

**NO SHIRT, NO SHOES, NO STATUS: UNIFORMS,
DISTINCTION, AND SPECIAL OPERATIONS IN
INTERNATIONAL ARMED CONFLICT**

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The United States is in international armed conflict with Country X, a nation that harbors terrorist group Y. A U.S. Special Operations Force (SOF) has been tasked to conduct a direct action raid to destroy a group Y terrorist cell in Country X. Both X and Y forces have been declared hostile. Two days before the anticipated raid, several reconnaissance teams are inserted to gather information on the objective and to assume sniper positions to support the follow-on raid force. These reconnaissance teams are inserted wearing local civilian clothing to help avoid detection, and they will remain in civilian clothing throughout the mission to conceal their true identity. After two days of reporting from near the objective, one of the reconnaissance teams identifies a building where several members of Country X's armed forces and terrorists from group Y conduct daily meetings.

The mission of the raid force is to kill or capture all members of Country X's armed forces and terrorist group Y found at the building. The reconnaissance teams are instructed that a sniper

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shot from one of the teams will initiate the raid on the building. The raid force, wearing black jumpsuits with no indicia of rank, service, or nationality, launches by helicopter into an insert point, and then moves to an attack position just off the objective. With perfect synchronization, a reconnaissance team sniper in civilian clothing engages an unsuspecting terrorist, and the raid force rushes in to complete the assault. The other reconnaissance teams, still in civilian clothing, provide overwatch and a base of fire for the raid force.

I. Introduction

Current U.S. operations in Afghanistan against the war on terrorism highlight the increased role special operations forces will likely play in future conflicts. The above fictional scenario is typical of a mission that special operations forces train for, and may be called on to perform, in today's world-environment. This scenario raises some important law of war (LOW) considerations for U.S. forces. The LOW delineates criteria that combatants must meet to gain prisoner of war (POW) status, and it obligates combatants to distinguish themselves from civilians.² Further, the LOW limits the conduct that combatants can engage in while dressed in civilian clothing, violations of which may result in a loss of POW status as well as disciplinary action against the combatants and their superiors.³

First, this article briefly discusses the two types of armed conflict and how the type of armed conflict determines which body of the LOW applies. Next, the article examines the issue of POW status, and how obtaining this coveted status is directly related to the LOW principle of distinction and the wearing of a uniform or some other fixed identifying emblem. In sections VI and VII, this article examines the conduct of military operations in civilian clothes, and how this conduct could result in a LOW violation (perfidy) or the loss of POW status (spying) depending on the type of conduct engaged in. Finally, this article examines the Supreme Court case, *Ex parte Quirin*,⁴ and how the Court's holding, though contra-

2. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(1), 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 37(1)(c), 1125 U.N.T.S. 3 [hereinafter Protocol I].

4. 317 U.S. 1 (1942).

dictory to the current state of the LOW regarding distinction and spying, is nevertheless binding on the U.S. armed forces.

II. Type of Armed Conflict

When analyzing a question under the LOW, one must first determine whether the armed conflict in question is international or internal because the type of conflict determines which body of the LOW applies. International armed conflicts, defined in Common Article 2 of the Geneva Conventions of 1949,⁵ trigger the entire body of the LOW, whereas conflicts classified as internal, defined by Common Article 3 of the Geneva Conventions,⁶ do not. This article assumes that the United States is in an international armed conflict with Country X.⁷ As a result, the complete body of the LOW applies to the conflict, primarily the Hague Regulations,⁸ the four Geneva Conventions of 1949,⁹ and Protocol I.¹⁰

5. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.S.T.S. 85 [hereinafter GWS Sea]; GPW, *supra* note 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]. Common Article 2 of the Geneva Conventions defines international armed conflicts as “all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Article 1(4) of (Protocol I) expanded the definition of international armed conflict to include “[a]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination.” Protocol I, *supra* note 3, art.1(4). The United States specifically disagrees with Article 1(4)’s expansion of Common Article 2. See Michael J. Matheson, *Remarks in Session One: 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. INT’L L. & POL’Y 419, 425 (1987).

6. Common Article 3 defines internal armed conflicts as “[c]onflicts which are not of an international character.” GWS, *supra* note 5, art. 3; GWS Sea, *supra* note 5, art. 3; GPW, *supra* note 2, art. 3; GC, *supra* note 5, art. 3. A detailed discussion of the criteria for meeting the definition of internal armed conflict is beyond the scope of this article.

III. Status

After determining the type of conflict, one must resolve the issue of status. Status is inextricably linked to all questions regarding the LOW because status determines the duties owed or owing to people or objects, or who or what may be lawfully targeted. For example, as discussed below, POWs are immune from prosecution for their lawful, pre-capture warlike acts (combatant immunity).¹¹ Similarly, one may not target persons characterized as noncombatants or civilians as long as the noncombatants refrain from actively participating in hostilities.¹² As the opening

7. The conclusions of this article could change substantially if the scenario involved internal armed conflict. The DOD Law of War Program states that it is DOD policy to comply with the LOW “in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized.” U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 5.3.1 (8 Dec. 1998) [hereinafter DOD DIR. 5100.77]. *Chairman of the Joint Chiefs of Staff Instruction 5810.01A, Implementation of the DoD Law of War Program*, likewise states:

The Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the US Armed Forces will comply with the principles and spirit of the law of war during all other operations.

CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 4(a) (27 Aug. 1999) [hereinafter CJCSI 5810.01B]. While it is U.S. policy to comply with the spirit and intent of the LOW in all conflicts, exactly which principles are so fundamental under the LOW that the United States will apply as a matter of policy in all conflicts remains to be seen.

8. Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations]. The United States considers the entire body of the Hague Regulations to be reflective of customary international law and binding on all parties, whether or not they are signatories. U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 6 (18 July 1956) [hereinafter FM 27-10].

9. *See supra* note 4.

10. *See generally* Matheson, *supra* note 5 (providing an in-depth discussion of which articles of Protocol I the United States considers as either reflective of customary international law or deserving of such status). While the United States has not ratified Protocol I, the United States recognizes many of its provisions as customary international law and the U.S. armed forces follow these provisions in international armed conflict. *Id.*

11. Commentary on the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 515 [hereinafter Commentary, Protocol I].

12. Protocol I, *supra* note 3, art 37(1)(c).

scenario primarily concerns the status of people, the following discussion focuses on people instead of objects.

The status of lawful combatants is critical to members of the armed forces because it brings with it the privilege of combatant immunity. Combatant immunity protects lawful combatants, on capture, from prosecution under the capturing nation's domestic law for pre-capture warlike acts as long as these acts were performed in accordance with the LOW.¹³ As Bothe, Partsch, and Solf state in their commentary on Protocol I:

[Combatant immunity] provides immunity from the application of municipal law prohibitions against homicides, wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflict.¹⁴

The Hague Regulations of 1907 were the first international convention to define fully who qualified for combatant status, and conversely, noncombatant status.¹⁵ Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) built on this definition and is the current authority for determining who is a lawful combatant.¹⁶ Article 4A(1) of the GPW states:

A. Prisoners of war,¹⁷ 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:

13. See Major Geoffrey S. Corn, "To Be or Not to Be, That Is the Question" *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1, 14-15; see also Commentary, Protocol I, *supra* note 11, at 510.

14. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 243 (1982). Conversely,

Civilians who participate directly in hostilities, as well as spies and members of the armed forces who forfeit their combatant status, do not enjoy that privilege, and may be tried, under appropriate safeguards, for direct participation in hostilities as well as for any crime under municipal law which they might have committed.

Id. at 244.

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.¹⁸

Thus, “[m]embers of the armed forces of a Party to the conflict”¹⁹ are accorded POW status, and consequently combatant immunity, when cap-

15. See Hague Regulations, *supra* note 8, arts. 1-3. The Hague Regulations provide the following regarding who qualifies for belligerent status:

Article 1: The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- (1) To be commanded by a person responsible for his subordinates;
- (2) To have a fixed distinctive emblem recognizable at a distance;
- (3) To carry arms openly; and
- (4) To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form any part of it, they are included under the denomination “army.”

Article 2: The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

Article 3: The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

Id.

16. See Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War 51 (1960) [hereinafter Commentary, GPW] (“[T]he present Convention [GPW] is not limited by the Hague Regulations nor does it abrogate them, and cases which are not covered by the text of this Convention are nevertheless protected by the general principles declared in 1907.”).

17. Although the GPW uses the term “prisoner of war” instead of the terms “lawful combatant” or “combatant immunity,” it is understood under the GPW and the accompanying commentaries that the term POW applies only to lawful combatants that have fallen into enemy hands, and encompasses “combatant immunity.” *Id.* at 46-47; Commentary, Protocol I, *supra* note 11, at 509; BOTHE ET AL., *supra* note 14, at 233-34. Bothe states, “The essence of prisoner of war status under the [GPW] is the obligation imposed on the Detaining Power to respect the privilege of combatants who have fallen into its power.” BOTHE ET AL., *supra* note 14, at 243-44.

tured. Despite this language, however, further analysis reveals that membership in the armed forces of a party to the conflict is not the only requirement to be a POW. Certain inherent requirements and responsibilities concomitant with such membership must also be met.

The term “member of the armed forces of a Party to the conflict” implies several things. First, this term “refers to all military personnel, whether they belong to the land, sea, or air forces” of a State, and is generally considered to encompass the regular, uniformed armed forces of a State.²⁰ This term also connotes an organizational structure, a chain of command, and a means of identification.²¹ Article 4A(2) of the GPW provides further clarification. It accords POW status to:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict 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;
- (c) that of carrying arms openly; [and]
- (d) that of conducting their operations in accordance with the laws and customs of war.²²

18. GPW, *supra* note 2, art. 4A(1). Article 4 of the GPW provides for several categories of persons entitled to POW status in addition to Article 4A(1), which are not pertinent to this discussion. These include: members of militias and other volunteer corps meeting certain criteria, *id.* art. 4A(2); “members of an armed force who profess allegiance to a Government not recognized by a detaining power,” *id.* art. 4A(3); “persons who accompany the force,” *id.* art. 4A(4); crews of ships and aircraft of the civil fleet, *id.* art. 4A(5); inhabitants of a non-occupied territory who rise up in a *levee en masse*, *id.* art. 4A(6); persons belonging to, or having belonged, to an armed force of an occupied territory, *id.* art. 4B(1); and persons belonging to one of the above categories who are found in a neutral or non-belligerent country and who must be interned under international law, *id.* art. 4B(2).

19. *Id.* art. 4A(1).

20. Commentary, GPW, *supra* note 16, at 51.

21. *Id.* at 51-67.

22. GPW, *supra* note 2, art. 4A(2). These four criteria originally appeared in Article 1 of the Hague Regulations and were incorporated nearly verbatim into Article 4A(2) of the GPW. See also Hague Regulations, *supra* note 8, art. 1.

Thus, members of militia or resistance forces who meet these four criteria are accorded POW status just the same as a member of the regular armed forces to a party to the conflict.

While Article 4A(2) of the GPW specifically does not apply to members of the regular armed forces of a party to the conflict,²³ the drafters of the GPW crafted the four criteria of Article 4A(2) because they believed these criteria were indicative of the characteristics inherent in the regular armed forces of a State.²⁴ Bothe makes the clearest statement on this point:

Other than the reference to the “armed forces of a Party to the conflict” in Article 4A(1), the Geneva Conventions do not explicitly prescribe the same qualifications for regular armed forces. It is generally assumed that these conditions were deemed, by the 1874 Brussels Conference and the 1899 and 1907 Hague Peace Conferences, to be inherent in the regular armed forces of States. Accordingly, it was considered to be unnecessary and redundant to spell them out in the Conventions. It seems clear that regular armed forces are inherently organized, that they are commanded by a person responsible for his subordinates and that they are obliged under international law to conduct their operations in accordance with the laws and customs of war.²⁵

This only seems logical, since it would be unreasonable to accord POW status, and the accompanying privilege of combatant immunity, to an organization that met a far lower standard than that met by the regular armed force of a state. Thus, while Article 4A(2) does not apply to the regular armed forces, the four criteria listed therein do apply because these criteria are already deemed inherent in the regular armed forces of a state.²⁶

On 7 February 2002, the United States made clear its position on this matter when the White House announced that it considered the Geneva Conventions applicable to Taliban detainees, but not to al Qaeda detain-

23. GPW, *supra* note 2, art. 4A(2)(b); Commentary, GPW, *supra* note 16, at 49.

24. Commentary, GPW, *supra* note 16, at 51-67; BOTHE ET AL., *supra* note 14, at 234-35.

25. BOTHE ET AL., *supra* note 14, at 234-35.

26. Commentary, GPW, *supra* note 16, at 49.

ees.²⁷ During a press conference on this matter, Mr. Ari Fleischer, the White House Press Secretary, stated:

To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population in Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war In any case, the United States would always be covered by the Geneva Convention, our military, because as I mentioned, under Article 4, you have to wear a uniform, you have to wear an insignia, carry your weapons outside, be distinguishable from the civilian population, all of which covers our military.²⁸

Clearly, the U.S. position is that the four criteria provided in Article 4A(2) are inherent in the definition of regular armed forces, and must be met by combatants before they are afforded POW status.

IV. Distinction

As discussed above, one of the prerequisites for gaining POW status is wearing a distinctive sign or emblem.²⁹ This requirement of identification is critical because it encompasses one of the fundamental principles of the LOW—distinction. The principle of distinction is codified in article 48 of Protocol I, which states:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.³⁰

27. Press Release, Office of the Press Secretary, the White House, Status of Detainees at Guantanamo (Feb. 7, 2002) (on file with author).

Although the United States has not ratified Protocol I, it treats article 48 as customary international law.³¹

28. *Id.* A DOD General Counsel briefing paper on this same matter states:

[The Taliban] are not the regular armed forces of any government. Rather, they are an armed group of militants who have oppressed and terrorized the people of Afghanistan and have been financed by, and in turn supported, a global terrorist network. They do not meet the criteria under which members of militias can receive POW status either. To qualify as POWs, militias must satisfy four conditions: they must be part of a military hierarchy; they must wear uniforms or other distinctive sign visible at a distance; they must carry arms openly; and they must conduct their operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war The Taliban do not qualify under Article 4(a)(3) which covers “members of the regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power” because the Convention applies only to regular armed forces who possess the attributes of regular armed forces, i.e. distinguish themselves from the civilian population and conduct their operations in accordance with the laws and customs of war.

Memorandum from the Department of Defense General Counsel, to Military Departments General Counsels and Judge Advocates General, subject: Background on Status and Treatment of Detainees (7 Feb. 2002) (on file with author). The briefing paper references Article 4(a)(3) because the United States never officially recognized the Taliban as the official government of Afghanistan. *Id.* at 8. Article 4(a)(3) was specifically written for this sort of situation and requires the armed forces of that “unrecognized regime” to meet the same criteria as that imposed on the regular armed forces of a party to be afforded POW status. GPW, *supra* note 2, art 4(a)(3).

29. *Id.* art. 4A(2)(b).

30. Protocol I, *supra* note 3, art. 48.

31. See Matheson, *supra* note 5, at 425. Although Matheson does not mention article 48, one can surmise the position of the United States based on Matheson’s comments regarding articles 44 and 45. See Protocol I, *supra* note 3, arts. 44-45, 48. Matheson states that the United States specifically rejects articles 44 and 45 because they reduce the requirement for obtaining POW status to carrying arms openly in some situations, thereby blurring the distinction between combatant and civilian. Matheson states: “[W]e support the principle that combatant personnel distinguish themselves from the civilian population when engaging in military operations.” Matheson, *supra* note 5, at 425. These comments indicate that the United States considers distinction critical to the LOW.

The principle of distinction is of fundamental importance to the LOW. Regarding Article 48, the Commentary to Protocol I states:

The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law.³²

To understand Article 48 completely, one must read it in conjunction with Articles 43, 44, and 50 of Protocol I.³³ Article 43 defines “combatant,”³⁴ Article 50 defines “civilian,”³⁵ and Article 44 determines when the distinction between the two must be in effect.³⁶ Article 43(2) defines combatants as members of the armed forces of a party to the conflict and is derived generally from Article 4 of the GPW.³⁷ Article 43(2) states that combatants are entitled to participate directly in hostilities, which is intended to clearly codify the principle of combatant immunity that was only implicitly mentioned in the Hague Regulations and the GPW.³⁸ Article 50 uses a negative definition of civilian—anyone not meeting the criteria of Article 4A(1), (2), (3), and (6) of the GPW or Article 43 of Protocol I.³⁹ Article 44(3) of Protocol I reaffirms the principle of distinction by

32. Commentary, Protocol I, *supra* note 11, at 598.

33. *See* Protocol I, *supra* note 3, arts. 43-44, 50.

34. *See id.* art. 43.

35. *See id.* art. 50.

36. *See id.* art. 44.

37. *See id.* art. 43(2). Article 43(1) of Protocol I states:

The armed forces of a Party to the conflict consists of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Id. art. 43(1). Matheson’s article is silent regarding the U.S. position on whether Article 43 of Protocol I reflects customary international law or deserves such status. *See generally* Matheson, *supra* note 5.

38. Commentary, Protocol I, *supra* note 11, at 510, 515.

39. Protocol I, *supra* note 3, art. 50.

requiring combatants to distinguish themselves from the civilian population during an attack or while preparing for an attack.⁴⁰

These Articles of Protocol I, when read in conjunction with Article 4 of the GPW, squarely address the matter of armed forces and identification. Parties to the conflict must distinguish between combatants and civilians when conducting military operations. Not only must parties to the conflict refrain from targeting civilians and civilian objects, they must also ensure that their own combatants are distinguishable from civilians.⁴¹ This inter-relationship between the armed forces, civilians, identification, and combatant immunity has been accurately described as a “quid pro quo.”⁴² Only lawful combatants are entitled to the privilege of combatant immunity. To qualify for this privilege, combatants must distinguish themselves from the civilian population. While this eases an opponent’s ability to identify the combatants as legitimate targets, it is the price to obtain combatant immunity.⁴³

To summarize, the LOW places a duty on parties to a conflict to distinguish combatants from civilians. This is a reciprocal duty, requiring all parties to distinguish among enemy combatants and civilians when conducting military operations⁴⁴ and to ensure a party’s own armed forces are distinguishable from enemy combatants and civilians.⁴⁵ This principle of distinction is fundamental under the LOW and has been codified since the Hague Regulations of 1907.⁴⁶ This principle was inherent in GPW Article 4’s definition of POW status⁴⁷ and carried through in the definition of combatant in Protocol I, Article 43.⁴⁸ Further, Protocol I specifically addresses this distinction again in Article 44(3), requiring combatants to distinguish themselves during an attack and in military operations preparatory to an attack.⁴⁹ As demonstrated in the following sections, distin-

40. *See id.* art. 44(3).

41. *See generally id.* art. 48 (indicating that distinction is a reciprocal duty placed on all parties to the conflict); BOTHE ET AL., *supra* note 14, at 281-83.

42. Major Geoffrey S. Corn, *International and Operational Law Note*, ARMY LAW., June 1999, at 35-37.

43. *Id.*

44. BOTHE ET AL., *supra* note 14, at 282-84.

45. *Id.*

46. Commentary, Protocol I, *supra* note 11, at 598.

47. *See GPW*, *supra* note 2, art. 4.

48. *See Protocol I*, *supra* note 3, art. 43.

49. *Id.* art. 44(3).

guishing combatants from civilians is critical because failure to do so could result in violations of the LOW.

V. Uniforms

Regular armed forces and the wearing of uniforms appear to go hand and hand. The GPW, however, does not specifically state that a person must wear a uniform to be considered a member of a regular armed force, at least not in the sense of a complete head-to-toe outfit that one normally associates with regular armed forces. The Commentary to Protocol I states:

The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of the armed forces should have for the 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 members of the enemy armed forces or from civilians.⁵⁰

Thus, states are free to choose their armed forces uniform, so long as it is readily distinguishable from the enemy and civilians.

In discussing the requirement for a distinct sign for irregular forces, the Commentary says the sign, while substituting for the requirement of a uniform, must be continuously worn and distinctive not only in the manner of distinguishing the wearer from the civilian population, but also in that all members of the group wear the same sign or emblem.⁵¹ The requirement that the sign distinguish the wearer from the civilian population does not mean a general civilian population, but the specific civilian population where the wearer is operating. Further, the sign must be recognizable at a comparable distance to that of a traditional uniform, and it must be “fixed” in that it cannot be easily taken on and off.⁵² The Council of Government Experts for the drafting of Article 4 of the GPW suggested that the language should read “habitually and constantly display a fixed distinctive sign recognizable at a distance.”⁵³ The drafters rejected this proposal

50. Commentary, GPW, *supra* note 16, at 52.

51. *Id.* at 59-61.

52. *Id.* at 60.

53. *Id.* at 59-60.

because they wanted to retain the “fixed distinctive sign” language first used in the Hague Regulations. Additionally, the drafters indicated that they considered the phrase “habitually and constantly” redundant with the term “fixed” in this context.⁵⁴ Thus, it is apparent that the drafters intended the term fixed to mean the same as habitually and constantly display.⁵⁵

What particular item or items will qualify as a uniform is far from clear. In regard to particular items of apparel, the Commentary to the GPW provides: “It may be a cap (although this may frequently be taken off and does not seem fully adequate), a coat, a shirt, an emblem or a colored sign worn on the chest.”⁵⁶ That a cap may not be a sufficient sign focuses on the requirement that the sign must also be fixed, in other words, not easily removed. Conversely, the Commentary to Article 39 of Protocol I (Emblems of Nationality) states:

In temperate climates it is customary for a uniform to consist of regulation headdress, jacket and trousers, or equivalent clothing (flying suits, specialist overclothes, etc.). However, this is not a rule, and “any 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.⁵⁷

Thus, under the GPW, the Commentary says that a cap might be insufficient because it is too easily removed. Under Protocol I, however, the Commentary considers a cap sufficient to be a uniform. This dichotomy illustrates the extent to which this remains a gray area in the LOW.

It appears that the drafters of both the GPW and Protocol I intended that combatants distinguish themselves from the local civilian population with a sign or emblem. To qualify, this sign or emblem must be fixed in that it is not easily detached or removed. Further, fixed also denotes that the sign or emblem must be constantly worn and not conveniently removed by the combatant to blend in with the local population. Additionally, the

54. *Id.* at 59-61.

55. *Id.* at 59-60.

56. *Id.* at 60.

57. Commentary, Protocol I, *supra* note 11, at 468. This quotation is from the Commentary discussing Article 39, Emblems of Nationality, which prohibits using enemy uniforms “while engaging in attacks or in order to shield, favor, protect, or impede military operations.” *Id.* at 465-68. While discussing a different article in a different Convention, this discussion is persuasive in determining what qualifies as an appropriate uniform.

sign or emblem must be such that it does, in fact, distinguish the combatant from the civilian population where the combatant is operating. While it is unlikely that this requirement will impact the traditional armed forces uniform, it will impact those forces that only wear a sign or emblem. The sign or emblem these forces rely on must be sufficiently different from the dress of the civilian population to ensure their identification as combatants.

The drafters of both the GPW and Protocol I, however, did not indicate that regular armed forces cease wearing traditional uniforms. In fact, it is apparent that the opposite is true. Paragraph 7 of Article 44, Protocol I, entitled Combatants and Prisoners of War, 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 the regular, uniformed armed units of a Party to the conflict."⁵⁸ Paragraph 3 of Article 44, Protocol I, relaxes the requirements for obtaining POW status for irregular forces in certain conflicts short of international armed conflict, merely requiring that such forces carry arms openly in certain circumstances.⁵⁹ Concern was so high that this paragraph would encourage regular armed forces to stop wearing uniforms that the working group for Article 44 drafted paragraph 7 to reiterate the traditional rule that the wearing of uniforms is the primary means for armed forces to distinguish themselves from civilians.⁶⁰

As previously noted, the drafters of the GPW considered a distinctive sign or emblem as inherent to a regular armed force, thus its inclusion as one of the four criteria required for irregular forces to gain POW status.⁶¹ International law scholar Dieter Fleck expressed belief that Article 44(7)

58. Protocol I, *supra* note 3, art. 44(7). While the United States specifically objects to Article 44 of Protocol I because it reduces the criteria for obtaining POW status in some situations, *see* GPW, *supra* note 2, art. 4A(2)(b), the U.S. would likely not have qualms with paragraph 7 of Article 44. The United States has consistently stated that it supports the principle that combatants must distinguish themselves from the civilian population while engaged in military operations. Matheson, *supra* note 5, at 425. Since paragraph 7 furthers this principle by encouraging regular armed forces to continue to wear traditional military uniforms, the United States would likely support this specific provision of Article 44. *Id.*

59. *See* Protocol I, *supra* note 3, art. 44(3).

60. BOTHE ET AL., *supra* note 14, at 257.

61. *See supra* notes 23-26 and accompanying text.

reflects a rule of customary international law that requires members of the regular armed forces of a party to wear a uniform.⁶² Fleck states:

[Paragraph 7 of Article 44, Protocol I] refers to a rule of international customary law according to which regular armed forces shall wear the uniform of their party to the conflict when directly involved in hostilities. This rule of international customary law had by the nineteenth century already become so well established that it was held to be generally accepted at the Conference in Brussels in 1874. The armed forces listed in Article 4(1) of the GPW are undoubtedly regarded as “regular” armed forces within the meaning of this rule. This is the meaning of “armed forces” upon which the identical Articles I of the Hague Regulations of 1899 and 1907 were based.⁶³

The GPW drafters, however, concluded that requiring a partisan or resistance force to wear a complete uniform was an unobtainable goal.⁶⁴ Thus, the compromise was the fixed distinctive sign to distinguish the force from civilians and the enemy. While this compromise relaxes the requirement of the traditional uniform, it also reaffirms that combatants must clearly distinguish themselves from the civilian population.

Having determined that lawful combatants must wear a uniform or some sort of device or emblem to distinguish themselves from civilians, the next issue is when the uniform or device must be worn to comply with the LOW. Article 44(3) of Protocol I answers this question.⁶⁵ The first sentence of Article 44(3) obligates combatants to distinguish themselves: (1) “while engaged in an attack”; and (2) in any “military operations preparatory to an attack.”⁶⁶ Remember that Article 44(3) was written primarily to address guerilla warfare situations,⁶⁷ thus the limitation on when distinction from civilians is required. The drafters of Article 44(3) believed that the danger to civilians would be greatest if guerillas wearing civilian clothing could simply emerge from a crowd, produce weapons, and begin firing.⁶⁸ The drafters wanted to ensure that guerilla forces were required to distinguish themselves from the civilian population in opera-

62. See Protocol I, *supra* note 3, art. 44(7); DIETER FLECK ET AL., THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 76 (1995).

63. *Id.*

64. Commentary, GPW, *supra* note 16, at 54-55.

65. Protocol I, *supra* note 3, art. 44(3). Similar to Article 44(7), the United States would probably agree with the first sentence of Article 44(3) because it reaffirms the principle of distinction. See *id.* arts. 44(3), 44(7). Matheson, *supra* note 5, at 425.

tions preceding an attack. Despite Article 44(3)'s focus on guerilla operations, the drafters clearly intended Article 44(3) to apply to all combatants in international armed conflict, whether members of the regular armed forces or guerillas.⁶⁹

Requiring combatants to distinguish themselves "while engaged in an attack" seems unambiguous.⁷⁰ The phrase "military operations preparatory to an attack," is open to debate.⁷¹ Bothe asserts that this phrase should be interpreted broadly based on the purpose of distinction, which is to minimize danger to the civilian population. In this view, administrative and logistical activities conducted before an attack should fall under the meaning of the phrase because they are likely carried out close to the civilian population.⁷² The Commentary only mentions that this phrase should

66. Protocol I, *supra* note 3, art. 44(3). The first sentence of Article 44(3), Protocol I, states: "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." *Id.* But see Commentary, Protocol I, *supra* note 11, at 528 ("It is certain that the humanitarian principle requiring appropriate clothing, applies throughout military operations in all cases which are not covered by the second sentence of this [paragraph 3 of Article 44]."). It is unclear what the Commentary to Protocol I means regarding appropriate clothing since, as demonstrated earlier, the Commentary to Protocol I and the Commentary to the GPW contradict each other concerning what items of apparel qualify as a uniform. See *supra* notes 56-57 and accompanying text.

67. BOTHE ET AL., *supra* note 14, at 245-48.

68. Commentary, Protocol I, *supra* note 11, at 520-28.

The purpose of this rule, of course, is to protect the civilian population by deterring combatants from concealing their arms and feigning civilian non-combatant status, for example, in order to gain advantageous positions for the attack. Such actions are to be deterred in this fashion, not simply because they are wrong (criminal punishment could deal with that), but because this failure of even minimal distinction from the civilian population, particularly if repeated, places that population at great risk.

Id. at 533.

69. *Id.* at 527; BOTHE ET AL., *supra* note 14, at 251-52.

70. Commentary, Protocol I, *supra* note 11, at 527.

71. *Id.*

72. BOTHE ET AL., *supra* note 14, at 252.

cover “any action carried out with a view to combat,”⁷³ which is a less than helpful insight. Fleck is silent on this issue.⁷⁴

The second sentence of Article 44(3) may shed additional light on the meaning of “military operations preparatory to an attack,” because the two criteria requiring combatants to distinguish themselves listed in sentence two are remarkably similar to the criteria for combatant distinction listed in sentence one. Sentence two provides:

Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in military deployment preceding the launching of an attack in which he is to participate.⁷⁵

By its clear language, this sentence is an exception to the general rule contained in Article 44(3)’s first sentence. This provision only applies in occupied territories and in armed conflicts described in Article 1(4) of Protocol I—armed conflicts against colonial domination, alien occupation, and racist regimes.⁷⁶ Commentators reviewed by the author are silent as to why the drafters chose slightly different language for the criteria in sentence one versus sentence two. Notwithstanding the limited application of Article 44(3)’s second sentence, arguably one may apply the Protocol I Commentary regarding the application of the criteria in sentence two in general to the criteria of sentence one. Both sentences of Article 44(3) address the same fundamental requirement—distinction—and both sentences contain similarly worded criteria for determining when combatants must maintain distinction.

Like the “while engaged in an attack” language in sentence one, the phrase “during each military engagement” in the second sentence is fairly unambiguous and not mentioned by the commentators reviewed by the

73. Commentary, Protocol I, *supra* note 11, at 527.

74. See generally FLECK ET AL., *supra* note 62.

75. Protocol I, *supra* note 3, art. 44(3).

76. FLECK ET AL., *supra* note 62, at 77; BOTHE ET AL., *supra* note 14, at 251-52.

author. Sentence two's second criterion, however, receives significant coverage, especially regarding the interpretation of the term "military deployment." Fleck states that Germany and several other States understand "military deployment" to mean "any movement towards the point from which an attack is to be launched."⁷⁷ The Commentary to Protocol I supports this point, stating that the United States, the United Kingdom, Australia, Canada, the Netherlands, and the Republic of Korea all made a declaration of understanding regarding Article 44(3)'s second sentence that "the term 'deployment' signifies any movement towards a place from which an attack is to be launched."⁷⁸ The Commentary to Protocol I interprets this understanding to mean that deployment begins when combatants move from an assembly or rendezvous point with the intention of advancing on their objective.⁷⁹ Other countries (such as Egypt, Qatar, and the United Arab Emirates) and the Palestine Liberation Organization understand the phrase to only cover the final movements to firing positions or the moments immediately before the attack.⁸⁰ Although these are just examples of some of the countries mentioned, they illustrate that countries typically not known for adhering to the LOW are the ones backing the later interpretation.

Bothe supports the view of the United States and the United Kingdom as correct when considered in light of the rule's objective, the protection of civilians. Bothe quotes Dr. Hans Blix, head of the Swedish delegation, who stated:

If a guerilla movement were systematically to take advantage of the surprise element that lies in attacking while posing as civilians until—as one expert said “a split second before the attack”—it would inevitably undermine the presumption, which is vital to maintain, namely that unarmed persons in civilian dress, do not attack. The result of undermining or eliminating this presumption is bound to have dreadful consequences for the civilian population.⁸¹

The Commentary to Protocol I sums up the varying understandings of the term "military deployment" by indicating that the second sentence's word-

77. FLECK ET AL., *supra* note 62, at 78.

78. Commentary, Protocol I, *supra* note 11, at 534 n.57; BOTHE ET AL., *supra* note 14, at 254.

79. Commentary, Protocol I, *supra* note 11, at 534-35.

80. *Id.* at 534; BOTHE ET AL., *supra* note 14, at 254.

81. BOTHE ET AL., *supra* note 14, at 254.

ing was a significant compromise among the Diplomatic Conference delegates and that “[t]he interpretation of the term ‘deployment’ remained the subject of divergent views.”⁸²

If one considers the commentary on the meaning of “military deployment” in sentence two of Article 44(3) to apply to the interpretation of “military operations preparatory to an attack” in sentence one, the meaning of the latter phrase becomes clearer. Combatants are required to distinguish themselves from the civilian population not only during an attack, but also when preparing for an attack. Preparing for an attack likely encompasses making final preparations in an assembly area before beginning an operation as well as movements to a final assembly area before commencing an attack. Considering the understanding that the United States, United Kingdom, and other countries took regarding the phrase “military deployment,” combatants must distinguish themselves earlier in an operation, rather than later, to protect the civilian population and prevent the dissolution of the principle of distinction.⁸³ This is an extremely unsettled area of Protocol I; many parties simply agreed to disagree on the meaning of key phrasing.⁸⁴

Although portions of Article 44(3) remain unsettled, its application can have serious implications for the U.S. armed forces. Failure to distinguish U.S. combatants from civilians properly “during an attack” and during “military operations preparatory to an attack” is a violation of Article 44(3),⁸⁵ and consequently, a violation of the LOW. Article 86 of Protocol I affirmatively obligates the parties to the conflict to prevent LOW violations, and it sanctions commanders if they knew or should have known of a violation and failed to prevent it.⁸⁶ Article 86 provides:

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to

82. Commentary, Protocol I, *supra* note 11, at 536

83. *Id.*

84. *Id.*

85. Protocol I, *supra* note 3, art. 44(3).

86. *Id.* art. 86. The United States supports the principles contained within Articles 86 and 87 of Protocol I and finds they are either reflective of customary international law or deserve such status. Matheson, *supra* note 5, at 428. For a detailed discussion of the evolution of the principle of command responsibility and the U.S. view on this topic, see Major Michael L. Smidt, Yamashita, Medina, and Beyond: *Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000).

suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.⁸⁷

Importantly, Article 86 covers acts of omission as well as acts of commission. The drafters of Article 86 found that the 1949 Geneva Conventions adequately covered acts of commission in their recitation of grave breaches, but that they did not adequately cover acts of omission; hence, the drafters included specific language at the end of Article 86(1).⁸⁸ Article 86(2) was included to tie the responsibility for LOW breaches to the need for POW status,⁸⁹ which requires members of an armed force to be commanded by someone responsible for their conduct.⁹⁰ After all, the purpose of mandating a “responsible commander” is to ensure that the force complies with the LOW.⁹¹ A commander is subject to sanctions under Article 86(2) if the following conditions are met:

- (a) The superior concerned must be the superior of the subordinate;
- (b) The commander knew, or had information which should have enabled him to conclude that a breach was committed or was going to be committed; and
- (c) The commander did not take the measures within his power to prevent it.⁹²

87. Protocol I, *supra* note 3, art. 86. Article 86 of Protocol I applies to all breaches of the LOW, not only to grave breaches. Commentary, Protocol I, *supra* note 11, at 1010-11. For purposes of Protocol I, grave breaches include those previously enumerated in the Geneva Conventions of 1949, *id.* at 1009, as well as those outlined in Articles 11 and 85 of Protocol I. Protocol I, *supra* note 3, art. 85.

88. Commentary, Protocol I, *supra* note 11, at 1007-09.

89. See Protocol I, *supra* note 3, art. 86(2).

90. GPW, *supra* note 2, art. 4.

91. Commentary, Protocol I, *supra* note 11, at 1011.

92. *Id.* at 1012-13.

The Commentary to Protocol I specifically mentions the failure of combatants to distinguish themselves in accordance with paragraphs 3 and 7 of Article 44 as an example of a breach the drafters intended Article 86 to address.⁹³

Article 87 of Protocol I complements Article 86. It requires commanders to prevent and report breaches of the Conventions and Protocol and to discipline those under their command who commit violations of the LOW. Article 87, entitled “Duty of Commanders,” states:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, suppress and report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violations thereof.⁹⁴

Article 87 applies to all commanders, regardless of their rank or level of responsibility.⁹⁵ As with Article 86, holding commanders responsible for the actions of their subordinates is directly linked to the requirement that combatants must be commanded by a “person responsible” to obtain POW status.⁹⁶ Article 87, however, goes further than Article 86, requiring

93. *See id.* at 1009.

94. Protocol I, *supra* note 3, art. 87.

95. Commentary, Protocol I, *supra* note 11, at 1019. Under Article 87, a commander is defined as someone who “exercises command responsibility.” Protocol I, *supra* note 3, art. 87.

96. Commentary, Protocol I, *supra* note 11, at 1018-19.

commanders to “prevent,” “suppress,” and “report” breaches of the LOW.⁹⁷ Thus, commanders are not only liable for the underlying breaches of their subordinates under Article 86, they may also be liable under Article 87 for failing to prevent and report LOW breaches. Further, Article 87(3) requires commanders to initiate disciplinary action against subordinates who commit breaches of the LOW.⁹⁸

Department of Defense Directive (DODD) 5100.77, DOD LOW Program, and Chairman of the Joint Chiefs of Staff Instruction 5810.01, Implementation of the DOD LOW Program, further delineate the principles of educate, train, prevent, and report contained in Articles 86 and 87 of Protocol I.⁹⁹ To prevent LOW violations, these authorities require all DOD components to establish a LOW program to teach all U.S. service members their obligations and responsibilities under the LOW. Additionally, these authorities require that all “reportable incidents”¹⁰⁰ be reported, investigated, and if warranted, corrected with disciplinary action.¹⁰¹

97. Protocol I, *supra* note 3, art. 87.

98. Commentary, Protocol I, *supra* note 11, at 1019-23.

99. See DOD DIR. 5100.77, *supra* note 7; CJCSI 5810.01B, *supra* note 7.

100. DOD DIR. 5100.77, *supra* note 7, para. 3.2 (defining “reportable incident” as “[a] possible, suspected, or alleged violation of the law of war.”).

101. *Id.* para. 4; CJCSI 5810.01B, *supra* note 7, para. 4. For example, *DOD Dir. 5100.77* states:

It is DOD policy to ensure that:

- (1) The law of war obligations of the United States are observed and enforced by the DOD Components.
- (2) An effective program to prevent violations of the law of war is implemented by the DOD Components
- (3) All reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

DOD DIR. 5100.77, *supra* note 7, para. 4. These authorities also require, as a matter of policy, that the U.S. armed forces apply the “spirit and principles” of the LOW in all conflicts no matter how they are characterized. DOD DIR. 5100.77, *supra* note 7, para. 5.3.1; CJCSI 5810.01B, *supra* note 7, para. 4. As previously mentioned, this article does not address the applicable LOW in internal armed conflicts, but *DOD Dir. 5100.77* and *CJCSI 5810.01B* may make many of the principles discussed in this article applicable to internal armed conflicts.

While the heads of the DOD components, the Secretaries of the Military Departments, and the commanders of the combatant commands are all tasked with implementing this guidance, primary responsibility for implementation of this policy falls to the commanders of the combatant commands.¹⁰² These authorities also require that legal advisers be made available at appropriate levels of command to ensure that the U.S. military operations are planned and executed in accordance with the applicable LOW.¹⁰³ Finally, DODD 5100.77 paragraph 6 provides detailed guidance on the reporting requirements for LOW violations.¹⁰⁴

VI. Perfidy

The prohibition against perfidy was first codified in Article 23(b) of the Hague Regulations.¹⁰⁵ Perfidy means the breaking, or a breach, of faith, and it devolves from the concept of chivalry that originated during the Middle Ages.¹⁰⁶ As codified in Article 37 of Protocol I, perfidy means the abuse of a protected status under the LOW to gain an advantage over the enemy.¹⁰⁷ Article 37(1) of Protocol I states:

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 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;

102. DOD DIR. 5100.77, *supra* note 7, para. 5.8.1; CJCSI 5810.01B, *supra* note 7, encl. A, para. 3.

103. DOD DIR. 5100.77, *supra* note 7, para. 5.8.3; CJCSI 5810.01B, *supra* note 7, encl. A, para. 3d.

104. *See* DOD DIR. 5100.77, *supra* note 7, para. 4.

105. Hague Regulations, *supra* note 8, art. 23 (b). Article 23(b) states, “[I]t is especially forbidden . . . [t]o kill or wound treacherously individuals belonging to the hostile nation or army” *Id.* This provision stills applies as customary international law. Commentary, Protocol I, *supra* note 11, at 431.

106. Fordham University, Medieval Sourcebook: Humbert de Romans, On Markets & Fairs, c. 1270, available at <http://www.fordham.edu/halsall/source/1270romans.html> (last visited Feb. 20, 2004).

107. BOTHE ET AL., *supra* note 14, at 203-04; Commentary, Protocol I, *supra* note 11, at 430-35.

- (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 or Parties to the conflict.¹⁰⁸

The United States interprets Article 37 of Protocol I to reflect customary international law.¹⁰⁹ The intent of Article 37(1) is to prevent the dissolution of certain fundamental protections under the LOW. As the Commentary to Protocol I states, “The central element of the definition of perfidy is the deliberate claim to legal protection for hostile purposes.”¹¹⁰ If parties to a conflict were allowed to lure an enemy into an unfavorable situation by feigning a protected status, respect for these protections would slowly dissipate until they were meaningless, with fateful consequences for the persons the LOW intends to protect.¹¹¹ As a result, Article 37(1) limits perfidy to those acts involving the fundamental protections afforded the wounded and sick, noncombatants or civilians, neutral parties, and flags of truce or surrender. Notably, Article 37(1)(a)-(d) only provides examples of prohibited acts of perfidy, not an exhaustive list.¹¹²

It is important not to confuse perfidy with legitimate ruses of war, which Article 37(2) specifically permits.¹¹³ Legitimate ruses involve deception, but not a breach of faith involving a protection applicable under the LOW.¹¹⁴ Further, Article 37(1) of Protocol I does not prohibit all acts of perfidy that occur during armed conflict. Article 37(1) essentially

108. Protocol I, *supra* note 3, art. 37(1).

109. Matheson, *supra* note 5, at 425.

110. Commentary, Protocol I, *supra* note 11, at 435.

111. BOTHE ET AL., *supra* note 14, at 202-03.

112. *Id.* at 205.

113. See Protocol I, *supra* note 3, art. 37(2). Article 37(2) of Protocol I provides:

Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under the law. The following are examples of such ruses: camouflage, decoys, mock operations and misinformation.

Id.

focuses on combat by only prohibiting those acts of perfidy that result in the death, injury, or capture of an adversary.¹¹⁵ Furthermore, the act of perfidy must be the proximate cause of the death, injury, or capture of the enemy.¹¹⁶ The Commentary to Protocol I considers this a specific weakness of Article 37 because it may be almost impossible to determine where to draw the line.¹¹⁷ Additionally, if the intent of Article 37 is to prevent the dissolution of certain fundamental protections under the LOW, limiting perfidious conduct only to those acts which result in death, injury, or capture of the enemy may not go far enough in ensuring respect for these protections.¹¹⁸

The Commentary to Protocol I also suggests that an attempted act of perfidy that Article 37(1) would prohibit (if the act were successful) should likewise be prohibited. The rationale is that a party should not benefit from the failure of an otherwise punishable act.¹¹⁹ Fleck disagrees, saying that failure to actually kill, injure, or capture the enemy through one of the means listed in Article 37(1)(a)-(d) is not perfidious within the plain mean-

114. BOTHE ET AL., *supra* note 14, at 206-07. Bothe states: "The essential distinction between perfidy and treachery on the one hand, and non-perfidious deception is that the latter neither contravenes any specific rules of international law applicable in armed conflict, nor invites confidence of an adversary with respect to protection under international law." *Id.*

115. *Id.* at 203-04; Commentary, Protocol I, *supra* note 11, at 432-33.

116. BOTHE ET AL., *supra* note 14, at 204.

117. Commentary, Protocol I, *supra* note 11, at 432-35.

118. BOTHE ET AL., *supra* note 14, at 204. The Commentary to Protocol I acknowledges that limiting prohibited perfidy to only those acts intended to kill, injure, or capture creates a gray area not satisfactorily addressed by the current version of Article 37(1). The Commentary states:

Moreover, it seems that a prohibition which is restricted to acts which have a definite result would give the parties to the conflict a considerable number of possibilities to indulge in perfidious conduct which was not directly aimed at killing, injuring, or capturing the members of the armed forces of an adverse party, but at forcing them to submit to tactical or operational measures which will be to their disadvantage . . . people will then be killed, injured, or captured in the course of combat. It will be no easy matter to establish a causal relation between the perfidious act that has taken place and the consequences of combat . . . This gray area forms a subject of permanent controversy in practice as well as in theory.

Commentary, Protocol I, *supra* note 11, at 432-33.

119. *Id.*

ing of Article 37. Fleck submits that his position accords with the belief of most parties who participated in Article 37's drafting.¹²⁰

The portion of Article 37 directly relevant to the fictional scenario at the beginning of this article is paragraph (1)(c), which prohibits the killing, injuring, or capture of an enemy by "feigning . . . civilian, non-combatant status."¹²¹ The original International Committee of the Red Cross (ICRC) draft of Article 37(1)(c) submitted to the drafting committee reads "the disguising of combatants in civilian clothing."¹²² The drafting committee found that the version of Article 37(1)(c) as it currently reads was more accurate and comprehensive. While ultimately rejected, the proposed ICRC draft indicates Article 37(1)(c)'s ultimate intent. Of note, commentators consider the comma between the words "civilian" and "noncombatant" in Article 37(1)(c) to be the conjunction "or" as reflected in the French translation of Protocol I.¹²³

As previously mentioned, Article 50 of Protocol I defines a civilian as anyone not fitting Protocol I Article 43's definition of combatant.¹²⁴ Under Article 4 of the GPW and Article 43 of Protocol I, members of the regular armed forces of a party, and certain other categories of individuals, are considered combatants.¹²⁵ An inherent characteristic of combatants is the requirement that they wear a distinctive sign or emblem, or somehow ensure that they distinguish themselves from the civilian population.¹²⁶ This is the *quid pro quo* for being accorded combatant immunity.¹²⁷ It follows then that combatants who fail to distinguish themselves from the civilian population, or actually disguise themselves as civilians, are "feign-

120. FLECK ET AL., *supra* note 62, at 472.

121. Protocol I, *supra* note 3, art. 37(1)(c).

122. Commentary, Protocol I, *supra* note 11, at 436-37; BOTHE ET AL., *supra* note 14, at 205-06.

123. BOTHE ET AL., *supra* note 14, at 206.

124. Protocol I, *supra* note 3, art. 50.

125. *See* GPW, *supra* note 2, art. 3; Protocol I, *supra* note 3, art. 43.

126. GPW, *supra* note 2, art. 4A(2).

127. *See supra* text accompanying notes 41-43.

ing . . . civilian, non-combatant status,”¹²⁸ and if they kill, injure, or capture the enemy as a result, they have violated Article 37(1)(c).

In discussing Article 37(1)(c), the Commentary states:

A combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may never feign a civilian status and hide amongst a crowd. This is the crux of the rule.¹²⁹

It is understandable why this is the crux of the rule. An increased protection for civilians was one of the primary goals of the drafters of Protocol I. Once combatants begin disguising themselves as civilians, or failing to distinguish themselves from civilians, to gain an advantage over the enemy, civilians will become suspect and ultimately targets in international armed conflict. Combatants cannot be expected to honor protections accorded under the LOW if their opponent continuously abuses these protections to gain military advantage. Fleck made perhaps the strongest statement the author found on the importance of Article 37(1)(c):

Of most importance in that respect is [Article 37(1)(c)], because the feigning of civilian, non-combatant status in order to attack the enemy by surprise constitutes the classic case of “treacherous killing of an enemy combatant” which was prohibited by Article 23(b) of the Hague Regulations; it is the obvious case of disgraceful behavior which can (and should) be sanctioned under criminal law as a killing not justified by the laws of war, making it a common crime of murder. Obscuring the distinction between combatants and civilians is extremely prejudicial to the chances of serious implementation of the rules of humanitarian law; any tendency to blur the distinction must be sanctioned heavily by the international community; otherwise the whole system based on the concept of distinction will break down.¹³⁰

128. Protocol I, *supra* note 3, art. 37(1)(c).

129. Commentary, Protocol I, *supra* note 11, at 438.

130. FLECK ET AL., *supra* note 62, at 471. *See also* BOTHE ET AL., *supra* note 14, at 205 (“[E]xample (c) reinforces the principle of distinction between combatants and the civilian population and is therefore indispensable to the protection of civilians against the hazards of war, a principal goal of Protocol I.”).

Statements such as these from Fleck and from the Commentary should leave no doubt of the importance the international community places on the fundamental principle of distinction.

Article 37(1)(c) does not, however, prohibit all acts of killing, wounding, or capturing the enemy while attired in civilian clothing. Only the wearing of civilian clothing with the intent to deceive the enemy that results in his death, injury, or capture is perfidious conduct within the meaning of Article 37(1)(c).¹³¹ The intent to deceive, instead of the wearing of civilian clothing, is the gravamen of the prohibition. One can think of many instances where U.S. service members may have to defend themselves while wearing civilian clothing. For example, U.S. service members could find their base camp under attack while in the midst of physical training (PT) or lounging in their tent. The LOW obviously does not require them to change from liberty attire into their uniforms before taking up arms to defend themselves. Any resulting death or injury to the attackers is not perfidious conduct because the service members are not wearing civilian clothing with the intent to deceive the enemy.

Article 37(1)(c) must be read in conjunction with Article 44(3) of Protocol I to be understood fully.¹³² Both Articles 37(1)(c) and 44(3) caused quite a bit of consternation within their respective drafting committees because it appeared they directly conflicted with each other.¹³³ As discussed above, Article 44(3) requires all combatants to distinguish themselves from the civilian population during an attack and in military operations in preparation for an attack. The second sentence of Article 44(3), however, also reduces the requirement for POW status to the sole condition of carrying arms openly in conflicts when the nature of the hostilities (the conflicts enumerated in Article 1(4) of Protocol I) prevents combatants from distinguishing themselves from the civilian population.¹³⁴

Several delegations feared that combatants who complied with the second sentence of Article 44(3) could still find themselves subject to a charge of perfidy under Article 37(1)(c) if they killed, injured, or captured the enemy. This is because they would likely be dressed in civilian cloth-

131. Protocol I, *supra* note 3, art. 37(1)(c).

132. *Id.* arts. (37)(1)(c), 44(3).

133. Commentary, Protocol I, *supra* note 11, at 521. The Commentary of Protocol I states that Article 44 was "one of the most bitterly disputed Articles at the Conference." *Id.*

134. Protocol I, *supra* note 3, art. 44(3).

ing while engaged in combat, and thus could be accused of feigning civilian, noncombatant status. The last sentence of Article 44(3) was specifically drafted to allay these fears: "Acts which comply with the requirements of this paragraph shall not be considered perfidious within the meaning of Article 37, paragraph 1(c)."¹³⁵ Thus, irregular forces engaged in the conflicts outlined in Article 1(4) of Protocol I only need to carry arms openly to distinguish themselves properly under Article 44(3). If they do this, they cannot be charged with perfidy for feigning civilian, noncombatant status under Article 37(c)(1).

VII. Spies

A charge of perfidy is not the only danger a combatant faces when participating in armed conflict while wearing civilian clothing. Combatants found in enemy-controlled territory while wearing civilian clothing may be viewed as engaging in espionage and treated as spies. Spying is not a violation of international law or the LOW.¹³⁶ The combatant caught spying, however, is not entitled to POW status and is subject to the capturing nation's domestic laws.¹³⁷ Article 46 of Protocol I builds on the principles enunciated in Articles 24 and 29 of the Hague Regulations,¹³⁸ stating in part:

(1) Notwithstanding any other provision of the Conventions or the 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 the status of prisoner of war and may be treated as a spy.

(2) A member of the armed forces of a Party to the conflict who, on behalf of that Party and in a territory controlled by an adverse Party, gathers or attempts to gather information shall not be con-

135. *Id.*

136. BOTHE ET AL., *supra* note 14, at 264. Spying can also involve wearing the enemy's uniform, instead of civilian clothing, while operating in enemy-controlled territory. In addition, wearing the uniform of the enemy may also violate Article 39(2) of Protocol I. See Protocol I, *supra* note 3, art. 39(2). The implications of Article 39(2) are beyond the scope of this article. Notably, the United States specifically disagrees with the prohibition on the use of enemy uniforms in military operations as provided in Article 39(2). Matheson, *supra* note 5, at 425; see also W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 76 n.259 (1990).

137. BOTHE ET AL., *supra* note 14, at 264.

sidered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.¹³⁹

Articles 46(1) and (2), when read together, codify the customary rule that the combatant found behind enemy lines in civilian clothing while trying to gather information about the enemy is not entitled to POW status and the accompanying combatant immunity.¹⁴⁰ Consequently, this combatant is subject to trial and punishment under the capturing nation's domestic laws not only for espionage,¹⁴¹ but also for any pre-capture war-like acts. By its language, Article 46 does not address espionage by civilians. Civilian espionage remains subject to Article 29 of the Hague Regulations.¹⁴²

Although Article 46(2) actually defines a spy by stating who is not a spy, the definition is clearer than the one provided in Article 29 of the Hague Regulations. Article 29 of the Hague Regulations defines a spy as one who acts "clandestinely or under false pretenses" and exempts soldiers who do not wear a "disguise."¹⁴³ While this language was intended to encompass the wearing of civilian clothing by combatants within the def-

138. Article 24 of the Hague Regulations provides: "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible." Hague Regulations, *supra* note 8, art. 24. Article 29 of the Hague Regulations states:

A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of the belligerent, with the intent 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

Id. art. 29.

139. Protocol I, *supra* note 3, art. 46.

140. Matheson is silent on whether the United States views Article 46 of Protocol I as reflective of customary international law. *See generally* Matheson, *supra* note 5. The United States, however, views Articles 24 and 29 of the Hague Regulations as reflective of customary international law, FM 27-10, *supra* note 8, para. 6, and at a minimum is bound by these provisions.

141. Conviction for espionage has traditionally been punished with death to provide a strong deterrent to spying. Commentary, Protocol I, *supra* note 11, at 562-65; BOTHE ET AL., *supra* note 14, at 264-65.

142. BOTHE ET AL., *supra* note 14, at 267.

143. Hague Regulations, *supra* note 8, art. 29.

inition of spying, it does not explicitly say so.¹⁴⁴ Under Article 46(2), the key to the definition is wearing the uniform of the combatant's nation. Members of the armed forces of a party who wear their nation's uniform while gathering or attempting to gather information in enemy territory are not considered spies. Conversely, a member of the armed forces not wearing a uniform under such circumstances is considered engaging in espionage and may be treated as a spy. Thus, Article 46(2) eliminates the uncertainty of Article 29 of the Hague Regulations by substituting "in the uniform of his armed forces" for the "acting clandestinely or under false pretenses" and "disguise" language of the Hague Regulations.¹⁴⁵ The thrust of this change is that a member of an armed force found in enemy territory while not wearing his uniform is presumed to be "acting clandestinely and under false pretenses"¹⁴⁶ as provided in Article 24 of the Hague Regulations.

The term "espionage" as used in Article 46(1) encompasses the phrase "gathering or attempting to gather information" used in Article 46(2) and is at the heart of Article 46 as a whole.¹⁴⁷ As its title indicates, Article 46 is primarily intended to address spies, in which gathering or trying to gather information is a critical component. While this may seem obvious, it is a crucial component to defining espionage and spies because Article 44(3) does not require combatants to distinguish themselves constantly from the civilian population. Article 44(3) only requires combatants to distinguish themselves during an attack and in military operations preparatory to an attack.¹⁴⁸ Thus, combatants may go into enemy territory while wearing civilian clothing, and as long as they are not "gathering or attempting to gather information"¹⁴⁹ and they properly distinguish themselves as required under Article 44(3), they have neither engaged in

144. Commentary, Protocol I, *supra* note 11, at 562-67; BOTHE ET AL., *supra* note 14, at 265-66.

145. See Hague Regulations, *supra* note 8, arts. 29, 46.

146. *Id.* art. 24.

147. *Id.* art. 46(1), (2).

148. See Protocol I, *supra* note 3, art. 44(3).

149. *Id.* art. 46(2).

espionage under Article 46, nor violated the principle of distinction under Article 44(3).¹⁵⁰ This idea was recognized by Bothe, who states:

It is, therefore, not prohibited for a Party to the conflict contemplating a surprise offensive in a quiet sector, to infiltrate regular commando units disguised as civilians into the territory of an adverse Party, to lie in wait until needed, provided, that its members distinguish themselves from the civilian population when the commando unit begins its preparation for a pre-planned sabotage operation after the major offensive has started.¹⁵¹

Article 46 does not define the phrase “uniform of his armed forces.”¹⁵² It was the general belief of the drafters that a uniform, as referred to in Article 46, was the same uniform as defined elsewhere in Protocol I. The report of the drafting committee for Article 46 states “there was no intent to define what constitutes a uniform, but any customary uniform which clearly distinguishes the member wearing it from a nonmember should suffice.”¹⁵³ Thus, everything discussed above regarding what is an appropriate uniform seems equally applicable here.

VIII. *Ex Parte Quirin* and U.S. Policy

The Supreme Court case *Ex parte Quirin*¹⁵⁴ further muddies the waters regarding when combatants must distinguish themselves because it is directly contradicted by Articles 44(3) and 46 of Protocol I. In *Ex parte Quirin*, the Court decided whether the detention of eight Nazi saboteurs for trial by military commission on charges of violating the LOW was in accordance with U.S. law. During World War II, a German submarine landed these saboteurs on the U.S. east coast. When they landed, they were wearing German Marine infantry uniforms, in whole or in part, and were carrying explosives, fuses, and timing devices. Upon landing, they promptly buried their uniforms, changed into civilian clothing, and proceeded to their pre-arranged rendezvous points. The Federal Bureau of

150. FLECK ET AL., *supra* note 62, at 98-99. Combatants that engage in this type of activity in enemy territory, however, will likely lose their right to be treated as POWs. *See infra* Section VIII (discussing the impact of *Ex parte Quirin*, 317 U.S. 1 (1942)).

151. BOTHE ET AL., *supra* note 14, at 252-53.

152. *See* Protocol I, *supra* note 3, art. 46.

153. Commentary, Protocol I, *supra* note 11, at 566; BOTHE ET AL., *supra* note 14, at 265.

154. 317 U.S. at 1.

Investigation subsequently apprehended all eight saboteurs before they could carry out their missions.¹⁵⁵

In determining that the detention of the eight saboteurs for trial by military commission was in accordance with U.S. law, the Court first had to determine whether the offenses the Nazis were charged with were, in fact, violations of the LOW. Four charges were preferred against each of the saboteurs: (1) violation of the LOW;¹⁵⁶ (2) violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to the enemy; (3) violation of Article 82 of the Articles of War, defining the offense of spying; and (4) conspiracy to commit the offenses alleged in charges 1, 2, and 3.¹⁵⁷ In deciding that eight saboteurs clearly violated the LOW, the Court stated:

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to status as Prisoners of War, but to be offenders against the law of war subject to trial and punishment by military tribunals.¹⁵⁸

In reaching this conclusion, the Court relied heavily on the Hague Regulations and the 1940 Rules of Land Warfare promulgated by the U.S. War Department.¹⁵⁹ Paragraph 9 of the Rules of Land Warfare, using verbatim language from Article 1 of the Hague Regulations, defined lawful

155. *Id.* at 21-22.

156. Specification 1 of Charge I stated that petitioners:

Being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purposes of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States.

Id. at 23.

157. *Id.*

158. *Id.* at 31.

159. *Id.* at 33-34.

belligerents as, among other things, those who “carried arms openly” and “wore a fixed distinctive emblem.”¹⁶⁰ Conversely, belligerents who engaged in hostilities while failing to meet these criteria violate the LOW and were considered unlawful belligerents.¹⁶¹ Thus, the Court based its decision, in part, on the principle of distinction. Combatants who fail to distinguish themselves appropriately by wearing a fixed distinctive sign and carrying arms openly are unlawful belligerents and not entitled to engage in combat.¹⁶² From these sources, the Court concluded, “Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear ‘fixed and distinctive emblems.’”¹⁶³

In commenting on specification 1 of charge 1, which alleged unlawful belligerency in violation of the LOW, the Court stated:

This specification so plainly alleges a violation of the law of war as to require but brief discussion of petitioners’ contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.¹⁶⁴

It follows that the Court would find combatants who enter enemy territory for whatever purpose, while not wearing their uniform or a fixed and dis-

160. U.S. DEP’T OF WAR, FIELD MANUAL 27-10, THE RULES OF LAND WARFARE para. 9 (1 Oct 1940). Paragraph 9 of the Rules of Land Warfare was derived from Article 1 of the Hague Regulations. See also Hague Regulations, *supra* note 8, art. 1.

161. *Ex parte Quirin*, 317 U.S. at 33-34.

162. *Id.* at 35.

163. *Id.*

164. *Id.* at 36-37.

tinctive emblem, unlawful combatants who violate the LOW and are not entitled to POW status.

Quirin's holding, however, actually conflicts with the Hague Regulations, on which the Court, at least in part, rested its decision.¹⁶⁵ Article 29 of the Hague Regulations specifically recognizes spying as a permissible activity under the LOW.¹⁶⁶ Further, spying during armed conflict has long been deemed permissible under customary international law.¹⁶⁷ Nonetheless, *Quirin* finds that “the spy who secretly and without uniform passes the military lines” is an unlawful belligerent who violates the LOW.¹⁶⁸ This assertion certainly clouds the holding in *Quirin*, at least as an interpretation of the Hague Regulations.

The Court did not rely solely on the Rules of Land Warfare and the Hague Regulations to reach its holding. The Court also relied on the Military Law Manual issued by the War Office of Great Britain, the practice of nations, and the legal writings of several authorities on international law, to support its conclusion that the saboteurs violated the LOW.¹⁶⁹ The Court stated:

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniform upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government.¹⁷⁰

165. *Id.*

166. Hague Regulations, *supra* note 8, art 29.

167. Commentary, Protocol I, *supra* note 11, at 562.

168. *Ex parte Quirin*, 317 U.S. at 31.

169. *Id.* at 35 n.12. The end of the footnote provides, “These authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as prisoners of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war.” *Id.*

170. *Id.* at 35-36.

Not only does the Court state that it is U.S. Government policy to treat as unlawful combatants those combatants that enter enemy territory, for whatever purpose, while not wearing their uniforms, but also through the last sentence of the above quotation, indicates this is a principle of customary international law. In the earlier case, *The Paquete Habana*,¹⁷¹ the Court held that customary international law was ascertained by looking at the practice of nations and the works of international jurists and writers¹⁷²—the very authorities the Court relied on in reaching the decision in *Quirin*.¹⁷³

Bothe supports the position that *Quirin*'s holding is indicative of customary international law, stating in his commentary on Article 44 of Protocol I:

Under the practice of States and customary international law, members of the regular armed forces of a Party to the conflict were deemed to have lost their right to be treated as prisoners of war whenever they deliberately concealed their status in order to pass behind enemy lines of the adversary for the purposes of:

- (a) gathering military information, or
- (b) engaging in acts of violence against persons or property.¹⁷⁴

Thus, Bothe concurs with the *Quirin* holding that the principle that combatants who cross enemy lines while wearing civilian clothing are not entitled to POW status is reflective of customary international law.

Bothe does not, however, assert that this conduct amounts to a LOW violation. Interestingly, Bothe cites Article 29 of the Hague Regulations, paragraph 74 of Field Manual (FM) 27-10, and *Quirin* in support of this

171. 175 U.S. 677 (1900).

172. *Id.* at 700-01.

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

174. BOTHE ET AL., *supra* note 14, at 256; *see also Ex parte Quirin*, 317 U.S. at 1.

assertion.¹⁷⁵ Paragraph 74 of FM 27-10, the Department of the Army's Law of Land Warfare Manual, states:

Members of the armed forces of a party to the conflict and members of militia or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces.¹⁷⁶

Thus, the current Law of Land Warfare Manual relied on by the U.S. armed forces agrees in part with the holding in *Quirin*. Further, the language of paragraph 74 of FM 27-10 is nearly identical to the language from the first quotation from *Quirin* cited above, suggesting that the drafters of paragraph 74 relied on *Quirin*'s holding in concluding that combatants found behind enemy lines in civilian clothing are not entitled to POW status, and consequently, combatant immunity. The important difference between *Quirin* and FM 27-10, however, is that paragraph 74 does not state that crossing into enemy territory while wearing civilian clothing is a LOW violation. This aligns FM 27-10 with *Bothe*.¹⁷⁷

Despite its apparently flawed analysis, the *Quirin* Court's interpretation of the LOW is binding on the U.S. armed forces. First, the *Quirin* holding is based on customary international law due to its reliance on the Hague Regulations, which the United States considers as reflective of customary international law,¹⁷⁸ as well as the practice of nations and the thoughts of international legal scholars.¹⁷⁹ In the *Habana* case, the Court held that customary international law is part of the federal law, and thus

175. See *id.* at 256 n.37; FM 27-10, *supra* note 8, para. 74; see also *Quirin*, 317 U.S. at 48.

176. FM 27-10, *supra* note 8, para. 74. Notably, paragraph 74 is not accompanied by citations to relevant treaties as is customary within FM 27-10. Paragraph 1, FM 27-10, states that this means such text is not binding on courts and tribunals applying the LOW, but is evidence bearing on questions of custom and practice. *Id.* para. 1.

177. See *Quirin*, 317 U.S. at 48; BOTHE ET AL., *supra* note 14, at 256; see also FM 27-10, *supra* note 8, para. 74.

178. FM 27-10, *supra* note 8, foreword; para. 6.

179. *Ex parte Quirin*, 317 U.S. at 31-35.

applies as such.¹⁸⁰ The Court based a sizeable part of its holding on specific language derived from the Hague Regulations,¹⁸¹ a treaty to which the United States is a party.¹⁸² Article VI of the Constitution provides that treaties entered into by the United States are the supreme law of the land.¹⁸³ Since the ultimate authority of the Court is to interpret U.S. law, of which treaty law is a part, its holding is binding on the United States. Until the United States ratifies another treaty that supercedes the Hague Regulations, or until the customary rule upon which *Quirin* is based changes due to State practice, *Quirin* remains binding on the United States.¹⁸⁴

Even assuming *arguendo* that the Court was mistaken in asserting that its position reflected customary international law, its holding may nevertheless be considered the United States view regarding customary international law on this topic. As late as 1980, the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*¹⁸⁵ rearticulated the general principle that the domestic legal decisions of a nation are indicative of that nation's views regarding customary international law.¹⁸⁶ At a minimum, the holding in *Quirin* is the United States view regarding the LOW principle of distinction and the LOW requirement concerning the wearing of uniforms.

Quirin significantly impacts U.S. forces because its holding directly contradicts Articles 44(2), 44(3), and 46 of Protocol I.¹⁸⁷ Article 44(2) of Protocol I provides specific protections regarding the loss of POW status:

While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant, or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in [Article 1(3)-(4)].¹⁸⁸

180. *Paquette Habana*, 175 U.S. at 34-35.

181. *Ex parte Quirin*, 317 U.S. at 34-35.

182. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2001, at 454-55 (June 2000).

183. U.S. CONST. art. VI.

184. *Ex parte Quirin*, 317 U.S. at 1.

185. 670 F.2d 876 (2d Cir. 1980).

186. *Id.* at 880-81.

187. *See Ex parte Quirin*, 317 U.S. at 1; *see also* Protocol I, *supra* note 3, art. 44(2).

188. Protocol I, *supra* note 3, art. 44(2).

Thus, a combatant can only lose POW status under Protocol I if he fails to distinguish himself by carrying arms openly in a conflict described in Article 1(4) or if he engages in espionage.¹⁸⁹ Article 46 states that combatants found in enemy territory while wearing civilian clothing and “gathering or attempting to gather information” may be considered as engaging in espionage and treated as spies.¹⁹⁰ It follows that combatants found behind enemy lines in civilian clothing while not trying to gather information should not be treated as spies.

While this may initially seem irrelevant because combatants caught behind enemy lines in civilian clothing will likely be treated as spies regardless of their activity, there is a difference when Article 46 is read in conjunction with Article 44(3).¹⁹¹ The first sentence of Article 44(3) only requires combatants to distinguish themselves “when engaged in an attack and in military operations preparatory to an attack.”¹⁹² Thus, Article 44(3) permits combatants entering enemy territory in civilian clothing as long as they distinguish themselves in an attack and when preparing for an attack. The fact that spying is not a violation of the LOW¹⁹³ further supports this conclusion. This position is also supported by the previous quotation from Bothe¹⁹⁴ regarding the infiltration of combatants into enemy territory while wearing civilian clothing to lie in wait for an upcoming offensive.

Under Article 44(2), combatants do not lose POW status for failing to distinguish themselves in accordance with Article 44(3), although they can be charged with a LOW violation.¹⁹⁵ Therefore, parties must affirmatively prove that combatants are found behind enemy lines in civilian clothing were gathering or attempting to gather information before considering the combatants as spies. This is because Article 44(3) of Protocol I allows combatants entering enemy territory in civilian clothing for purposes other than spying.

The dichotomy between Articles 44(2), 44(3), and 46 of Protocol I and the *Quirin* holding is illustrated by applying these provisions to *Qui-*

189. BOTHE ET AL., *supra* note 14, at 249. Article 46, while not mentioned in Article 44(2), is included within Article 44(2)'s meaning because Article 46(1) states that combatants who engage in espionage lose their POW status. *Id.*

190. Protocol I, *supra* note 3, art. 46.

191. *Id.* arts. 44(3), 46.

192. *Id.* art. 44(3).

193. Commentary, Protocol I, *supra* note 11, at 562-63.

194. *See supra* text accompanying note 151.

195. *See* Protocol I, *supra* note 3, art. 44(2).

rin's facts. The Nazi saboteurs were found in U.S. territory while wearing civilian clothing.¹⁹⁶ They did not appear to fit the prohibition of Article 46, however, because they were not gathering or attempting to gather information other than to identify their targets properly. They were in the United States to blow up factories, not to commit espionage, a fact demonstrated by their possession of explosives, fuses, and timing devices.¹⁹⁷ If they were not gathering information, but preparing to blow up industrial targets, Article 44(3) permits their conduct, so long as they distinguished themselves from the local U.S. population while they engaged in military operations preparatory to the attack and during the attack. It is unlikely that the Nazi saboteurs in *Quirin* would have satisfied Article 44(3) because they buried their uniforms when they landed.¹⁹⁸ Even if they failed this requirement, they would still have been entitled to POW status. Therefore, if Articles 44(2), 44(3), and 46 of Protocol I had been in effect in 1940, the eight Nazi saboteurs would neither have violated the LOW nor lost their entitlement to POW status. Under the holding in *Quirin*, the Nazi saboteurs not only lost their status as POWs, but they were also charged with violating the LOW simply for being in enemy territory dressed in civilian clothing.¹⁹⁹

This distinction between *Quirin* and Protocol I becomes clearer when the Commentaries to Protocol I are considered. Recall the earlier quotation from Bothe regarding the application of Article 44 of Protocol I that was used to support the proposition that the *Quirin* holding was based on customary international law:

Under the practice of States and customary international law, members of the regular armed forces of a Party to the conflict were deemed to have lost their right to be treated as prisoners of war whenever they deliberately concealed their status in order to pass behind enemy lines of the adversary for the purposes of:

(c) gathering military information, or

(d) engaging in acts of violence against persons or property.²⁰⁰

196. *Ex parte Quirin*, 317 U.S. 1, 21 (1942).

197. *Id.*

198. *Id.*

199. *Id.* at 36.

200. BOTHE ET AL., *supra* note 14, at 256.

The second half of this quotation (intentionally omitted by the author earlier), reads:

Nothing in Protocol I affects the application of the foregoing rule relative to spies, but in the absence of para. 7, the provisions of para. 3 would probably have been construed to have affected the rule relative to attacks against persons and objects which are military objectives.²⁰¹

Thus, according to Bothe, absent Article 44(7), Article 44(3) would have changed the customary rule enunciated in *Quirin*—combatants caught in enemy territory in civilian clothing lose their POW status regardless of their intended activities. Article 44(7), which 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 the regular, uniformed armed units of a Party to the conflict,”²⁰² keeps alive the customary rule. Article 44(7) also limits the application of the first sentence of Article 44(3), which states, “[C]ombatants 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.”²⁰³

Bothe’s assertion seems to accord with *Quirin*. In *Quirin*, the Court held that the entering of enemy territory by combatants while dressed in civilian clothing was an instantaneous offense. The Court stated:

Nor are petitioners any less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theater or zone of activity of military operations. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification.²⁰⁴

201. *Id.*

202. Protocol I, *supra* note 3, art. 44(7).

203. *Id.* art. 44(3).

204. *Ex parte Quirin*, 317 U.S. at 38.

If Bothe's comment is taken literally, the customary rule, as enunciated by *Quirin*, severely restricts the application of Article 44(2) as well. Bothe's assertion means that the customary rule, which results in a loss of POW status for combatants found in enemy territory while wearing civilian clothing, continues to apply despite Article 44(2).

Bothe does not totally emasculate Article 44(3), however. Bothe does not mention a LOW violation, as does *Quirin*. This is where Bothe and *Quirin* part company. Under *Quirin*, being in enemy territory in civilian clothing as a combatant is a LOW violation and results in a loss of POW status. Under Bothe's interpretation, as well as paragraph 74 of FM 27-10, the combatant would lose his POW status but his conduct would not be a LOW violation.

This distinction between Bothe and *Quirin* is critical because of the impact of Articles 86 and 87 of Protocol I. Both Articles 86 and 87 place an affirmative obligation on commanders to prevent LOW violations and subject commanders to sanctions for knowingly allowing LOW violations.²⁰⁵ While the United States has not ratified Protocol I, it considers Articles 86 and 87 either reflective of customary international law or deserving such recognition.²⁰⁶ Further, both DODD 5100.77 and CJCSI 5810.01 require that all LOW violations be reported, investigated, and if warranted, punished.²⁰⁷ Since *Quirin* considers the placing of combatants into enemy territory while wearing civilian clothing a LOW violation, Articles 86 and 87 of Protocol I place an affirmative obligation on U.S. commanders to prevent such conduct and to discipline those who engage in such conduct. Commanders who know, or should know, that such conduct is taking place and fail to take all reasonable measures to stop it are subject to disciplinary action as well.

Clearly, the holding in *Quirin* is outdated in the sense that it considers entering enemy territory in civilian clothing a LOW violation. Articles 44(2), 44(3), and 46 of Protocol I reflect a more modern view of the LOW in this area: allowing combatants to wear civilian clothing in enemy territory so long as they distinguish themselves as required by Article 44(3). Nevertheless, *Quirin* remains binding on U.S. forces because the United States has not ratified Protocol I. While Bothe supports the *Quirin* Court's

205. See Protocol I, *supra* note 3, arts. 86-87.

206. Matheson, *supra* note 5, at 428.

207. DOD DIR. 5100.77, *supra* note 7, para. 4.3; CJCSI 5810.01B, *supra* note 7, para. 4a(3) and (4).

assertion that entering enemy territory in civilian clothing results in a loss of POW status, neither Bothe, nor anyone else, agree that this is also a LOW violation. This appears to be a case in which the United States is placed under a stricter standard than that required by Protocol I because of its failure to ratify Protocol I.

IX. Conclusion

Returning to the opening scenario of this article, recall that there are two groups of U.S. forces, the reconnaissance teams and the raid force. The raid force appears to be in compliance with the applicable provisions of the LOW. They are wearing black jumpsuits typically worn by U.S. special operations forces, and this is a fixed, distinctive uniform or sign. They are all wearing the same thing, and the jumpsuit is fixed in that it is not easily removed. Unless the local population of Country X wears black jumpsuits on a regular basis, black jumpsuits are sufficient to distinguish the raid force from the local population as required by Article 44(3) of Protocol I.²⁰⁸ Since the raid force members belong to a regular armed force that meets the four criteria required under GPW Article 4, they are combatants and entitled to participate directly in hostilities under Article 43 of Protocol I.²⁰⁹ Further, because the black jumpsuit is sufficient under Article 44(3), members of the raid force do not face any issues regarding perfidy or espionage. They have complied with the *quid pro quo* by properly distinguishing themselves, and if they are captured, they are entitled to POW status as members of a regular armed force under GPW Article 4.²¹⁰ Additionally, *Quirin* has no impact because the members of the raid force are wearing uniforms when they enter enemy territory.

The members of the reconnaissance teams are an entirely different story. They are members of a regular armed force of a party to the conflict. As such, they are required to distinguish themselves from the civilian population while engaging in an attack and in military operations preparatory to an attack in accordance with Article 44(3).²¹¹ As discussed previously, the phrase “military operations preparatory to an attack” likely includes any movement toward a place where an attack is to be launched,²¹² which in this case, encompasses the movement of the reconnaissance teams

208. Protocol I, *supra* note 3, art. 44(3).

209. *Id.*

210. *Id.*

211. *Id.*

212. See *supra* notes 65-76 and accompanying text.

toward their overwatch positions. Thus, under Article 44(3), the reconnaissance teams are required to distinguish themselves not only while acting as a base of fire and overwatch during the raid, but also when moving toward their overwatch positions. Their failure to do this is a violation of Article 44(3) of Protocol I.²¹³

The reconnaissance teams will also violate Article 37(1)(c) if they kill, wound, or capture any of the members of Country X's armed force. Article 37(1)(c) prohibits the killing, injuring, or capturing of an adversary while feigning civilian, noncombatant status.²¹⁴ Even though the United States has not ratified Protocol I, it considers Article 37 as reflective of customary international law.²¹⁵ The reconnaissance teams are feigning civilian, noncombatant status by remaining dressed in civilian clothing while providing a base of fire and overwatch during the conduct of the raid. Therefore, the reconnaissance teams would be guilty of perfidious conduct in violation of Article 37(1)(c) if they kill, injure, or capture any member of Country X's armed force.²¹⁶

Articles 86 and 87 of Protocol I place an affirmative duty on parties and commanders to prevent and punish breaches of the LOW. If commanders know, or should have reason to know, that a breach of the LOW will take place, they must stop it. If they fail to stop it, they are also guilty of a violation of the LOW.²¹⁷ Department of Defense Directive 5100.77 and CJCSI 5810.01 place similar obligations on U.S. commanders.²¹⁸ Since the commander of this mission should know that the reconnaissance teams will violate both Article 44(3) and Article 37(1)(c), he cannot let this part of the mission take place.²¹⁹ If he does, he also violates the LOW and is subject to sanctions.

The members of the reconnaissance teams may also face a charge of espionage if they are captured before the raid takes place. They are combatants gathering or attempting to gather information in enemy territory, and fall under the provisions of Article 46 of Protocol I.²²⁰ As mentioned

213. Protocol I, *supra* note 3, art. 44(3).

214. *Id.* art. 37(1)(c).

215. Matheson, *supra* note 5, at 425.

216. Protocol I, *supra* note 3, art. 37(1)(c).

217. *See id.* arts. 86-87.

218. *See* DOD DIR. 5100.77, *supra* note 7, paras. 5.5.2-5.5.5, 5.8.4, 6; CJCSI 5810.01B, *supra* note 7, encl. A, para. 3(f).

219. *See* Protocol I, *supra* note 3, arts. 37(1)(c), 44(3).

220. *See id.* art. 46.

earlier, spying is not a violation of the LOW.²²¹ Combatants, however, caught spying are not entitled to POW status and may be prosecuted by the capturing nation under its domestic law for espionage, as well as for any pre-capture warlike acts.²²² A conviction for espionage traditionally results in a death sentence.²²³

Ex parte Quirin further restricts the mission of the reconnaissance team. The *Quirin* Court held that combatants who enter enemy territory while wearing civilian clothing violate the LOW, whether they intend to engage in espionage or a direct action mission.²²⁴ Further, this is an instantaneous offense, subject to sanction as soon as combatants cross into enemy territory.²²⁵ The *Quirin* holding specifically contradicts Articles 44(2), 44(3), and 46 of Protocol I, but since the United States has not ratified Protocol I, it is bound by *Quirin*.²²⁶ Thus, the reconnaissance teams cannot enter Country X dressed in civilian clothing. While they could enter Country X to gather information under Article 46 of Protocol I, *Quirin* finds this is a LOW violation. Under Articles 86 and 87 of Protocol I, U.S. commanders must prohibit the reconnaissance teams from entering the territory of Country X while wearing civilian clothing because, according to *Quirin*, this is a LOW violation.²²⁷

This article attempts to demonstrate the difficulty and intricacy of this area of the LOW. What constitutes an appropriate uniform and when combatants must distinguish themselves, continue to be areas of disagreement among the parties to Protocol I as well as the commentators. For U.S. forces, *Ex parte Quirin* further complicates this area, as this case takes a more restrictive view of the LOW. The holding in *Quirin* has certainly not kept pace with the LOW as evidenced by Protocol I. Further, *Quirin* is suspect considering its assertion that spying is a violation of the LOW,²²⁸ when clearly it is not. Until the United States ratifies Protocol I or another treaty that supercedes the Hague Regulations, or until State practice suffi-

221. Commentary, Protocol I, *supra* note 11, at 562-63.

222. BOTHE ET AL., *supra* note 14, at 264-65.

223. Commentary, Protocol I, *supra* note 11, at 562-65; BOTHE ET AL., *supra* note 14, at 264-65.

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

225. *Id.* at 38.

226. *Id.*; see Protocol I, *supra* note 3, arts. 44(2), 44(3), 46.

227. See Protocol I, *supra* note 3, arts. 86, 87.

228. See *Ex parte Quirin*, 317 U.S. at 38.

ciently changes the customary international law on which *Quirin* relied, *Quirin* remains binding on the United States.