in a failed state.²¹ By the time Army Civil Affairs entered Afghanistan, the case was absolute.

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, with Noel Botham and Brian Hitchen, *Eye of the Storm* (Michael O'Mara 2000), where the faces of current members of Special Air Services ("SAS") are obscured.

²¹ 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 in Central Asia* (Yale 2000). The author also is indebted to Lieutenant Colonel Kirby Abbott, Chief, International and

Operational Law Division, Office of the Judge Advocate General, Canada, for his contributions to the analysis in this section.

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 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 11, 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 percent of the world's 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. Any perception of the Taliban as any sort of a national government dissolved following Taliban abandonment of Kabul (Nov 12, 2001) and the US capture of Kandahar (Dec 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, *2 International Law: Chiefly as Interpreted and Applied by the United States* § 652 (Little, Brown 1922).

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 NGOs and considered in Washington, the conflict against the Taliban and al Qaeda looked more like a counterinsurgency campaign or counterterrorist operation than an international armed conflict. While the Administration chose to apply the law of war applicable in international armed conflicts as a template for US conduct,²² 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.²³ Nonetheless, the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 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. DoD 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.²⁴ The primary issue in US and Coalition operations against al Qaeda and the Taliban was whether captured al Qaeda and Taliban were entitled to prisoner of war status under the Geneva

²² See, for example, President's Military Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism*, 66 Fed Reg 57833, § 1(a) (Nov 13, 2001) (hereinafter Military Order).

²³ Press Briefing by Ari Fleischer (February 7, 2002), available online at <<http://www.whitehouse.gov/news/releases/2002/02/20020207-6.html>> (visited Sept 21, 2003); Katherine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, NY Times A1 (Feb 8, 2002). The issues are summarized in John C. Yoo and James C. Ho, *International Law and the War on Terrorism*, Va J Intl L (forthcoming Fall 2003).

²⁴ DoD Law of War Program, DoD Directive 5100.77 at ¶ 5.3.1 (Dec 9, 1998); *Implementation of the DoD Law of War Program*, CJCSI 5810.01A at ¶ 5a (Aug 27, 1999). 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 Anthony Dworkin, *Excerpt from Interview with Charles Allen, Deputy General Counsel for International Affairs, US Department of Defense, Crimes of War Project*, (Dec 16, 2002), available online at <<http://www.crimesofwar.org/onnews/news-pentagon-trans.html>> (visited Sept 21, 2003). This announcement was greeted with astonishment by some international law experts. See, for example, Marco Sassoli, "Unlawful Combatants:" *The Existing Law and Whether It Needs to Be Revised*, Conference on Current Issues in International Law and Military Operations 1, US Naval War College (June 25–27, 2003). 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.

Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (“GPW”)²⁵ which, as indicated in note 23, had been decided.

IV. 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.”²⁶ 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 GPW. 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.²⁷ 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 prohibiting them from fighting in something other than full, standard uniform. Nor does it make it a war crime not to wear a uniform. Article 4 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:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;

²⁵ 6 UST 3316 (hereinafter GPW).

²⁶ Sir Adam Roberts, *Enforcement of International Humanitarian Law: Challenges for the UN Security Council and the USA*, Speech at the US Institute of Peace (Mar 1, 2001) (personal knowledge of author, who was present).

²⁷ Personal knowledge of author as a participant in numerous official meetings and discussions with various NGOs.

- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.²⁸

Differing views as to whether regular force combatants are *expected* or *required* to meet the four criteria contained in Article 4A(2) are beyond this Article's scope. 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),²⁹

²⁸ GPW art 4 (cited in note 25).

²⁹ Historically, regular military forces' entitlement to prisoner of war status has been absolute and unqualified. Article 49 of US General Orders No. 100 (1863) 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.

Schindler and Toman, *Laws of Armed Conflicts* at 10–11 (cited in note 16). Similarly, Jean Pictet's ICRC *Commentary* states:

Once one is accorded the status of a 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.

Jean Pictet, ed, *The Geneva Conventions of 12 August 1949: Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 46–47 (ICRC 1960) (A.P. de Heney, trans) (hereinafter *Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War*).

Entitlement to prisoner of war status for members of the armed forces existed without pre-condition in treaty law. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex art 1 (1907), 36 Stat 2277 (hereinafter Hague Convention IV); GPW art 4(A)1 (cited in note 25). William E. S. Flory, *Prisoners of War* 27–28 (American Council on Public Affairs 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, 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 of [sic] 4, 5 and 85 of the Geneva (POW) Convention, 1949, makes this clear.*

G.I.A.D. Draper *The Present Law as to Combatancy*, in Michael A. Meyer and Hilaire McCoubrey, eds, *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 (Kluwer Law 1998) (emphasis added). Denial to regular forces (including special operations forces) of prisoner of war status and the protections of the 1929 GPW, 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

other experts argue that the 4A(2) criteria are prerequisites for prisoner of war status for regular force personnel as well as militia members.³⁰ Court cases, while limited in number, tend to support the latter point of view.³¹ Article 46 of the

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) of the Annex to the Hague Convention IV) or, if captured, denied prisoner of war status and summarily executed. The “Commando Order” was declared a war crime at Nuremberg. Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression: Opinion and Judgment* 58 (GPO 1947). Its implementation resulted in war crimes convictions by United States military tribunals (*In re Dostler*, in 1 *Law Reports of Trial of War Criminals* 22, 22–34 (HMSO 1945)), and by British military courts (*Trial of Generaloberst Nikolaus von Falkenhorst*, in 11 *Law Reports of Trials of War Criminals* 18, 18–30 (HMSO 1949), and *Trial of Karl Buck and Ten Others*, in 5 *Law Reports of Trials of War Criminals* 39, 39–44 (HMSO 1948)).

In the *Dostler* case, two officers and thirteen enlisted men from Unit A, 1st Contingent (OSS Operational Group, Italy) were captured on March 22, 1944, and executed under 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. 1 *Law Reports of Trial of War Criminals* at 22 (cited above). See also photographic evidence in author’s possession. Other OSS Operational Groups sewed Seventh US Army patches on their left shoulders to conceal their OSS identity. Ian Sutherland, *The OSS Operational Groups: Origin of Army Special Forces*, 2 *Special Warfare* 2, 3 (Summer 2002).

³⁰ In *International Law and the War on Terrorism*, Yoo and Ho argue that the four criteria contained in Article 4A(2), GPW are prerequisites to prisoner of war status for regular force combatants. Va J Intl L (cited in note 23) That view is not consistent with Articles 5, 85 and 93 of the GPW or the negotiating history of the four criteria; see, for example, Draper, *The Present Law as to Combatancy* at 197 (cited in note 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) (on file with author).

³¹ 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 (1942), 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 (discussed below) that followed *Quirin*.

Quirin is lacking with respect to some of its law of war scholarship. Review of the Court’s citation of Field Manual 27-10, *Rules of Land Warfare* (US 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 relating to actions by military personnel, who remain entitled to prisoner of war status. The Court correctly stated, citing ¶ 83 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.” *Ex parte Quirin*, 317 US at 32. This provision is consistent with Article 29 of the Annex to the Hague Convention IV. However, the Court failed to note ¶ 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 that “the absence of uniform . . . renders the offender liable to trial for violation of the laws [sic] of war.” *Ex parte Quirin*, 317 US at 35–36 n12. The statement has no basis in the law of war. It is contrary to Article 31 of the Annex to the

1977 Additional Protocol I denies prisoner of war protection to spies, even if they have been identified as regular members of the military.³²

Hague Convention IV (cited in note 29) (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. J.M. Spaight, *Air Power and War Rights* 287 (Longmans, Green 2d ed 1933).

For a summary of the German operation, trial of the saboteurs, and critical analysis of *Quirin*, see Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Kansas 2003).

Two cases from Singapore follow the reasoning of *Quirin*. The facts of each are similar. During armed conflict between Indonesia and Singapore, Indonesian soldiers in civilian clothing entered Singapore on sabotage missions. The courts determined that while entitled to prisoner of war status under Article 4A(1), GPW, 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*, [1967] 1 Malayan L J 133 (Fed Ct Cr App 1966) (Singapore), and *Osman Bin Haji Mohamed Ali v Public Prosecutor*, 1 AC 430 (Privy Council 1969) (appeal taken from Malaysia) (UK).

See also *Military Prosecutor v Omar Mahmud Kassem and Others* (Israel Military Court sitting in Ramalah 1969), published in *Law and Courts in the Israel-held Areas* 17 (Hebrew University 1970), which contains similar conclusions but is distinguishable in that it involved non-state actors.

³² Members of the military captured behind enemy lines wearing civilian clothing may be denied prisoner of war status and may be subject to trial for espionage under the domestic law of the captor government, but are not subject to prosecution if subsequently captured in uniform after safely returning from the espionage mission. Articles 29 and 31 of the Annex to the Hague Convention IV Respecting the Laws and Customs of War on Land of October 18, 1907, state:

Art. 29. A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army for the purpose of obtaining information are not considered spies.

...

Art. 31. 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.

36 Stat 2277 (cited in note 29).

Article 46 of the 1977 Additional Protocol I provides:

Notwithstanding any other provisions of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to status of prisoner of war and may be treated as a spy.

16 ILM 1391, 1411 (1977).

Historical state practice, discussed in Section IV.B. and the Appendix, 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 suffering serious abuse.³³ 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 uniforms, 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 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

Participants in the negotiation of Article 46 argue that this language was intended to re-codify the provisions of Articles 29 and 31 of the Annex to the Hague Convention IV. Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts* 264–65 (Martinus Nijhoff 1982). Article 46 goes beyond previous law in denying prisoner of war status to military personnel captured while engaged in spying, but is generally consistent with state practice, noted in Section IV.C. That the United States is not a state party to Additional Protocol I is not germane, inasmuch as consideration must be given to enemy actions towards US military personnel captured in civilian attire.

The provisions of the 1907 Hague Convention IV and the 1977 Additional Protocol I do not make spying a war crime. Rather, denial of prisoner of war status and the death penalty are regarded as long-standing deterrents to spying; see W. Hays Parks, *International Law of Intelligence Collection*, in John Norton Moore, Frederick S. Tipson, and Robert F. Turner, *National Security Law* 433, 435 (Carolina 1990).

³³ See, for example, *Trial of Lieutenant-General Shigeru Sawada and Three Others*, in 5 *Law Reports of Trials of War Criminals* 1 (HMSO 1948) (denial of prisoner of war status to and execution of eight US Army Air Corps personnel); and *In re Dostler* (cited in note 29).

US military personnel captured in uniform during the Vietnam war were illegally denied prisoner of war status by their captors and routinely tortured. Guenter Lewy, *America in Vietnam* 332–34 (Oxford 1978); Howard S. Levie, *Maltreatment of Prisoners of War in Vietnam*, in Richard A. Falk, ed, 2 *The Vietnam War and International Law* 361, 382 (Princeton 1969); Stuart I. Rochester and Frederick Kiley, *Honor Bound: The History of American Prisoners of War in Southeast Asia, 1961–1973* at 188–94, 199–207 (Department of Defense 1998); and Vernon E. Davis, *The Long Road Home: U.S. Prisoner of War Policy and Planning in Southeast Asia* 5, 64–84 (Historical Office, Secretary of Defense 1998). Three representative personal accounts detailing the torture and other violations of the GPW are Robinson Risner, *The Passing of the Night: My Seven Years as a Prisoner of the North Vietnamese* (Random House 1973); Sen. Jeremiah A. Denton, Jr., *When Hell Was in Session* (Reader's Digest 1976) (reprinted by Robert E. Hopper 1982); and Col. George E. Day, USAF (Ret.), *Return with Honor* (Champlin Museum 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. *Final Report to Congress: Conduct of the Persian Gulf War* 619–20 (Department of Defense 1992); Office of General Counsel, Department of Defense, *Memorandum for the Judge Advocate General, Department of the Army Report on Iraqi War Crimes (Desert Shield/Desert Storm)* 11–12 (Mar 12, 1993) (Department of the Army 1993) (unclassified version prepared for the Department of State, on file with CJIL) (original Memorandum on file with author).

involves perfidy, discussed in Section IV.B. Military personnel wearing non-standard uniform 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 in them are liable to be killed."³⁴

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 international arms conflict in something other than 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?" Also, 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.³⁵ With a single, limited exception,³⁶ only military forces may engage directly or actively in hostilities, that

³⁴ M.R.D. Foot, *SOE in France: An Account of the British Special Operations Executive in France, 1940-44* at 20 (HMSO 1966).

³⁵ For example, US War Department Field Manual 27-10, *Rules of Land Warfare* 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." (cited in note 31) (emphasis in original). See also War Office [UK], *Manual of Military Law* 7 (War Office 1929) ("The division of the population of a belligerent State into two classes, namely, the armed forces and the peaceful population, has already been mentioned. . . . It is one of the purposes of the laws of war to ensure that an individual who belongs to one class or the other shall not be permitted to enjoy the privileges of both."). See also War Office [UK], *The Law of War on Land, Being Part III of the Manual of Military Law* 30 ¶ 86 (HMSO 1958) (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 belligerent forces but are non-combatants.

³⁶ The *levée en masse* which, as defined in Article 2 of the Annex to the Hague Convention IV (cited in note 29), is "the inhabitants of a territory [not under occupation] who, on the

is, in combatant-like activities. Hostile acts by private citizens are not lawful, and are punishable, in order to protect innocent civilians from harm.³⁷ 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 20th 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.³⁸

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 19th 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.³⁹

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 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 in Section IV.B. The ancillary law of war prohibition on “killing treacherously”⁴⁰ 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.⁴¹

approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves.” Treaty recognition of the *levee en masse* constituted a first step in relaxation of the principle of *distinction*.

³⁷ L. Oppenheim, *Disputes, War and Neutrality*, 2 *International Law: A Treatise* 206 (Longmans, Green 7th ed 1952) (H. Lauterpacht, ed).

³⁸ J.M. Spaight, *War Rights on Land* 37 (MacMillan 1911).

³⁹ Frits Kalshoven, *The Law of Warfare* 31 (A.W. Sijthoff 1973).

⁴⁰ Article 23(b) of the Annex to the Hague Convention IV (cited in note 29) states that it is prohibited “to kill or wound treacherously individuals belonging to the hostile nation or army.”

⁴¹ Article 24 of the Annex to the Hague Convention IV (cited in note 29) states: “Ruses of war and the employment of measures necessary for obtaining information about the

A. WEAR 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 in this section. This practice has a long history, dating at least to the Peloponnesian Wars (431 to 404 BC).⁴²

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.⁴³ 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.⁴⁴

enemy and the country are considered permissible." See also US Army Field Manual 27-10, *The Law of Land Warfare* ¶ 51 (US Army 1956); War Office [UK], *The Law of War on Land* at 101-02 (cited in note 35).

⁴² 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. See Oppenheim, *International Law* at 429-30 (cited in note 37).

⁴³ The negotiating record exception is discussed in Section IV.B. Two treaty exceptions exist. GPW art 93 (cited in note 25) states in part:

[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, [and] *the wearing of civilian clothing*, shall occasion disciplinary punishment only.

(Emphasis added.) In its discussion of this provision, the ICRC *Commentary* states:

[A] prisoner of war retains that legal status until such time as he has made good his escape. It is absolutely forbidden for him to commit any belligerent act, to carry weapons, or to engage in armed resistance, otherwise he will be liable to be treated as a sniper [sic] or saboteur.

Pictet, ed, *Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War* at 454 (cited in note 29). The *Commentary* uses "sniper" in the pejorative sense in which it was formerly used, that is, to denote a civilian who ambushes or "bushwhacks" enemy military personnel. The term was used in this manner during the Franco-Prussian (1870-1871) and Anglo-Boer (1899-1902) Wars; see Spaight, *War Rights on Land* at 52, 62-63 (cited in note 38), for discussion. A military sniper is a lawful combatant. See Headquarters, Department of the Army, Office of The Judge Advocate General, Memorandum, Subject: Legality of Snipers (Sept 29, 1992).

⁴⁴ Maj. Richard R. Baxter, JA, USA, *The Juridical Basis of the Distinction between Lawful Combatant and Unprivileged Belligerent* 47-51 (unpublished thesis, The Judge Advocate General's School, US Army, 1959) (on file with author).

Art 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..." GPW art 4A(2), 6 UST 3316 (cited in note 25) (emphasis added). This was a further relaxation

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.⁴⁵ 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.”⁴⁶ Neither the 1907 Hague Convention IV or the GPW offers a definition or precise standard. In the International Committee of the Red Cross’s (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.⁴⁷

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 population⁴⁸

of the principle of distinction. See Pictet, ed, *Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War* at 52–61 (cited in note 29).

⁴⁵ US Department of War Manual, *Rules of Land Warfare* ¶ 22 (1914, corrected to April 15, 1917), 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* 348–49 (Suomalainen Tiedeakatemia 1976).

⁴⁶ See Rosas, *The Legal Status of Prisoners of War* at 348 (cited in note 45) (“[T]he concept of uniforms has never been explicitly defined in international law.”).

⁴⁷ Pictet, ed, *Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War* at 52 (cited in note 29). Spaight, *War Rights on Land* at 57 (cited in note 38), emphasizes that “[t]he ‘distinctive emblem’ does not mean a uniform.”

⁴⁸ Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman, eds, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* at 468 (ICRC 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

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, or 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”) (emphasis added), 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.⁴⁹

Given generally acceptable “distinctive devices”—a hat, a scarf, or an armband—any device recognizable in daylight with unenhanced vision at a reasonable distance would meet the law of war obligation to be distinguishable from the civilian population.⁵⁰

commentary, the Working Group experienced considerable difficulty with the practical details of this issue; see Bothe, Partsch, and Solf, *New Rules for Victims of Armed Conflicts* at 205–06 (cited in note 32).

⁴⁹ Howard S. Levie, *Prisoners of War in International Armed Conflict* 47 (Naval War College 1978) (internal citations omitted). Spaight argued that the distinctive device “must be fixed—externally, so as not to be assumed or concealed at will.” *War Rights on Land* at 57 (cited in note 38). 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.” Quoted in Richard Shelly Hartigan, *Lieber’s Code and the Law of War* 40 (Precedent 1983) (emphasis added).

⁵⁰ Spaight commented:

At what distance should the sign be recognizable? The German authorities demanded in 1870 that the 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 (Clarendon 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, stating that Russia had approved the formation of

There are at least five categories of clothing: (a) a uniform such as BDU; (b) uniform worn with some civilian clothing;⁵¹ (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 or 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.⁵² Based upon historical practice and treaty negotiation records, the

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 the ordinary people* or fulfil the conditions required for militia or volunteers by the Hague *Règlement*.

War Rights on Land at 57 (cited in note 38) (emphasis and punctuation in original, footnotes omitted).

Similarly, US Department of War Manual, *Rules of Land Warfare* (1914, corrected to April 15, 1917) (cited in note 45), 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 cites this provision as authority in 2 *International Law* at 291 n 3 (cited in note 21).

The term “unenhanced vision” is utilized in Article 1 of Protocol II (Blinding Laser Weapons) to the 1980 United Nations Conventional Weapons Convention. 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, Subject: *Travaux Préparatoires* and Legal Analysis of Blinding Laser Weapons Protocol (Dec 20, 1996). On page 8, the memorandum 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.

⁵¹ As noted in the text accompanying footnotes 151 and 190, 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.

⁵² 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 L Rev* 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

first three constitute a “uniform.” The fourth should protect the individual from charges of spying if captured if the individual is distinguishable from the civilian population by physical separation, clearly military duties, and other characteristics.⁵³ 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 did not regard it as serious enough to be classified as a Grave Breach.

The United States is not a State Party to the 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949. 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.⁵⁴ However, the United States acknowledged that it is bound by Additional Protocol provisions that constitute a codification of customary international law.⁵⁵

operations in Iraq on 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 No. 3 (May 23, 2003) (on file with author).

⁵³ As summarized in this article, 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 (1990–1991) 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 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).

⁵⁴ On January 29, 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 from 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, 100th Cong, 1st Sess (1987), 26 ILM 561 (1987).

⁵⁵ Department of State, 3 *Cumulative Digest of United States Practice in International Law, 1981–1988* at 3434–35 (cited in note 11). See also DoD Law of War Working Group, Session One: Memorandum for Assistant Counsel (International), OSD, Subject: 1977 Protocols Additional to the Geneva Conventions; Customary International Law Application (May 9, 1986). 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 Am U J Intl L & Poly 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

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.⁵⁶

An authoritative commentary on Additional Protocol I—prepared by individuals directly involved in its drafting and negotiation—offers 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. 3.⁵⁷

his personal opinion that “certain provisions of Protocol I reflect customary international law or are positive new developments which should . . . become part of that law.” *Id.* at 421.

⁵⁶ 16 ILM at 1411 (cited in note 32) (emphasis added).

⁵⁷ Bothe, Partsch, and Solf, *New Rules for Victims of Armed Conflicts* at 257 (cited in note 32). The new rules set forth in Article 44, ¶ 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, 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

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.⁵⁸

Thus, commentaries by participants in the 1974–1977 Diplomatic Conference confirm Additional Protocol I's acknowledgement that, where warranted by military necessity, it may be permissible in international armed conflict⁵⁹ for regular military forces to wear civilian clothing. At issue is whether the action is a legitimate ruse or perfidy.

1. 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.⁶⁰ The law of war prohibits "killing or wounding treacherously individuals belonging to the hostile nation or army,"⁶¹ commonly known as *perfidy*.⁶²

⁵⁸ Rosas, *The Legal Status of Prisoners of War* at 333 (cited in note 45). 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."

Id at 349 n 592 (citing CDDH/236/Rev 1, 29). See also Howard S. Levie, *2 Protection of War Victims: Protocol I to the 1949 Geneva Conventions* 475 (Oceana 1980).

⁵⁹ The uniform requirement has not been codified for military operations short of international armed conflict.

⁶⁰ Hague Convention IV, Annex art 24 (cited in note 29). See also Spaight, *War Rights on Land* at 152–56 (cited in note 38); Oppenheim, *2 International Law* at 428 (cited in note 37); War Office [UK], *The Law of War on Land* at 101 (cited in note 35).

⁶¹ Hague Convention IV, Annex art 23(b) (cited in note 29).

⁶² 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, *2 International Law* at 430 (cited in note 37). See also US Army Field Manual 27-10 at 22, ¶¶ 49–55 (cited in note 41).

Article 23 of the Annex to the 1899 Hague II 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 or army.⁶³

This article, along with Articles 29 and 31, were re-codified with non-substantive changes in the Annex to the 1907 Hague IV. 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 of 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.⁶⁴

In order to be perfidy, the act must be the proximate cause of the killing, injury, or capture of the enemy.⁶⁵ 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.”⁶⁶ 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 the indigenous apparel of their

⁶³ 32 Stat 1803 (1899); see also Schindler and Toman, *The Laws of Armed Conflicts* at 82–83 (cited in note 16).

⁶⁴ *Id.* at art 37.

⁶⁵ See Bothe, Partsch, and Solf, *New Rules for Victims of Armed Conflicts* at 204 (cited in note 32). 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.

⁶⁶ Additional Protocol I art 85, ¶ 3(f), 16 ILM at 1428 (cited in note 32).

Northern Alliance partners, including their distinctive *pakol* hats and/or tribal scarves, did not constitute perfidy. US Army Civil Affairs wearing of Western-style civilian clothing or indigenous attire in Afghanistan would not have constituted perfidy unless it had been done for the purpose of and with the result of killing treacherously. The NGOs' complaint made no such allegation, and no evidence has surfaced to suggest such conduct.

That being said, the devil always has been in the details in drawing the line between perfidy and the allowance for military personnel to operate in denied areas in civilian attire. 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 is limited to special circumstances, such as support for partisans, which 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.⁶⁷ 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.

⁶⁷ This approach, taken by the United States in Vietnam, was praised by the International Committee of the Red Cross; see Prugh, *Law at War* at 66–67 (cited in note 15).

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, *War Rights on Land* at 105–09 (cited in note 38). 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!*, (Random House (Australia) 2002) (on file with author) (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 the novel by Kit Denton, *The Breaker* (Angus & Robertson 1973). Subsequently, Denton authored the non-fiction *Closed File: The True Story behind the Execution of Breaker Morant and Peter Handcock* (Rigby 1983) (on file with author), less sympathetic to Morant than *The Breaker*. Comprehensive, authoritative accounts are contained in Arthur Davey, ed, *Breaker Morant and the Bushveldt Carbineers* (Van Riebeeck Society 1987) and William Woolmore, *The Bushveldt Carbineers and the Pietersburg Light Horse* (Slouch Hat Publications 2000) (on file with author).

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.⁶⁸ Counter-terrorist units have been authorized to use hollow-point or other expanding ammunition,⁶⁹ for example, and have worn civilian clothing or non-standard uniforms on missions.⁷⁰ President Bush's radio address to the nation and the world on September 29, 2001,⁷¹ in response to the September 11th terror attacks on the World Trade Center and the 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.

B. WHAT IS STATE PRACTICE?

State practice is important to answering legal questions because it forms a basis for determining customary international law.⁷² State practice—a synonym

⁶⁸ See Toman, *The Status of Al Qaeda/Taliban Detainees* at 287 (cited in note 30).

⁶⁹ Headquarters, Department of the Army, Office of The Judge Advocate General, DAJA-IA Memorandum 1985/7026, Subject: Use of Expanding Ammunition by US Military Forces in Counterterrorist Incidents (Sept 23, 1985) (on file with author). Hollow-point or expanding small arms ammunition is prohibited in international armed conflict by the Hague Declaration Concerning Expanding Bullets of 29 July 1899. See Schindler and Toman, *The Laws of Armed Conflicts* at 109 (cited in note 16). 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 Hague Convention IV (cited in note 29), 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, Subject: 5.56mm, 77-grain Sierra MatchKing™ Bullet; Legal Review (May 19, 2000) (on file with author).

⁷⁰ 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* (photo section) (Bloomsbury 1994); Rolf Tophoven, *GSG9: The German Response to Terrorism* 66–73 (Bernard & Graefe Verlag 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 T' SAS* (photo section) (Bloomsbury 1989); General Sir Peter de la Billiere, *Looking for Trouble* 319–3 (photo section) (Harper Collins 1994). Other examples are provided in the State Practice sections of this paper (Section IV.B and Appendix).

⁷¹ Available online at <<http://www.whitehouse.gov/news/releases/2001/09/20010929.html>> (visited Oct 9, 2003).

⁷² As the United States Supreme Court stated in *The Paquete Habana*, 175 US 677, 700 (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 . . .

for military history—reveals how governments interpret, apply, and/or enforce law of war treaty provisions.

As illustrated in the Appendix, 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.⁷³ 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.

judicial decision, resort must be had to the customs and usages of civilized nations.

⁷³ 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, *Lawrence of Arabia* at 334–35 (cited in note 7). In August 1917 Lawrence penned his *Twenty-Seven Articles*, lessons learned from his service in the Arab Revolt. They include:

18. Disguise is not advisable. Except in special areas let it be clearly known that you are a British officer and a Christian. At the same time if you can wear Arab kit when with the tribes you will acquire their trust and intimacy to a degree impossible in uniform. It is however dangerous and difficult. They make no special allowances for you when you dress like them. Breaches of etiquette not charged against a foreigner are not condoned to you in Arab clothes. You will be like an actor in a foreign theatre, playing a part day and night for months, without rest, and for an anxious stake. Complete success, which is when the Arabs forget your strangeness and speak naturally before you, counting you one of themselves, is perhaps only attainable in character: while half success (all that most of us strive for—the other costs too much) is easier to win in British things, and you yourself will last longer, physically and mentally, in the comfort that they mean. Also then the Turks will not hang you when you're caught.
19. If you wear Arab things, wear the best. Clothes are significant among the tribes, and you must wear the appropriate, and appear at ease in them. Dress like a Sherif—if they agree to it.
20. If you wear Arab things at all, go all the way. Leave your English friends and customs on the coast, and fall back on Arab habits entirely.

Id at 963. As Lawrence indicates in Rule 18, he was fully aware of the risks involved in wearing something other than his uniform. He was captured by Turkish forces in Deraa on November 20, 1917, while on a reconnaissance mission in Arab attire. He was well known and sought after by Turkish forces. Identified, he was subjected to severe sexual abuse by his captors before managing to escape. Id at 459–61, 1083 n49.

As noted by James Maloney Spaight, Colonel Lawrence was not alone in wearing civilian clothing on combat missions during World War I. See Spaight, *Air Power and War Rights* at 273–74 (cited in note 31).

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),⁷⁴ Boer commando success against the British in the 1899–1902 Anglo-Boer War,⁷⁵ Colonel Lawrence's success, the British experience in facing Sinn Fein in Ireland (1919–1921),⁷⁶ Chinese guerrilla operations against Japan in the Sino-Japanese War,⁷⁷ 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 Leaders' Handbook*, and *How to Use High Explosives*, all subsequently noted in *GS(R) Report No. 8 Investigation of the Possibilities of Guerrilla Activities*.⁷⁸

⁷⁴ David Gates, *The Spanish Ulcer: A History of the Peninsular War* 35 (W.W. Norton 1986), noting Wellington's comment that because of the guerrillas' activities, "The French armies have no communications and one army has no knowledge of the position or of the circumstances in which others are placed, whereas I have knowledge of all that passes on all sides." The term *guerrilla* is generally regarded as originating from the Peninsular War. See also David G. Chandler, *The Campaigns of Napoleon* 593–660 (MacMillan 1966). Chandler notes: "Although the regular Spanish armies were destroyed or scattered, there were no signs that the will to resist of the Spanish people had been even substantially weakened. Popular patriotism, religious fanaticism and an almost hysterical hatred for the French remained as strong as ever [in January 1809], and over the next five years the world was to see the development of a new type of ruthless war waged by guerrillas who refused to come down into the open plains . . . and . . . defied all efforts to destroy them, in the meantime causing a heavy toll of French casualties." Id at 659–60. See also Don W. Alexander, *Rod of Iron: French Counterinsurgency Policy in Aragon during the Peninsular War* (Scholarly Resources 1985).

⁷⁵ Deneys Reitz, *Commando: A Boer Journal of the Boer War* (Praeger 1970). For general reading, see Byron Farwell, *The Great Anglo-Boer War* (Harper & Row 1976); Thomas Pakenham, *The Boer War* (Random House 1979). The term *commando* originated in Boer use.

⁷⁶ M.R.D. Foot, *The IRA and the Origins of SOE*, in M.R.D. Foot, ed, *War and Society: Historical Essays in Honour and Memory of J.R. Western, 1928–1971* at 57 (Barnes & Noble 1973); M.R.D. Foot, *Resistance: European Resistance to Nazism, 1940–1945*, 7 (McGraw-Hill 1977).

⁷⁷ See generally Frank Dorn, *The Sino-Japanese War, 1937–41* (MacMillan 1974).

⁷⁸ 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. See M.R.D. Foot, *SOE: An Outline History of the Special Operations Executive, 1940–46* at 14 (University Publishers of America 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 (Odense 1978); Foot, *SOE in France* at 2–4 (cited at note 34); Foot, *SOE*:

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.⁷⁹ 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 exile governments and through them—or without them—with Resistance Movements in the territories occupied by the enemy."⁸⁰ The Charter for the British Special Operations Executive ("SOE") received War Cabinet approval on July 22, 1940.⁸¹ At this time Prime Minister Winston S. Churchill offered his oft-quoted edict: "And now set Europe ablaze."⁸² Working closely with exile governments, the British Government began making contact with potential resistance movements throughout Nazi-occupied Europe, ultimately

An Outline History at 11–15 (cited above); David Stafford, *Britain and European Resistance, 1940–1945* at 19, 21 (MacMillan 1980); Peter Wilkinson and Joan Bright Ashley, *Gubbins & SOE* 34, 36 (Leo Cooper 1993); W.J.M. Mackenzie, *The Secret History of SOE: The Special Operations Executive, 1940–1945* at 10, 38–39 (St. Ermin's 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.

⁷⁹ James Lucas, *Kommando: German Special Forces of World War Two* (St Martin's 1985). Specific examples are provided on the list in the Appendix.

⁸⁰ Hæstrup, *Europe Ablaze* at 37 (cited in note 78). There is no evidence to suggest establishment of the Special Operations Executive was a reprisal for earlier German actions. A *reprisal* is an act that would be unlawful if not committed for the purpose of reprisal, done for the purpose of compelling the other belligerent to observe the law of war, with strict standards for its execution. W. Hays Parks, *A Few Tools in the Prosecution of War Crimes*, 149 *Milit L Rev* 73, 84 (1995). See generally, Frits Kalshoven, *Belligerent Reprisals* (A.W. Sijthoff 1971); Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 *Milit L Rev* 155 (2001); Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 *Milit L Rev* 184 (2003). At the same time, early German operations made it clear to the British leadership that Germany had "set a fashion for subversive activities in countries they proposed to conquer which defied the Queensbury rules of international conduct that staid powers had recently observed. This . . . debased the standards of how countries ought to behave to each other; however reluctant, these powers had to join the new fashion or succumb." Foot, *SOE in France* at 1 (cited in note 34).

⁸¹ J.R.M. Butler, ed, 1 *History of the Second World War: Grand Strategy* 260–61 (HMSO 1957). The Charter, WP(40)271, can be found in Mackenzie, *The Secret History of SOE* at 753–55 (cited in note 78).

⁸² See Foot, *SOE in France* at 11 (cited in note 34); E.H. Cookridge, *Set Europe Ablaze* 1 (Thomas Y. Crowell 1966). Churchill's early enthusiasm for irregular warfare is acknowledged in Foot, *SOE in France* at 7 (cited in note 34).

providing them personnel and material support, subsequently coordinating their actions to link them directly to the British and Allied war effort.⁸³

It is important to understand what SOE was, and what it was not. SOE was an independent secret service.⁸⁴ 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.⁸⁵ Although intelligence was sometimes a by-product of its activities, SOE was not an intelligence collection agency.⁸⁶ It was intended for its operatives to engage in clandestine, subversive operations in civilian clothing. The dagger lay concealed beneath the cloak.⁸⁷ 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

⁸³ See Hæstrup, *Europe Ablaze* at 37, 41 (cited in note 78). For detailed histories by country, see Mackenzie, *The Secret History of SOE* at 133–687 (cited in note 78); Foot, *SOE in France* (cited in note 34); Ian Trenowden, *Operations Most Secret: SOE: The Malayan Theatre* (Crécy 1994); Charles Cruickshank, *SOE in the Far East* (Oxford 1983); Charles Cruickshank, *SOE in Scandinavia* (Oxford 1986); M.R.D. Foot, *SOE in the Low Countries* (St. Ermin's 2001); Knud J.V. Jespersen, *No Small Achievement: Special Operations Executive and the Danish Resistance, 1940–1945* (University of Southern Denmark 2002); Olav Riste and Berit Nökleby, *Norway 1940–1945: The Resistance Movement* (Johan Grundt Tanum Forlag 1973); Tore Gjelsvik, *Norwegian Resistance, 1940–1945* (C. Hurst 1979) (Thomas Kingsgton Derry, trans).

⁸⁴ See Foot, *SOE: An Outline History* at 21 (cited in note 78).

⁸⁵ See Mackenzie, *The Secret History of SOE* at 348–67 (cited in note 78); Foot, *SOE in France* at 74–93 (cited in note 34). SOE was dependent upon the Royal Air Force and Royal Navy for transport. See, for example, Gibb McCall, *Flight Most Secret: Air Missions for SOE and SIS* (William Kimber 1981); Terence O'Brien, *The Moonlight War: The Story of Clandestine Operations in South-East Asia, 1944–45* (William Collins Sons 1987). US Army Air Corps support is discussed in Ben Parnell, *Carpetbaggers: America's Secret War in Europe* (Eakin 1987). Sea transport is described in part in Cruickshank, *SOE in Scandinavia* at 72–92 (Sweden), 91–121 (Norway), and Appendix 1 (cited in note 83). The latter chapter and Appendix 1 summarize "The Shetland Bus Service," which transported agents into Norway—initially by fishing boat, then by submarine chasers furnished by the United States Navy. See also *id.* at 96; David Howarth, *The Shetland Bus* (Thomas Nelson & Sons 1951) (on file with author).

⁸⁶ Responsibility for intelligence collection belonged to the Secret Intelligence Service (SIS). See F.H. Hinsley, et al, 1 *British Intelligence in the Second World War: Its Influence on Strategy and Operations* 277–78 (HMSO 1979).

No attempt has been made to list or summarize the various British secret agencies during World War II or their missions. The special operations mission of SOE was performed by its SO2 branch, while SO1 was responsible for covert propaganda. A reader interested in the larger picture is invited to read any of the opening chapters of the various books by M.R.D. Foot cited herein and/or *British Intelligence in the Second World War I* at 3–43 and Hinsley et al, 2 *British Intelligence in the Second World War* 3–40 (HMSO 1981).

⁸⁷ Foot, *SOE in France* at 11–12 (cited in note 34).

slow and terrible death.”⁸⁸ 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.⁸⁹ For post-D-Day operations, SOE personnel were provided armbands for partisans and British military personnel not in uniform.⁹⁰ 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.⁹¹

In addition to SOE, which was to work with underground movements in Axis-controlled nations, the British also recognized the potential of commando units to fight independently and conduct “tip-and-run” raids of not more than forty-eight hours. Their formation began simultaneously with the establishment of SOE.⁹² Generally performed in uniform or non-standard uniform, the list of

⁸⁸ Dodds-Parker, *Setting Europe Ablaze* at 36, 76, 198 (cited in note 20). 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 Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929, 47 UST 2021–73. Article 1 thereof incorporated by reference Article 1 of the Annex to the Hague Convention IV to establish criteria for prisoner of war status.

⁸⁹ Dodds-Parker, *Setting Europe Ablaze* at 44, 145 (cited in note 20).

⁹⁰ See Foot, *SOE: An Outline History* at 98 (cited in note 78); Dodds-Parker, *Setting Europe Ablaze* at 85, 124 (cited in note 20).

⁹¹ India Office Records L/WS/1/1296, cited in Cruickshank, *SOE in the Far East* at 249 (cited in note 83). Military necessity could change in a moment. For example, British Liaison Officer Major Harvard Gunn was assigned to work with partisans in Southern France in summer 1944. In his official report he noted: “Difficulty in movement, area surrounded by German garrisons; made first recce area BARCELONNETTE-LARCHE, had to travel as Gendarme, uniform hidden.” Historian Arthur Layton Funk continues the story while explaining Major Gunn’s dilemma: “Gunn’s uniform . . . consisted of the kilts of the Seaforth Highlanders, difficult to conceal under any circumstances, but, wishing to let it be known that Allied support had arrived, Gunn and the other British officers (as well as Jedburghs and OGs [Operational Groups]) wore their uniforms as frequently as feasible.” Arthur Layton Funk, *Hidden Ally: The French Resistance, Special Operations, and the Landings in Southern France, 1944* at 86 (Greenwood 1992).

⁹² See Butler, 2 *History of the Second World War: Grand Strategy* 259 (HMSO 1957); Ministry of Defence, *Combined Operations: The Official Story of the Commandos* 3–4 (HMSO 1943); Hilary St. George Saunders, *The Green Beret: The Story of the Commandos, 1940–1945* at 21–25

examples of state practice that follows nonetheless shows that commando units did resort to civilian attire or enemy uniforms on occasion.

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.⁹³

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.⁹⁴ The partisan movement, organized, trained, and directed by Soviet Army personnel, was

(Michael Joseph 1949); Bernard Fergusson, *The Watery Maze: The Story of Combined Operations* 47 (Holt 1961); Charles Messenger, *The Commandos, 1940–1946* at 17–32 (William Kimber 1985). There were distinctions between SOE and Combined Operations. While the former often operated in civilian attire, the latter normally carried out its missions in uniform. Combined Operations raids normally were to be executed by fifty or more British troops, to be withdrawn following the operation. SOE operations were executed primarily by foreign personnel numbering no more than thirty, who would “fade into the landscape” following their mission. See Mackenzie, *The Secret History of SOE* at 94 (cited in note 78). The original commando Independent Companies subsequently were joined by other British special forces, such as the Long Range Desert Group, Special Air Service, Special Boat Service, as well as clandestine reconnaissance units such as the Combined Operations Pilotage Parties. See Roy Farran, *Winged Dagger: Adventures on Special Service* (Collins 1948) (reprinted Cassel 1998); Virginia Cowles, *The Phantom Major: The Story of David Stirling and the S.A.S. Regiment* (Collins 1958); Warner, *The Special Air Service* (cited in note 5); Strawson, *A History of the S.A.S. Regiment* (cited in note 5); Alan Hoe, *David Stirling: The Authorised Biography of the Founder of the SASs* 41–225 (Little, Brown 1992); Derrick Harrison, *These Men Are Dangerous: The Early Years of the S.A.S.* (Blandford Press 1957); W.B. Kennedy Shaw, *Long Range Desert Group: World War II Action in North Africa* (Collins 1945) (reprinted Greenhill 2000); Lt. Col. David Lloyd Owen, *The Desert My Dwelling Place* (Cassell 1957); Michael Crichton-Stuart, *G Patrol* (William Kimber 1958); John W. Gordon, *The Other Desert War: British Special Forces in North Africa, 1940–1943* (Greenwood 1987); Brendan O’Carroll, *Kiwi Scorpions: The Story of the New Zealanders in the Long Range Desert Group* (Token 2000); John Lodwick, *The Filibusters: The Story of the Special Boat Service* (Methuen 1947); C.E. Lucas Phillips, *Cockleshell Heroes* (Heinemann 1956); G.B. Courtney, *SBS in World War Two: The Story of the Original Special Boat Section of the Army Commandos* (Robert Hale 1983); James D. Ladd, *SBS: The Invisible Raiders: The History of the Special Boat Squadron from World War Two to the Present* (Arms and Armour 1983); Bill Strutton and Michael Pearson, *The Secret Invaders* (Hodder and Stoughton 1958); Ian Trenowden, *Stealthily by Night: The COPPists Clandestine Beach Reconnaissance and Operations in World War II* (Crécy 1995).

⁹³ See Stafford, *Britain and European Resistance* at 68 (cited in note 78).

⁹⁴ Hæstrup notes that the partisan organs worked closely with the General Staff of the Soviet Armies and with the Central Staff of the Partisan Movement. *Europe Ablaze* at 36 (cited in note 78).

substantial. In the month of July 1943, partisan forces carried out 10,000 separate demolitions of track to impede German re-supply efforts.⁹⁵ During the night of July 4, 1944 alone, partisans laid 4,110 separate demolition charges on rail lines;⁹⁶ on June 19, partisans planted over 5,000 mines on the roads and railroads behind the Second and Fourth German Armies.⁹⁷ 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.⁹⁸ 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.

The 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). The 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, under the administrative cognizance of the Joint Chiefs of Staff but under operational control of the theater commander.⁹⁹ It was

⁹⁵ John Erickson, *The Road to Berlin: Continuing the History of Stalin's War with Germany* 114 (Westview 1983). For a detailed discussion of Soviet partisan warfare, see Earl F. Ziemke and Magna E. Bauer, *Moscow to Stalingrad: Decision in the East* 199–219, 252–54, 330, 434–35 (Military Heritage rev ed 1985) (on file with author); Earl F. Ziemke, *Stalingrad to Berlin* 30, 103–05, 303–08 (Military Heritage 1968) (on file with author).

⁹⁶ Ziemke, *Stalingrad to Berlin* at 141 (cited in note 95). For results in other German-occupied nations, see Henri Michel, *The Shadow War: European Resistance, 1939–1945* at 214 (Harper & Row 1972) (Richard Barry, trans).

⁹⁷ Ziemke, *Stalingrad to Berlin* at 315 (cited in note 95).

⁹⁸ Ziemke and Bauer, *Moscow to Stalingrad* at 330, 435 (cited in note 95); Ziemke, *Stalingrad to Berlin* at 303 (cited in note 95). In June 1944, partisans in Belorussia numbered 150,000 in 150 brigades and 49 detachments. Id at 304.

⁹⁹ Presidential Military Order, Office of Strategic Services, 3 CFR 1308 (1938–1942); JCS 67, Subject: Office of Strategic Services (June 21, 1942) (on file with author). The latter stated in part that “Under direction of the Joint U.S. Chiefs of Staff . . . [OSS will] prepare plans for and . . . execute subversive activities.” See also R. Harris Smith, *O.S.S.: The Secret History of America's First Central Intelligence Agency* (California 1972); Edward Hymoff, *The OSS in World War II* (Richardson and Steirman 1972); Richard Dunlop, *Behind Japanese Lines: With the OSS in Burma* (Rand McNally 1979); William Casey, *The Secret War against Hitler* (Regnery Gateway 1988); Roger Hilsman, *American Guerrilla: My War behind Japanese Lines* (Brassey's (US) 1990); Tom Moon, *This Grim and Savage Game: OSS and the Beginning of U.S. Covert Operations in World War II* (Burning Gate 1991) (reprinted Da Capo 2000); Franklin Lindsay, *Beacons in the Night: With the OSS and Tito's Partisans in Wartime Yugoslavia* (Stanford 1993); Mills, Mills, and Brunner, *OSS Special*

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.¹⁰⁰

By the spring of 1944, SOE and OSS were operating together in a variety of missions.¹⁰¹ Some OSS units operated in uniform, while others did not under all circumstances. In one of its major efforts in 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 weapons and explosives. Thirty-three members of that group were active in France before 6 June 1944, D-Day.

...

The largest OSS group in France consisted of some 356 Americans who were members of Operational Groups (OGs). All recruits for the OGs were French-speaking volunteers from US Army units, primarily infantry and

Operations in China (cited in note 7); Dan Pinck, *Journey to Peking: A Secret Agent in Wartime China* (Naval Institute 2003).

¹⁰⁰ Bank, *From OSS to Green Berets* (cited in note 5), traces the OSS to US Army Special Forces lineage, as does Paddock, *U.S. Army Special Warfare* (cited in note 5), and Sutherland, *The OSS Operational Groups*, 2 *Special Warfare* at 2–13 (cited in note 29). 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: A History of the Establishment of the Central Intelligence Agency* (CIA 1981); Richard Dunlop, *Donovan: America's Master Spy* (Rand McNally 1982).

¹⁰¹ 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. See Foot, *SOE in France* at 32 (cited in note 34). As described by one authority, SPOC executed six types of missions:

1. British SOE missions . . . ;
2. French missions . . . ;
3. Inter-allied missions, made up of British, French, and American representatives;
4. Jedburghs. [discussed in this Section and Appendix];
5. Operational Groups. The Operational Groups were an elite OSS mission. They were paratroopers organized into squads of thirty who generally fought in component parts, for example, a half: thirteen men and two officers, all of them American volunteers for “extra hazardous duty” and assigned to OSS for special missions.
6. Counterscorch. These counter-sabotage teams consisted of French naval personnel sent to the ports of Marseille, Toulon, and Sète to keep the Germans from sabotaging the docks or blocking the channels.

Funk, *Hidden Ally* at 33–34 (cited in note 91).

engineer (for demolition experts). . . . Working in uniform, these teams parachuted behind the lines after D-Day to perform a variety of missions.¹⁰²

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 European member, each military, two of whom were officers; the third was the communications specialist.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵

¹⁰² Paddock, *U.S. Army Special Warfare* at 28 (cited in note 5) (emphasis added). As was the case in Great Britain, the United States formed its own commando units, such as the Army Rangers, the short-lived Marine Raiders, the Army's 5307th Composite Unit Provisional (Merrill's Marauders), and the Canadian/American First Special Service Force, all uniformed units and therefore beyond the scope of this article. For their history, see William O. Darby and William H. Baumer, *Darby's Rangers: We Led the Way* (Presidio 1980); Michael J. King, *William Orlando Darby: A Military Biography* (Archon 1981); Michael J. King, *Rangers: Selected Combat Operations in World War II* (Leavenworth Papers No 11, US Army Command and General Staff College 1985) (on file with author); *Merrill's Marauders: February–May 1944* (Historical Division, War Department 1945) (reprinted US Army Center for Military History 1990); Robert D. Burhans, *The First Special Service Force: A War History of the North Americans 1942–1944* (Infantry Journal 1947). First Special Service Force was a combined unit of Canadian and US Army forces. For the history of Marine Corps special operations units, see Charles L. Updegraph, Jr., *U.S. Marine Corps Special Units of World War II* at 1–35 (History and Museums Division, Headquarters, US Marine Corps 1972), and Joseph H. Alexander, *Edson's Raiders: The 1st Marine Raider Battalion in World War II* (Naval Institute 2001).

¹⁰³ This nationality mix became more the exception than the rule. Of the 101 Jedburgh teams deployed to France, only 10 were so composed. Sutherland, *The OSS Operational Groups*, 2 *Special Warfare* at 13 n11 (cited in note 29); Funk, *Hidden Ally* at 141, 145 (cited in note 91).

¹⁰⁴ Smith, *OSS: The Secret History of America's First Central Intelligence Agency* at 174–75 (cited in note 99); Bank, *From OSS to Green Berets* at 13–62 (cited in note 5); Cookridge, *Set Europe Ablaze* at 241 (cited in note 82); Stafford, *Britain and European Resistance* at 155 (cited in note 78); Foot, *Resistance* at 247 (cited in note 76); Foot, *SOE: An Outline History* at 151, 191 (cited in note 78); Foot, *SOE in France* at 33–34 (cited in note 34).

¹⁰⁵ See Maj. Robert E. Mattingly, *Herringbone Cloak—GI Dagger: Marines of the OSS 140* (US Marine Corps 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

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.¹⁰⁶

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—the United Kingdom, the United States, and Soviet Union—and each government in exile.¹⁰⁷ 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.¹⁰⁸ In Yugoslavia, 400,000 were involved in partisan operations.¹⁰⁹

Resistance activity was dependent upon volunteers—whether partisans from the civilian population of Axis-controlled nations, civilian and military

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* at 357 (cited in note 34). 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, *Herringbone Cloak—GI Dagger* at 116 (cited above). 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 French Croix de Guerre. *Captain Peter J. Ortiz*, 18 *Fortitudine* 14 (Marine Corps History and Museums Division Historical Bulletin Fall 1988) (on file with author); Lt. Col. Harry W. Edwards, USMC (ret.), *A Different War: Marines in Europe and North Africa* 12–13 (History and Museums Division, US Marine Corps 1994); Benis Frank, *Colonel Peter Julien Ortiz, US Marine* (unpublished manuscript, on file with author). The author is indebted to Lieutenant Colonel Joseph Wheeler, USMC, for the last two documents.

¹⁰⁶ Mills, Mills, and Brunner, *OSS Special Operations in China* at 9 (cited in note 7). Vice Adm. Milton E. Miles, USN, *A Different Kind of War* 274, 371 (Doubleday 1967); Pinck, *Journey to Peking: A Secret Agent in Wartime China* at 134 (cited in note 99); Dale Andrade, *Every Man a Tiger*, *Naval Hist* 16 (Nov/Dec 1994).

¹⁰⁷ Hæstrup, *Europe Ablaze* at 35, 49 (cited in note 78); Michel, *The Shadow War* at 355 (cited in note 96).

¹⁰⁸ Hæstrup, *Europe Ablaze* at 14 (cited in note 78).

¹⁰⁹ *Id.* at 50. SOE schools graduated 7,500 men and women for operations in Western Europe, and 4,000 for missions in Italy, Yugoslavia, Greece, Albania, Poland, Czechoslovakia, Hungary, Rumania, and elsewhere. See Cookridge, *Set Europe Ablaze* at 26 (cited in note 82).

personnel serving with the SOE or OSS, or members of Special Forces.¹¹⁰ 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.¹¹¹

¹¹⁰ Hæstrup, *Europe Ablaze* at 22 (cited in note 78). See also Cruickshank, *SOE in the Far East* at 249 (cited in note 83), which in noting the Chief of Staff's May 30, 1943 communiqué to the Commander in Chief in India, continues: "The men must be volunteers and warned that if caught they were likely to be shot without trial." Cruickshank adds: "Of course SOE were equally powerless to order men to act as agents."

In his classic and humorous tale of his experience as an Army officer in OSS, Roger Hall repeats the warning provided him at the beginning of his OSS training:

These units are to be parachuted deep behind enemy lines and carry out work which is designed to accomplish three things. First, organize guerrilla forces and lead them against the enemy. Second, disrupt enemy activity as much as possible. Third, send back by whatever means possible all intelligence that can be gathered. You will operate in uniform, but if you are captured, the chances are fifty to one you will not be treated as a prisoner of war. The work is highly confidential and dangerous. Knowing all this, do you still volunteer?

Roger Hall, *You're Stepping on My Cloak and Dagger* 20 (Norton 1957). See also Bank, *From OSS to Green Berets* at 79–80 (cited in note 5) and Mills, Mills, and Brunner, *OSS Special Operations in China* at 12 (cited in note 7).

¹¹¹ For example, in 1942 two German spies, Johann Eppler and Heinrich Gerd Sandstette, were transported across the Libyan desert and into Cairo to collect intelligence on the British campaign in North Africa. Because they had German military paybooks on them at the time of their apprehension, they were treated as prisoners of war. Saul Kelly, *The Lost Oasis: The Desert War and the Hunt for Zerzura: The True Story behind The English Patient* 226, 228 (Westview 2003). The Eppler-Sandstette mission became the basis for Ken Follet's novel *The Key to Rebecca* (Signet 1981).

Captured SOE and OSS personnel fared unevenly, as noted in Foot, *SOE in France* at 465–69 (cited in note 34); Foot, *SOE in the Low Countries* at 72, 193, 276–77 (cited in note 83); Mackenzie, *The Secret History of SOE* at 636, 664 (cited in note 78); Bank, *From OSS to Green Berets* at 66 (cited in note 5) (noting that one captured OSS officer was executed, while another caught by German troops survived because he was not turned over to the Gestapo). Even when captured in uniform, Special Forces personnel often were murdered. For example, British Special Air Service (SAS) personnel were forced to change into civilian clothing before being taken into the woods to be executed. See Foot, *SOE in France* at 305, 405 (cited in note 34). The individual responsible, Paris *Sicherheitsdienst* ("SD") Leader Josef Keiffer, was captured after the war, tried, convicted, and hanged. See *id.* at 305. Other British commandos captured in uniform suffered the same fate. Mackenzie, *The Secret History of SOE* at 653 (cited in note 78). An SAS War Crimes Investigation Team assisted in the capture of Germans suspected of murdering SOE or SAS personnel. See Anthony Kemp, *The Secret Hunters* (Michael O'Mara 1986).

Others fared better. Captured in North Africa in 1943, OSS officer Jerry Sage was sent to a prisoner of war camp after successfully concealing his OSS status and claiming to be a downed aviator. Jerry Sage, *Sage* (Miles Standish 1985) (on file with author). An SOE agent captured in Norway successfully employed the same cover story. See Mackenzie, *The Secret History of SOE* at 659 (cited in note 78). Similarly, David Stirling, a founder of the British Special Air Service, survived his capture. See Hoe, *David Stirling* at 223–57 (cited in note 92).

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.¹¹² 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.¹¹³ In some cases, the evidence was clear that

¹¹² The French, Dutch, Belgian, and Norwegian governments-in-exile expressed concern over collateral civilian damage and injuries resulting from Allied air attacks. See Michel, *The Shadow War* at 212, 216–17 (cited in note 96). 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* at 266 (cited in note 34). 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: An Outline History* at 219–20 (cited in note 78). For a list of key SOE industrial sabotage, see Foot, *SOE in France* at 505–17 (cited in note 34). Benjamin F. Jones, *The Moon is Down: The Jedburghs and Support to the French Resistance* (unpublished MA thesis, University of Nebraska, 1999) describes the Resistance process for infiltrating and attacking these targets. Foot, *SOE in France* at 505 (cited in note 34), 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 and Noble Frankland, 1 *The Strategic Air Offensive against Germany, 1939–1945* at 452–53 (Sir James Butler, ed, History of the Second World War, United Kingdom Military Series) (HMSO 1961) (on file with author). For heavy bomber accuracy, see W. Hays Parks, “Precision” and “Area” Bombing: *Who Did Which, and When?*, 18 *J Strategic Stud* 147 (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 percent probability of a single hit on a target 60 by 100 feet in size. Richard P. Hallion, *Storm over Iraq: Air Power and the Gulf War* 283, Table 2 (Smithsonian 1992).

¹¹³ *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 the 1863 US Army General Orders No 100 (the Lieber Code). Articles 20 through 23 state:

20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.
21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

partisan/Special Forces sabotage often was more effective than air operations against the same targets,¹¹⁴ while in other instances OSS-led partisans were able

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.
23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

Schindler and Toman, *The Laws of Armed Conflicts* at 6–7 (cited in note 16).

Similarly, two UN General Assembly Resolutions acknowledge the principle. UN General Assembly Resolution No 2444 (XXIII 1968), adopted unanimously, states in part:

- That it is prohibited to launch attacks against the civilian population as such; [and]
- That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

Schindler and Toman, *The Laws of Armed Conflicts* at 263 (cited in note 16).

UN General Assembly Resolution No 2675 (XXV 1970), adopted by a vote of 109–0, with 18 States abstaining or absent, states in part:

- (2) In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
- (3) In the conduct of military operations, every effort should be made to spare the civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.
- (4) Civilian populations as such should not be the object of military operations.
- (5) Dwellings and other installations that are used only by civilian populations should not be the object of military operations.

Schindler and Toman, *The Laws of Armed Conflicts* at 267 (cited in note 16).

¹¹⁴ See Mackenzie, *The Secret History of SOE* at 599 (cited in note 78), which 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 percent 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

to destroy heavily defended targets that had resisted air attack.¹¹⁵ While the rationale for partisan or Special Forces attacks may have been selected over aerial attack more for political than law of war reasons,¹¹⁶ 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,¹¹⁷ and significantly impaired German efforts to reinforce their defenses at Allied points of offensive ground operations.¹¹⁸ 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.¹¹⁹ Special Forces served as on-the-scene ambassadors where Allied combat operations killed innocent civilians.¹²⁰

repair, 2.40 percent of the total, eight times as many as those damaged by aircraft.

See also Michel, *The Shadow War* at 215–16 (cited in note 96), describing the SOE attack on the Vermork heavy water facility in Norway.

¹¹⁵ Mills, Mills, and Brunner, *OSS Special Operations in China* at 45, 47, 186–203 (cited in note 7) describes one such case. The Yellow River Bridge carrying Ping-Han railway traffic had been attacked repeatedly but unsuccessfully by the 311th (US) Air Force, with heavy friendly losses. OSS Operational Team Jackal severed the bridge on August 9, 1945.

¹¹⁶ As a matter of policy, Great Britain prohibited area bombing attacks in Nazi-occupied territories. Webster and Frankland, *The Strategic Air Offensive against Germany* at 463 (cited in note 112); Robin Neillands, *The Bomber War: The Allied Air Offensive against Nazi Germany* 288–89 (Overlook 2001).

¹¹⁷ See, for example, Michel, *The Shadow War* at 289 (cited in note 96), which notes that in Russia in the summer of 1942, it was necessary for Germany to employ fifteen divisions in counter-partisan operations.

¹¹⁸ See Foot, *SOE: An Outline History* at 225–27 (cited in note 78); Stafford, *Britain and European Resistance* at 153–54 (cited in note 78); Hæstrup, *Europe Ablaze* at 434–35 (cited in note 78). Hæstrup notes on page 435, for example, that:

On D-Day itself, about 950 actions were carried through, out of a planned 1050, and German Divisions which relied upon railway transport were delayed in their movements towards the [Allied] bridgehead in Normandy for up to two weeks, by which time the bridgehead had been consolidated.

¹¹⁹ See Hæstrup, *Europe Ablaze* at 373–74 (cited in note 78); Airey Neave, *The Escape Room* (Doubleday 1970); M.R.D. Foot and J.M. Langley, *MI9: The British Secret Service That Fostered Escape and Evasion 1939–1945 and Its American Counterpart* (Bodley Head 1979).

¹²⁰ 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. 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, *Hidden Ally* at 77–79, 153 (cited in note 91); Kit C. Carter and Robert Mueller, eds, *The Army Air Forces in World War II: Combat Chronology, 1941–1945* at 424 (Center for Air Force History 1973).

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.¹²¹ 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: "[T]he Resistance Movements, seen in their entirety, deeply influenced the course of the war, psychologically, militarily and politically."¹²² 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. Furthermore the masses had never before taken so directly part in the military combat, as was the case in the last war in Europe.¹²³

V. CONCLUSION

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 listed in the Appendix, 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. State practice provides several points for fine-tuning a general principle:

First, treacherous killing involves more than wearing or fighting in civilian clothing. Colonel Lawrence wore indigenous attire while leading the Arab uprising against the Ottoman Empire in the Hejaz Province of Arabia (Syria) in 1916. Fighting in large, armed groups against the Turkish Army, his actions parallel those of Coalition Special Forces aligned with Northern Alliance and Southern Alliance forces in Afghanistan, suggesting a nuance to 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.

Second, non-standard uniforms or indigenous attire may be adopted for practical rather than perfidious reasons. The British/Commonwealth Long Range Desert Group ("LRDG"), operating behind enemy lines in North Africa

¹²¹ See, for example, Roy Farran, *Operation Tombola* 22, 32, 33, 35, 59 (Arms and Armour 1960).

¹²² Hæstrup, *Europe Ablaze* at 9, 421–31 (cited in note 78).

¹²³ Id at 7. On pp 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.

from 1940–1943, adopted the *kaffiyeh* and *agal* as a standard part of their uniform for utilitarian purposes, for example.¹²⁴ 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.¹²⁵ 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.¹²⁶

Third, 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.¹²⁷ However, distinctive emblem wear was viewed with skepticism in

¹²⁴ Gordon, *The Other Desert War* at 50 (cited in note 92).

¹²⁵ Ratcliffe, Botham, and Hitchen, *Eye of the Storm* at 214, 305, 326 (cited in note 20).

¹²⁶ See Shaw, *Long Range Desert Group* at 27 (cited in note 92); O'Carroll, *Kivi Scorpions* at 14–15, 75–79 (cited in note 92).

¹²⁷ See Foot, *SOE: An Outline History* at 98 (cited in note 78); Dodds-Parker, *Setting Europe Ablaze* at 85, 124 (cited in note 20). 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 Vermark, Norway, were executed in compliance with this order on November 20, 1942. See Richard Wiggan, *Operation Freshman: The Rjukan Heavy Water Raid, 1942* at 81–82 (William Kimber 1986). During the night of March 22, 1944, a uniformed US Army special operations team landed along the Italian coast about sixty 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 on October 8–12, 1945, sentenced to death, and executed. *In re Dostler*, in 1 *Law Reports of Trials of War Criminals* 22 (cited in note 29).

The background to Hitler's *Führerbefehl* is contained in Foot, *SOE in France* at 186–87 (cited in note 34). The *Führerbefehl* declared:

[A]ll 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) of the Annex to the Hague Convention IV (prohibiting denial of quarter) (cited in note 29). The Commando Order is contained in its entirety in *United States v Wilhelm von Leeb* ("High Command Case"), 11 *Trials of War Criminals* 73–75, 525–27 (GPO 1951), with additional implementing orders at pp 76–110. The Court's judgment that the *Führerbefehl* was "criminal on its face" is on 527. The *Führerbefehl* also is discussed in 11 *International Military Tribunal* 26 (GPO 1946), and 15 *International Military Tribunal* 296–306, 403–10, 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. See Farran, *Operation Tombola* at 7–8

light of Hitler's Commando Order denying quarter to any partisans or Special Operations Forces.¹²⁸

Fourth, 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 reveal (a) that the law of war obligation is one of *distinction* that otherwise has eluded precise statement in all circumstances; (b) there is no agreed definition of *uniform*; (c) the uniform "requirement" is less stringent with respect to Special Forces working with indigenous forces or executing a mission of strategic importance; and (d) 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

(cited in note 121); and Strawson, *A History of the S.A.S. Regiment* at 275 (cited in note 5). Similarly, German Security Forces ("SD") leader Josef Keiffer was tried and executed for the murder of captured uniformed British Special Air Service troops. See Foot, *SOE in France* at 305 (cited in note 34). See also *Trial of Karl Buck and Ten Others*, 5 *Law Reports of Trials of War Criminals* 39 (HMSO 1948); *Trial of Karl Adam Golke and Thirteen Others*, 5 *Law Reports of Trials of War Criminals* at 45 (murder of captured uniformed SAS pursuant to *Führerbefehl*); *Trial of Generaloberst Nikolaus von Falkenhorst*, 11 *Law Reports of Trials of War Criminals* 18 (HMSO 1949); E.H. Stevens, ed, *Trial of Nikolaus von Falkenhorst: Formerly Generaloberst in the German Army*, in Sir David Maxwell Fyfe, ed, 6 *War Crimes Trials* (William Hodge 1949) (murder of captured uniformed British commandoes pursuant to *Führerbefehl*); *Trial of Werner Robde and Eight Others*, 5 *Law Reports of Trials of War Criminals* at 54 (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. See Lynette Ramsay Silver, *The Heroes of Riman: Unravelling the Mystery of One of World War II's Most Daring Raids* 225 (Sally Milner 1990). See also *The Jaluit Atoll Case*, 1 *Law Reports of Trials of War Criminals* 71 (HMSO 1947); *Trial of Lieutenant General Shigeru Sawada and Three Others*, 5 *Law Reports of Trials of War Criminals* 1 (HMSO 1948) (execution/murder of three captured US airmen); *Trial of Lieutenant General Harukei Isayama and Seven Others*, 5 *Law Reports of Trials of War Criminals* 60 (HMSO 1948) (murder of captured US aircrew).

¹²⁸ For an example of the skepticism of field agents, see Farran, *Operation Tombola* at 70 (cited in note 121).

enforcement by a government against its own personnel.¹²⁹ 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.

In international armed conflict, the wearing of standard uniforms by conventional military forces, including special operations forces, is the normal and expected 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 standard uniform. The generally recognized manner of *distinction* when wearing something other than 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 deception 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

¹²⁹ The inevitable reaction of some would be to suggest new legislation beyond the prohibition of perfidy, or to make any act of perfidy a Grave Breach. History shows that successful means and methods of warfare elude efforts at prohibiting them. See W. Hays Parks, *Making Law of War Treaties: Lessons from Submarine Warfare Regulation*, in Michael N. Schmitt, ed, *International Law across the Spectrum of Conflict: Essays in Honor of Professor L.C. Green on the Occasion of his Eightieth Birthday*, 75 *International Law Studies* 339 (US Naval War College 2000).

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 wear of civilian attire. But the law of war requirement to wear a complete, "standard" uniform is not as absolute as some recently suggested.

IN SUMMARY

The law of war requires military units and personnel to distinguish themselves from the civilian population in international armed conflict.¹³⁰ Article 4(A)2 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 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.

Standard US military uniforms satisfy the requirements of Art 4A, GPW. "Standard military uniform" refers to battle dress uniform ("BDU"), desert camouflage uniform ("DCU"), official flight suit, or other obvious military apparel.¹³¹ The presumption should be that all US armed forces operate in standard uniforms during military operations in international armed conflict.

When authorized, the requirements of GPW Art 4(A)2 may be satisfied by other than 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.

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

¹³⁰ Stating the obvious, special operations missions outside international armed conflict, such as counterterrorism, are not subject to these legal obligations.

¹³¹ 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.

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.

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.

Forces operating in other than 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.

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 (for example, spying). Unless they otherwise commit an independent law of war violation (for example, perfidy), history indicates that the acts will not be regarded as violation of the law of war.

APPENDIX

The list that follows 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*¹³² and the unsuccessful prosecution of Otto Skorzeny,¹³³ 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

¹³² 317 US 1 (1942) (discussed in note 31).

¹³³ *Trial of Otto Skorzeny and Others*, 9 *Law Reports of Trials of War Criminals* 90 (HMSO 1949). 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. See Hague Convention IV, Annex art 31 (cited in note 29). Nor, however, was he charged with violation of Hague Convention IV, Annex art 23(b), 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”), but rather based upon the international law principle of *rebus sic stantibus* (“substantial change of circumstances”). James J. Weingartner, *Otto Skorzeny and the Laws of War*, 55 *J Milit Hist* 207, 217–18 (1991). 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 and British operations. Otto Skorzeny, *My Commando Operations: The Memoirs of Hitler’s Most Daring Commando* 450–51 (Schiffer Milit Hist 1995) (David Johnston, trans); and Weingartner, 55 *J Milit Hist* at 219 (cited above).

Restatement (Second) of Foreign Relations Law of the United States § 153 (1965) states that *rebus sic stantibus* means in part that:

An international agreement is subject to the implied condition that a substantial change of a temporary or permanent nature, in a state of facts existing at the time when the agreement became effective, suspends or terminates, as the case may be, the obligations of the parties under the agreement to the extent that the continuation of the state of facts was of such importance to the achievement of the objectives of the agreement that the parties would not have intended the obligations to be applicable under the changed circumstances.

See also Wolfgang Friedman, Oliver J. Lissityn, and Richard C. Pugh, *International Law, Cases and Materials* 417–21 (West 1969) (on file with author).

Based upon information known today, as exhibited in the state practice section of this paper, a defense of *rebus sic stantibus* was plausible. It also is possible that the court accepted the evidence more as the *tu quoque* defense, as was the case in the prosecution of Admiral Karl Dönitz. Charged with conducting unrestricted submarine warfare, the court declined to find Admiral Dönitz guilty of the charge when his defense presented a statement by Admiral Chester Nimitz, USN, Commander in Chief, US Forces Pacific, acknowledging that US submarines had conducted unrestricted submarine warfare throughout World War II. See Peter Padfield, *Dönitz: The Last Führer* 463–68 (Harper & Row 1984).

war crime.¹³⁴ Personnel caught *in flagrante delicto* in civilian attire or enemy uniforms have been treated as spies, sometimes (but not always) with severe consequences.¹³⁵ 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. 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 such forces were employed.¹³⁶

¹³⁴ As indicated in the preceding footnote, members of Skorzeny’s commando team captured wearing US Army uniforms were executed as spies. They were not charged with violation of Article 23(b) of the Annex to the Hague Convention IV. Skorzeny could not be charged as a spy, as he was arrested long after completion of his mission. His prosecution as a spy was precluded by Article 31 of the Annex to the Hague Convention IV, and no consideration was given to alleging a violation of Article 23(b). At the time of the Skorzeny trial, law of war experts disagreed as to whether or not wearing an enemy uniform in battle was illegal. Weingartner, 55 J Milit Hist at 213–14 (cited in note 133), and Spaight, *War Rights on Land* at 105–06 (cited in note 38).

¹³⁵ Michel, *The Shadow War* at 121 (cited in note 96), offers perspective on numbers:

Of 250 [SOE] agents who left London for Belgium . . . 145 returned to Great Britain but 105 were arrested; of the latter 25 were executed, 20 died from maltreatment and 40 were deported, of whom only 20 survived. The casualty rate therefore was a full 25 per cent.

¹³⁶ Special forces’ wear of enemy uniforms is more commonplace 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.” Edward N. Luttwak, Steven L. Canby, and 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 include Valentine Jobst III, *Is the Wearing of the Enemy’s Uniform a Violation of the Laws of War?*, 35 Am J Intl L No 3 435 (July 1941); and R.C. Hingorani, *Prisoners of War* 28–30 (N.M. Tripathi 1963).

Article 39, ¶ 2 of the 1977 Additional Protocol I 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, favour, protect or impede military operations.

16 ILM at 1409 (cited in note 32). This new law has not been tested. In addition to the list in Section IV.B., there is considerable historical evidence to the contrary, including since 1977. See Parks, 32 Air Force L Rev at 76 n259 (cited in note 52). 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) on ratification. The Canadian reservation, available online at <<http://www.icrc.org/ihl.nsf/677558c021ecf2c14>

Table of Historical State Practice

Who	When	Where	Disposition (if any)
Japan ¹³⁷ Japanese officers in civilian Chinese mission	1904 (Russo- Japanese War)	Manchuria	Captured
Russia ¹³⁸ Russian soldiers in Chinese civilian attire attacked Japanese units	1904 (Russo- Japanese War)	Manchuria	Japanese diplomatic protest

1256739003e6370/172ffec04adc80f2c1256402003fb314?OpenDocument> (visited Sept 21, 2003), 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, see Mackenzie, *The Secret History of SOE* (cited in note 78), 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.

¹³⁷ See Spaight, *War Rights on Land* at 110 (cited at note 38).

¹³⁸ Sakuyé Takahashi, *International Law Applied to the Russo-Japanese War* 174–78 (Banks Law 1908).

Who	When	Where	Disposition (if any)
United Kingdom ¹³⁹ Colonel T.E. Lawrence (Lawrence of Arabia) wore Arab attire while leading the Arab uprising against the Ottoman Empire, fighting the Turkish Army	1916–18 (WWI)	Hejaz Province, Arabia (Syria)	Lawrence decorated
Germany ¹⁴⁰ Special Forces dressed as Polish civilians faked a raid on customs house as a pretext for the German invasion of Poland	1939	Germany	None
United Kingdom ¹⁴¹ Special Operations Executive (“SOE”) personnel in civilian clothing supported partisan operations in Axis-controlled nations	1940–45	Europe, Asia	SOE agents captured <i>in flagrante delicto</i> were incarcerated, not always executed ¹⁴²
Germany ¹⁴³ Danish-speaking SF dressed as Danish soldiers seize key bridge to initiate invasion	1940	Denmark	None
Germany ¹⁴⁴ SF dressed as Dutch military policemen seize key bridge at start of German invasion	1940	Netherlands	None

¹³⁹ Lt. Col. W. F. Stirling, *Safety Last* 81, 94 (Hollis and Carter 1953); Wilson, *Lawrence of Arabia* at 279–568 (cited at note 7). Lawrence served in the ranks of lieutenant to colonel. Lawrence’s awards included the French Legion d’Honneur, Companion of the Order of the Bath (in lieu of a recommended Victoria Cross, denied on a technicality), and Distinguished Service Order. Id at 251–52, 424–25, 492. He declined a recommendation by King George V for a knighthood. Id at 577.

¹⁴⁰ Lucas, *Kommando* at 29–39 (cited in note 79).

¹⁴¹ Mackenzie, *The Secret History of SOE* at 334 (cited in note 78).

¹⁴² Where captured SOE personnel were executed without trial, those responsible were prosecuted following World War II. See, for example, *Trial of Wolfgang Zeuss (The Natzweiler Trial)*, 5 War Crimes Trials (HMSO 1949).

¹⁴³ Lucas, *Kommando* at 45 (cited in note 79).

¹⁴⁴ Id at 49.

Who	When	Where	Disposition (if any)
Germany ¹⁴⁵ SF wearing Belgium Army overcoats over their uniforms seize key bridge at start of German invasion	1940	Belgium	None
United Kingdom ¹⁴⁶ Long Range Desert Group ("LRDG") wore Arab <i>kaffiyeh</i> and <i>agal</i> , sometimes worn over their uniforms	1940–43	Libya	None. <i>Kaffiyeh/agal</i> adopted by LRDG as official uniform
France ¹⁴⁷ Free French commander wore indigenous attire in attack on Italian fort at Murzuk, January 11, 1941	1941	Libya	Killed in action during attack
Germany ¹⁴⁸ SF wearing Russian Army overcoats, carrying Russian weapons, driving Russian vehicles, spearhead German invasion	1941	Russia	None
Germany ¹⁴⁹ SF dressed in British Army uniforms and indigenous attire, driving British vehicles, attempt reconnaissance to Suez	1941	Libya	None
Soviet Union ¹⁵⁰ Russian partisans and military operative groups deployed to support them fought in civilian clothing	1941–45	German-occupied territory in Soviet Union	Partisans captured were executed. Survivors decorated by Russia post-war

¹⁴⁵ Id at 71–73.

¹⁴⁶ Shaw, *Long Range Desert Group* at 27 (cited in note 92); Gordon, *The Other Desert War* at 50 (cited in note 92); O'Carroll, *Kivi Scorpions* at 75, 79 (cited in note 92).

¹⁴⁷ Crichton-Stuart, *G Patrol* at 27, 38, 42 (cited in note 92).

¹⁴⁸ Lucas, *Kommando* at 77 (cited in note 79).

¹⁴⁹ Id at 84–85.

¹⁵⁰ John Erickson, *The Road to Stalingrad, 1 Stalin's War with Germany* 240–48 (Harper & Row 1975); Erickson, *The Road to Berlin* at 114–15, 147 (cited in note 95); Ziemke and Bauer, *Moscow to Stalingrad* at 199–219 (cited in note 95); Ziemke, *Stalingrad to Berlin* at 303–09,

Who	When	Where	Disposition (if any)
United Kingdom ¹⁵¹ 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 ¹⁵² SOE-trained, equipped, and transported partisans kill <i>Obergruppenführer</i> Reinhard Heydrich, Nazi Governor of Czechoslovakia	1942	Czechoslovakia	Partisans committed suicide rather than surrender
Soviet Union ¹⁵³ Naval <i>Spetsnaz</i> conduct operations in civilian clothing and enemy uniforms	1942–45	German-occupied territory in Soviet Union	Partisans captured were executed. Survivors decorated by Russia post-war

315–16 (cited in note 95). These histories show that Soviet partisan units reached a peak strength of 250,000 in 1943 and 1944, consisting of 40 percent civilians, 40 percent Russian soldiers left behind German lines during Germany's invasion of Russia, and 20 percent Special Forces parachuted in to augment, organize, and direct partisan operations.

¹⁵¹ Gordon Landsborough, *Tobruk Commando* 29–31, 35, 64–66 (Cassell 1956); Shaw, *Long Range Desert Group* at 185–95 (cited in note 92); Owen, *The Desert My Dwelling Place* at 224–27 (cited in note 92); Gordon, *The Other Desert War* at 119–26 (cited in note 92); Kelly, *The Lost Oasis* at 233–34 (cited in note 111); Maj. Gen. I.S.O. Playfair and Brig. C.J.C. Molony, *The Mediterranean and Middle East: The Destruction of the Axis Forces in Africa, 4 History of the Second World War: United Kingdom Military Series* 20–23 (HMSO 1966). The raiding party consisted of uniformed SAS posing as British prisoners of war guarded by German-speaking Palestinian Jews, members of the British Special Identification Group (“SIG”), dressed in German uniforms. While Saul Kelly states that the German-uniformed escort changed into British uniforms following infiltration and before fighting, (see Kelly, *The Lost Oasis* at 233 (cited in note 111)), Landsborough indicates only the three British officers who donned German uniforms at the last moment changed back into British uniform, see *id.* at 98. The raid proved a disaster, and captured SIG were executed. Author's discussion with Saul Kelly, June 21, 2003. The raid was the basis for the movie *Tobruk* (1967) starring Rock Hudson and George Peppard.

¹⁵² Callum MacDonald, *The Killing of SS Obergruppenführer Reinhard Heydrich* (Free Press 1989).

¹⁵³ Yuriy Fedorovich Strehnin, *Commandos from the Sea: Soviet Naval Spetsnaz in World War II* at 3, 58, 66, 71, 89–90 (Naval Institute, 1996) (James F. Gebhardt, trans).

Who	When	Where	Disposition (if any)
Japan ¹⁵⁴ 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 ¹⁵⁵ Eight German soldiers on sabotage mission captured in civilian clothing	1942	US	Tried by military commission for violation of the laws of war
United Kingdom/ Australia ¹⁵⁶ Operation JAYWICK, combined SOF team navigated to Singapore in Japanese fishing boat <i>Kofuku Mara</i> , flying Japanese flag and dressed in native sarongs. Attacked and sunk seven ships (38,000 tons)	1943	Singapore	Participants commended
Poland ¹⁵⁷ SOE-trained partisans, one dressed in SS uniform, raided Pinsk prison near Brest-Litovsk, freed prisoners and killed commandant	1943	Poland	None

¹⁵⁴ Peter Elphick, *Singapore: The Pregnable Fortress* 356–60 (Hodder and Stoughton 1995).

¹⁵⁵ *Ex parte Quirin*, 317 US at 1. 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, *Nazi Saboteurs on Trial* at 23, 26, 35 (cited at note 31).

¹⁵⁶ Brian Connell, *Return of the Tiger* 84, 122 (Doubleday 1961); Ronald McKie, *The Heroes* 58, 99, 146, 175 (Harcourt, Brace 1961); Lynette Ramsey Silver, *Krait: The Fishing Boat that Went to War* (Sally Milner 1992). Illegal Japanese reprisals against Allied prisoners of war and civilian internees held in Singapore was the basis for the postwar *Trial of Sumida Haruzo and Twenty Others (The "Double Tenth" Trial)*, in Colin Sleeman and S.C. Silkin, eds, 8 *War Crimes Trials* (William Hodge 1951).

¹⁵⁷ Foot, *SOE: An Outline History* at 193 (cited in note 78).

Who	When	Where	Disposition (if any)
United Kingdom ¹⁵⁸ SOE-trained, equipped, and transported partisans sabotaged German heavy water plant at Vermok	1943	Norway	None
Japan ¹⁵⁹ 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 captured under India Army Act or Indian Penal Code rather than charges of war crimes
United Kingdom ¹⁶⁰ Lt. B.J. Barton, No. 2 Commando, penetrated German defenses wearing indigenous attire and killed German commandant	1944	Brac (Aegaen)	Awarded Military Cross

¹⁵⁸ Riste and Nökleby, *Norway 1940–1945* at 59–60 (cited in note 83); Thomas Gallagher, *Assault in Norway: Sabotaging in the Nazi Nuclear Bomb* (Harcourt Brace Jovanovich 1975); and Dan Kurzman, *Blood and Water: Sabotaging Hitler's Bomb* 144–58 (Henry Holt 1997).

¹⁵⁹ A detailed and fascinating account is contained in Leslie C. Green, *Essays on the Modern Law of War* 41–434 (Transnational 2d ed 1999), based upon Professor Green's personal participation in the post-war trials. The Indian National Army (Azad Hind Fauj) was formed from Indian Army personnel captured during the 1942 Japanese conquest of Hong Kong, Malaya, and Singapore. Subsequently the Japanese "recruited" its Indian prisoners of war—through inducements as well as threats of violence and torture—to enlist in the Indian National Army ("INA") to fight against British forces. Some, but not all, did so. As Professor Green explains on page 411:

These "Volunteers" had indulged in infiltration and propaganda on behalf of Free India among Indian Army personnel, often operating through Burma and the Malayan advance behind British lines which, in view of their uniforms and language, they were easily able to infiltrate, [sic] In addition, they were able to indicate to the Japanese where British or Indian troops were hiding.

Professor Green notes that British military authorities began the prosecution of personnel captured while fighting on behalf of the INA as early as the middle of 1943. See *id.* at 414–15. These prosecutions continued through the post-war period, gradually becoming more selective with respect to those brought to trial. See *id.* at 418. However, accused were brought before courts martial for violations of the Indian Army Act or the Indian Penal Code rather than being charged with a war crime for fighting in Indian Army uniforms. See *id.* at 431.

The role of the INA in Japanese operations against British forces in Burma is described in Field Marshal, The Viscount Slim, *Defeat into Victory* (David McKay 1961), and Louis Allen, *Burma: The Longest War, 1941–1945* (St. Martin's 1985).

Who	When	Where	Disposition (if any)
United Kingdom ¹⁶¹ British officers dressed as German soldiers, with partisan assistance, abducted Major General Karl Kreipe, Commander, 22 nd Panzer Division on Crete	1944	Crete	None
United Kingdom ¹⁶² SAS wore mixed dress of British, German, and Italian uniforms and civilian clothing	1944	Aegaen	One Victoria Cross, numerous other awards
United Kingdom ¹⁶³ Operation RIMAU, combined SF team in uniform attacked Japanese ships	1944	Singapore	Captured, died from illegal medical experimentation or were executed
United Kingdom ¹⁶⁴ Special Boat Squadron ("SBS") officer dressed as priest led successful attack on German units	1944	Nisiros (Aegaen)	None

¹⁶⁰ Saunders, *The Green Beret* at 244–45 (cited in note 92); Messenger, *The Commandos* at 331–32, 335 (cited in note 92); and William Seymour, *British Special Forces* 49–50 (Sidgwick & Jackson 1985).

¹⁶¹ W. Stanley Moss, *Ill Met by Moonlight* (MacMillan 1950). While SOE historian M.R.D. Foot states that "SOE never attempted in France to do what the *Lehr-Regiment Brandenburg* did on the other side in Russia: operate tactical or even strategic reconnaissance and fighting patrols behind the lines in enemy uniform." Foot, *SOE in France* at 390 (cited in note 34). While Stanley Moss never acknowledged his mission to have been SOE-sponsored, the official SOE history acknowledges it as an SOE mission, Mackenzie, *The Secret History of SOE* at 483 (cited in note 78). Moss's book is an early one, but the team's priority of dispatch—a dozen parachute attempts before being delivered by ship—his communications capabilities, his liaison with SOE operatives on Crete, and his less-than-credible procurement of well-fitting German military police uniforms (the book contains a photograph of Moss and his teammate in German uniforms) suggests that Foot's statement denying any such activity "in France" was carefully crafted. A summary of Moss's mission in Patrick Howarth, *Undercover: The Men and Women of the SOE* 162–65 (Phoenix 1980), adds to the official SOE acknowledgement. *Lehr-Regiment Brandenburg* operations are the subject of Lucas, *Kommando* (cited in note 79).

¹⁶² Suzanne Lassen, *Anders Lassen VC* 121, 176 (Muller 1965) (Inge Hack, trans).

¹⁶³ Silver, *The Heroes of Rimau* (cited in note 127) details the mission. In 1951, those responsible for the illegal medical experimentation and execution of the captured Allied personnel were convicted of war crimes by an Australian military court sitting on Admiralty Island of Los Negros. Id at 228–29.

¹⁶⁴ Ladd, *SBS: The Invisible Raiders* 64–66 (cited at note 92).

Who	When	Where	Disposition (if any)
United Kingdom ¹⁶⁵ SOE-trained/equipped partisans sabotaged and sunk ferry carrying German heavy water	1944	Norway	None
United States ¹⁶⁶ Office of Strategic Service ("OSS") teams entered Nazi- occupied Europe, conducted operations in civilian clothing and German uniform.	1944	France, Yugoslavia	None
United States ¹⁶⁷ US Naval Group China wearing civilian clothing collected intelligence and executed direct action missions against Japanese	1944	China	None
United States ¹⁶⁸ Army Rangers dressed as German soldiers to penetrate and fight in Aachen (OSS operation)	1944	Germany	None
United States/ United Kingdom ¹⁶⁹ JEDBURGH teams operate post-D-Day in support of partisans, not always in uniform	1944–45	France, Italy, Yugoslavia, Albania, Netherlands	None

¹⁶⁵ Riste and Nökleby, *Norway 1940–1945* at 60–61 (cited in note 83); Kurzman, *Blood and Water: Sabotaging Hitler's Bomb* 224–38 (cited in note 158).

¹⁶⁶ Joseph E. Persico, *Piercing the Reich: The Penetration of Nazi Germany by American Secret Agents during World War II* at 12–115, 120–21, 126–27, 140–41 (Viking 1979); Paddock, *U.S. Army Special Warfare: Its Origins* at 28 (cited in note 5).

¹⁶⁷ Miles, *A Different Kind of War* at 274, 371 (cited in note 106).

¹⁶⁸ Charles Whiting, *Bloody Aachen* 143–46 (Stein and Day 1976). The US Army use of German uniforms in the battle for Aachen was specifically mentioned in the defense of *SS-Obersturmbannführer* Otto Skorzeny. See Weingartner, 55 *J Milit Hist* at 217–218 (cited in note 133).

¹⁶⁹ David Schoenbrun, *Soldiers of the Night: The Story of the French Resistance* 331 (Dutton 1980); Hymoff, *The OSS in World War II* at 247–50 (cited in note 99); Casey, *The Secret War against Hitler* at 74–75, 92, 94–95, 122–23, 146, 148, 154 (cited in note 99); Mackenzie, *The Secret History of SOE* at 603–04, 642 (cited in note 78). Jedburgh teams were planned for Belgium, but were not deployed. *Id.* at 604.

Who	When	Where	Disposition (if any)
Germany ¹⁷⁰ German Kommando unit dressed in US uniforms and driving US vehicles penetrated US lines in Ardennes	1944	Belgium	Members captured in US uniforms executed; mission commander Otto Skorzeny and ten others acquitted in war crimes trial
Germany ¹⁷¹ Partisan operation by German SF in civilian clothing	1944–45	Germany	None
United Kingdom ¹⁷² Operation TOMBOLA, SAS operation with Italian partisans. Civilian attire with mixed uniform	1945	Italy	None
United States ¹⁷³ OSS team in German uniforms to conduct Operation IRON CROSS to execute subversion missions and capture or kill Nazi officials	1945	Germany	Mission aborted by end of war

¹⁷⁰ *Trial of Otto Skorzeny and Others*, 9 *Law Reports of Trials of War Criminals* at 90–94 (cited in note 133); Hugh M. Cole, *The Ardennes: Battle of the Bulge*, Stetson Conn, ed, 8 *United States Army in World War II: European Theater of Operations* 269–71 (Department of the Army 1965). See also discussion in note 133.

¹⁷¹ Lucas, *Kommando* at 205–06 (cited in note 79).

¹⁷² See Farran, *Winged Dagger* at 282–339 (cited at note 92); Farran, *Operation Tombola* at 13, 22, 25, 33, 59–60 (cited in note 121). The latter narrative suggests that some partisans wore distinctive emblems relating to their communist or non-communist affiliation, or allegiance to the group with whom they were associated (somewhat akin to modern day gang “colors”) rather than as distinctive devices in the traditional law of war sense.

¹⁷³ Persico, *Piercing the Reich* at 253 (cited in note 166); Bank, *From OSS to Green Berets* at 73–99 (cited in note 5). A photograph of the London OSS fitting room, showing an OSS agent being outfitted in German *Wermacht* uniform, is in Francis Russell, *The Secret War* 106 (Time-Life 1981).

Who	When	Where	Disposition (if any)
United States ¹⁷⁴ OSS Operations Groups operated in US uniforms, indigenous attire, and Chinese Puppet Army uniforms	1945	China	None
Indonesia (I) ¹⁷⁵ Soldiers dressed in civilian attire while attacking civilian objects	1965	Singapore	Captured and tried under domestic law
Indonesia (II) ¹⁷⁶ Soldiers in civilian attire captured while on mission to attack civilian objects	1965	Singapore	Captured and tried under domestic law
United States ¹⁷⁷ Military Assistance Command (Vietnam) Studies and Operations Group teams wore non-standard uniforms while operating in denied areas	1965–71	Southeast Asia	None
United States ¹⁷⁸ SF soldier fought in civilian clothing in response to Tet Offensive enemy attacks	1968	Vietnam	Awarded Medal of Honor

¹⁷⁴ Mills, Mills, and Brunner, *OSS Special Operations in China* (cited in note 7).

¹⁷⁵ *Krofan*, 1 Malayan L.J. at 133 (cited in note 31).

¹⁷⁶ *Osman bin Haji Mohamed Ali v Public Prosecutor*, 1 AC 430 (Privy Council 1969) (appeal taken from Malaysia) (UK).

¹⁷⁷ John Plaster, *SOG: The Secret Wars of America's Commands in Vietnam* 143 (Simon and Schuster 1997). Some, including US Road Runner teams operating in North Vietnam, wore sterile field uniforms or indigenous straw conical hats to delay positive enemy identification at a distance. Interview with Lt. Col. L.H. Burruss, SF, USA (June 12, 2002).

¹⁷⁸ The Medal of Honor citation of Sgt. Drew D. Dix, USA, reads as follows:

Learning that a nurse was trapped in a house near the center of the city, S/Sgt. 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, S/Sgt. Dix voluntarily led another force to rescue 8 civilian employees located in a building which was under heavy mortar and small-arms fire. S/Sgt. 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. The following day S/Sgt. Dix, still on his own volition, assembled a 20-man force and though 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

Who	When	Where	Disposition (if any)
Soviet Union ¹⁷⁹ <i>Spetsnaz</i> dressed as tourists disabled the Prague airport before disembarkation of planes carrying Soviet troops.	1968	Czechoslovakia	None
United States ¹⁸⁰ 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

success of S/Sgt. Dix, rallied and commenced firing upon the Viet Cong. S/Sgt. Dix captured 20 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. S/Sgt. Dix's personal heroic actions resulted in 14 Viet Cong killed in action and possibly 25 more, the capture of 20 prisoners, 15 weapons, and the rescue of 14 United States and free world civilians. The heroism of S/Sgt. Dix was in the highest tradition and reflects great credit upon the US Army.

Available online at <<http://www.army.mil/cmh-pg/mohviet.htm>> under "Dix, Drew Dennis" (visited Oct 11, 2003).

¹⁷⁹ Viktor Suvorov, *Spetsnaz: The Inside Story of the Soviet Special Forces* 131, 161 (Norton 1987).

¹⁸⁰ This was the famous rescue by Lieutenant Thomas R. Norris, USN, of Lieutenant Colonel Icel 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* (Naval Institute 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. See Bosiljevac, *SEALs: UDT/SEAL Operation in Vietnam* at 211–213 (cited in note 5). 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:

Lt. Norris completed an unprecedented ground rescue of 2 downed pilots deep within heavily controlled enemy territory in Quang Tri Province. Lt. Norris, on the night of 10 April, led a 5-man patrol through 2,000 meters of heavily controlled enemy territory, located 1 of the downed pilots at daybreak, and returned to the Forward Operating Base (FOB). On 11 April, after a devastating mortar and rocket attack on the small FOB, Lt. Norris led a 3-man team on 2 unsuccessful rescue attempts for the second pilot. On the afternoon of the 12th, a forward air controller located the pilot and notified Lt. Norris. *Dressed in fishermen disguises and using a sampan*, Lt. Norris and 1 Vietnamese traveled throughout that 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. Lt. Norris called in an air strike which provided suppression fire and a smoke screen, 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, Lt. Norris enhanced the finest traditions of the U.S. Naval Service.

Who	When	Where	Disposition (if any)
Israel ¹⁸¹ Operation Aviv Neurim, Israeli Defense Force ("IDF") SF team dressed in civilian clothing raided PLO Beirut targets	1973	Lebanon	Team commander Ehud Barak eventually became IDF Chief of Staff, Israeli Prime Minister
Israel ¹⁸² Entebbe rescue force included commandos dressed as Uganda soldiers	1976	Uganda	Mission successful in rescuing hijacked aircrew and passengers held hostage

Available online at <<http://www.army.mil/cmh-pg/mohviet2.htm>> (under "Norris, Thomas R.") (visited Oct 11, 2003) (emphasis added).

¹⁸¹ Yeshayahu Ben-Porat, Eiten Haber, and Zeev Schiff, *Entebbe Rescue* 210 (Delacorte 1976) (Louis Williams, trans); Neil C. Livingstone and David Halevy, *Inside the PLO: Covert Units, Secret Funds, and the War against Israel in the United States* 36–37 (Morrow 1990); Israeli Defence Forces Weekly *Ba'Machaneh* (1998) (on file with author); e-mail message to author from David H. Halevy, Global Options, Inc (July 8, 2003) (on file with author). The operation took place during the night of April 9–10, 1973. Barak was dressed as a woman, with a long, dark wig, false breasts, and women's clothing. An interview with retired Brigadier General Emanuel Shaked, commander of the actual operation, tells the story:

The task of killing the three senior members of the PLO was entrusted to the Sayeret Matkal people. They walked singly and in pairs at a distance of ten meters one from the other as if there was no relationship between them, wrote Moshe Zondar in his book "Sayeret Matkal". Four of the warriors were disguised as women. Ehud Barak's wig was black. Amiram Levine (destined to become Commanding General of the Northern Command and Deputy Head of the Mossad) boasted a red hairpiece. Loni Rafaeli and Danny Bar looked like blond women. In accordance with the dictates of fashion, Barak wore widening pants and within his large breasts, artificial of course, he hid explosive blocks.

Barak walked in front with "her" partner, Muki Betzer, who wore a civilian suit. To the Lebanese passerby the two looked like a man and a woman, normal citizens. In fact, a pair of Lebanese Gendarmiers, who strode towards them on the sidewalk, gave them a close look, and Betzer, who strengthened his lovers hug, dared even to rub shoulders with the Lebanese uniform bearer, who was forced to give in and to step down to the road with his partner. The Lebanese did not know that in front of them was a deadly couple, leading the force forward.

The attack on three separate Palestine Liberation Organization targets was successful. E-mail message to author from Col. Daniel Reisner, Israeli Defence Force, (Aug 6, 2003) (on file with author).

¹⁸² William Stevenson, *90 Minutes at Entebbe* 109, 112 (Bantam 1976).

Who	When	Where	Disposition (if any)
Soviet Union ¹⁸³ <i>Spetsnaz</i> dressed in civilian clothing neutralized senior Afghan officers, then secured Kabul Airport wearing Afghan Army uniforms	1979	Afghanistan	None
United States ¹⁸⁴ Team for rescue of US hostages in American Embassy in Tehran wore non-standard uniforms approved by the Joint Chiefs of Staff and President	1980	Iran	Mission aborted due to helicopter failures
Soviet Union, ¹⁸⁵ East Germany <i>Spetsnaz</i> 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
North Korea ¹⁸⁶ SF infiltrated South Korea wearing civilian clothing or South Korean uniforms	1950–88	South Korea	Treated as spies when caught

¹⁸³ Michael G. Welham and Bruce Quarrie, *Operation Spetsnaz: The Aims, Tactics and Techniques of Soviet Special Forces* 40 (Patrick Stephens 1989); Department of Defense, *Soviet Military Power* 72 (1985).

¹⁸⁴ Personal knowledge of the author. Each aircraft carried Iranian markings to be stuck on the fuselage in the event an aircraft had to be abandoned. For the history of the mission, see Paul B. Ryan, *The Iranian Rescue Mission: Why It Failed* (Naval Institute 1985), and Col. James H. Kyle, *The Guts to Try* (Orion 1990).

¹⁸⁵ Welham and Quarrie, *Operation Spetsnaz* at 31–32 (cited in note 183); Ross S. Kelly, *Spetsnaz: Special Operations Forces of the USSR*, 12 Def & Foreign Aff 28–29 (Dec 1984) (on file with author); Dale Van Atta, *Spetsnaz: The Soviets' Sinister Strike Force*, 65 Reader's Digest 72 (Apr 1986).

¹⁸⁶ Joseph S. Bermudez, Jr., *North Korea Special Forces* 21, 33, 53, 54, 70 (Jane's 1988). North Korean Special Forces' disguises included dressing as civilian males and females; see id at 37, 70. North Korean use of South Korean uniforms or civilian clothing cannot be documented to present, but is likely.

Who	When	Where	Disposition (if any)
Israel ¹⁸⁷ <i>Sarayat Maktal</i> wearing non-standard uniforms carried out successful direct action mission to kill Abu Jihad, PLO military commander, in Tunis	1988	Sidi-bou-Said, Tunisia	None
Panama ¹⁸⁸ 7th Infantry Company (<i>Macho de Monte</i>), Panamanian Defense Forces, 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 ¹⁸⁹ Commander-in-Chief's SF personal security detail wore civilian attire	1990–91	Saudi Arabia	None
United Kingdom/ United States ¹⁹⁰ SF wore <i>kaffiyeh/agal</i> and indigenous coats over uniforms during operations in Iraq	1991	Iraq	None

¹⁸⁷ See Livingstone and Halevy, *Inside the PLO* at 31–58 (cited in note 181). Team members wore unmarked black fireproof coveralls. *Id.* at 50.

¹⁸⁸ E-mail message to author from Lt. Col. Kevin H. Govern, JA, USA (June 18, 2003) (on file with author).

¹⁸⁹ Personal knowledge of the author, photograph in author's files.

¹⁹⁰ See Ratcliffe, Botham, and Hitchen, *Eye of the Storm* at 214, 305 (cited in note 20).