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**PRINCIPLE OF DISTINCTION UNDER AP I:
UNIFORM REQUIREMENT**

Master's thesis

Programme HAJM, specialisation European Union and International Law

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LIST OF ABBREVIATIONS

API	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of June 8 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of June 8 1977
BDU	Battle dress uniform
DA	Direct action
GC III	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
EDF	Estonian Defence Forces
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
IHL	International Humanitarian Law
MA	Military assistance
NATO	North Atlantic Treaty Organization
PW	Prisoner of War
SOF	Special Operations Forces
SR	Special reconnaissance

ABSTRACT

Armed conflicts have changed from vast armies fighting against each other in trenches into small unit tactics, cyber warfare and hybrid warfare. Special Operations Forces (SOF) have a major role in those tactics. They conduct clandestine operations mostly behind enemy lines. Those types of operation require SOF operators to blend in to local environment as much as possible. Thus, their combat attire might not look like how the world has normally used to see members of regular armed forces – in uniform.

The main research question is: taking into consideration of the modern types of warfare and states' practice concerning deployment of SOF units, are members of SOF units, due to being part and parcel of regular armed forces, required to wear a uniform according to Additional Protocol I (AP I)? Codified law, court cases and military manuals are analysed in order to find answer to the question.

Analyses done for this thesis concludes that SOF can deviate from uniform requirement and still be in the limits for combatant and prisoner of war status under certain circumstances - while they wear partial uniform or distinctive sign recognizable at a distance with arms carried openly; while they wear indigenous civilian clothes with arms carried openly in cases where indigenous clothing is a clear sign amongst the locals and the adversary as a distinction element for combatants; and while they wear civilian clothes with arms carried openly in situations of occupation or working together with guerrilla forces, when “owing to the nature of the hostilities cannot so distinguish himself” during each military engagement and during each time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Military deployment in the sense can be interpreted as moments immediately prior to an attack.

Key words: international humanitarian law, law of armed conflict, principle of distinction, uniform

INTRODUCTION

“All warfare is based on deception”¹

Sun Tzu, *The Art of War*

Modern forms of warfare have blurred the lines of a battlefield. Furthermore, lines have been blurred in regards to differentiating combatants from civilians. More effort is required to be able to distinguish a potential enemy in order to engage them. This, in turn, requires more clandestine activities from military units e.g. SOF units, to be able to locate the enemy. Clandestine activities, however, require blending in with the local environment as much as possible. Military practice has shown that members of armed forces, especially SOF units, tend to deviate from uniform requirement. However, it is treaty and also customary law that armed forces must distinguish themselves from civilian population. International humanitarian law (IHL) establishes rules for distinction that can be interpreted ambiguously – on one hand, rules can be interpreted in a way that standard uniform for regular armed forces is required and, on the other hand, that armed forces can also enjoy the conditions of Article 44(3) of AP I in the same manner as guerrilla forces. The latter provides much more opportunities for regulations concerning combat attire.

Research problem

According to Geneva Convention Relative to the Treatment of Prisoners of War² (GC III) Article 4(1) prisoner of war status is given to members of armed forces. Article 4(2) of GC III includes a requirement for volunteer corps, militias including organized resistance movements amongst other conditions that they have to have a “fixed distinctive sign recognizable at a distance”. GC III does not say explicitly that armed forces must also follow the requirement for having a “fixed distinctive sign”. Commentary to the GC III states that “The drafters of the 1949 Convention, like those of The Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians”.³ During the drafting process of the Geneva Conventions delegates to the 1949 Diplomatic Conference were

¹ Cantrell, R. L. (2003). *Understanding Sun Tzu on the Art of War*. Arlington: Center of Advantage, p 77.

² Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

³ Preux, de Jean. (1960). *The Geneva Convention of 12 August 1949, Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War*. Geneva: International Committee of the Red Cross, p 52.

of the opinion that "regular armed forces" have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war, meaning that there was no need to specify the four combatant requirements for the armed forces.⁴ Indicating that the minimum requirement for distinction would be "fixed distinctive sign" and not a standard uniform.

Article 44(7) of AP I creates an understanding that armed forces are wearing standard uniforms by default. However, this is controversial because AP I also causes a derogation from the requirement for a fixed distinctive sign in general. Article 44(3) of AP I changes the traditional requirements of Article 4 of GC III by not requiring the uniform when "owing to the nature of the hostilities an armed combatant cannot so distinguish himself".⁵ Commentary to the AP I says the following about Article 44(7): "This does not mean that a combatant of a regular army can never dispense with wearing a uniform while he is engaged in hostile acts. However, this possibility is open to him, as we have seen above, only in the same situations and under the same exceptional conditions as those which apply to members of guerrilla forces. Although not explicitly stated, this article is primarily aimed at guerrilla fighters".⁶

Uniform requirement rule can be interpreted in different ways. This creates difficult position for regular armed forces, especially for SOF units, who are required to conduct clandestine operations. SOF units face a dilemma, on one hand, to what extent they can change their uniforms in order to blend in with the local environment and, on the other hand, what are the requirements that they would not violate the principle of distinction under AP I.

Aim and scope of the thesis

Aim of this thesis is to analyse principle of distinction and what specific requirements does it entail concerning combat attire of SOF operators during clandestine operations in an international armed conflict. In more detail, the thesis will focus on the "uniform requirement". It is important for SOF operators to remain as undetected as possible, however, they are still required to distinguish themselves from civilians and fulfil the conditions for receiving status of prisoner of war (PW)

⁴ Preux (1960), *supra nota* 3, p 63.

⁵ AP I, Article 44(3).

⁶ *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. (1987). /Eds. Sandoz, Y., Swinarski, C., Zimmermann, B. Geneva: Martinus Nijhoff Publishers, p 542.

upon their capture by the enemy. Results of this thesis will be used in the Estonian Defence Forces in order to provide guidance for SOF units concerning their clothing during operations.

Even though four requirements listed in Article 4(A)(2) of GC III must be viewed conjunctively,⁷ this thesis will focus on two of those requirements – “fixed distinctive sign recognizable at a distance” and “carrying arms openly”. Scope of this paper will be limited to the legal framework of international armed conflict.

Hypothesis and research question

In order to conduct the study, the author has formulated one primary research question and three additional questions. The main research question is: taking into consideration of modern types of warfare and states’ practice concerning deployment of SOF units, are members of SOF units, due to being part of regular armed forces, required to wear a uniform according to AP I?

Additional questions are:

- 1) How does not wearing a uniform affect legal status of members of regular armed forces?
- 2) Under what circumstances can members of regular armed forces deviate from the uniform requirement?
- 3) Does not wearing a uniform constitute perfidy according to AP I?

Research methods and data

Analyses is conducted whilst taking into account current positive law, case law and states’ practices. Codified law will be analysed alongside scholarly opinion. In addition, military manuals of different countries are analysed in order to establish how states interpret obligation to distinguish combatants from civilians and whether states provide specific guidance concerning the uniform requirement.

Overview of the structure

The thesis consists of three chapter. The first chapter covers principle of distinction in general and relevant sources of law. Chapter gives an overview how principle of distinction was initially codified and which sources of law are relevant. The second chapter covers different types of uniforms and how they affect the status of personnel. In addition, chapter analyses whether wearing different types of uniform constitute perfidy. The third chapter focuses on the practical

⁷ Jensen, E. T. (2005). Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance. – *Virginia Journal of International Law*, Vol. 46, No. 1, p 222.

input of the uniform requirement and gives an overview of how principle of distinction is regulated in military manuals, whether new rules are required concerning uniform requirement and what are other aspects that SOF operators must take into account while wearing different types of uniform.

1. IHL RULES CONCERNING UNIFORM REQUIREMENT

1.1. Historical overview of principle of distinction

*“The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”*⁸

Principle of distinction is considered customary international humanitarian law as one of the main principles in warfare. It obliges belligerents to distinguish at all times between persons who may be lawfully attacked, and persons who must be spared and protected from the effects of the hostilities.⁹ The cardinal importance of this principle was also confirmed in the *Nuclear Weapons Opinion* of the International Court of Justice (ICJ) stating that “The cardinal principles ...constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants...”.¹⁰

The principle of distinction has its roots in Hague Law and Geneva Law. Hague Law is composed of the Hague Conventions of 1899 and 1907, which are apposite to multiple facets of the conduct of hostilities on land, at sea and even in the air.¹¹ Geneva Law stands for the Geneva Conventions for the protection of war victims, also known as “Red Cross Conventions”.¹² However, the distinction between Hague Law and Geneva Law became obsolete in 1977, when the Geneva Conventions were supplemented by Additional Protocols.¹³ Therefore, with the adoption of Additional Protocols it is not necessary any more to distinguish Hague Law and Geneva Law. Nevertheless, it provides an historical overview of how principle of distinction was codified.

⁸ Henckaerts, J.-M., Doswald-Beck, L. (2005). *Customary International Humanitarian Law Volume I: Rules*. New York: Cambridge University Press, p 3.

⁹ Melzer, N. (2014) The Principle of Distinction Between Civilians And Combatants. In: *The Oxford Handbook of International Law in Armed Conflict*. (2014). /Eds. Clapham, A., Gaeta, P. New York: Oxford University Press, p 296.

¹⁰ ICJ, *Legality of the Threat or Use of Nuclear Weapons Opinion*, Advisory Opinion, I.C.J Reports 1996, para 78.

¹¹ Dinstein, Y. (2016), *The Conduct of Hostilities Under the Law of International Armed Conflict*. 3rd ed. Cambridge: Cambridge University Press, p 21.

¹² *Ibid.*, p 22.

¹³ *Ibid.*, p 24; ICJ, *Legality of the Threat or Use of Nuclear Weapons Opinion*, Advisory Opinion (8 July 1996), para 75.

The principle of distinction between civilians and combatants was first set forth in the St. Petersburg Declaration, which states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.¹⁴ Hague Law also reflects the principle, however, it provides more practical output. Article 25 of the Hague Regulations states that “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.”¹⁵ This is understandable, because Hague Law is the law of armed conflict written from the standpoint of the soldier, in the sense that it takes the form of a statement of the rights and duties of the military in a conflict.¹⁶ In other words, Hague Law is more practical for a soldier.

Hague Law is largely based on Lieber Code, which was written during the American Civil War in order to restrain its brutality.¹⁷ Lieber Code articulates key principles of the IHL, such as necessity and distinction, that remain at the heart of the IHL today.¹⁸ The 1907 Hague Conventions are binding not only upon the contracting parties, but have been largely recognized as customary law.¹⁹

Principle of distinction is not covered in the same manner in Geneva Law as it is in Hague Law. In addition to Article 25 of the Hague Regulations, it is required in Hague Law, that combatants must, (a) be commanded by a person responsible for his subordinates; (b) have a fixed distinctive emblem recognizable at a distance; (c) carry arms openly; and (c) conduct their operations in accordance with the laws and customs of war.²⁰ Those so called “four combatant requirements” remain unchanged in Article 4(2) of GC III.²¹

¹⁴ Henckaerts & Doswald-Beck (2005), *supra nota* 8, p 3; St Petersburg Declaration (1868), preamble.

¹⁵ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (The Hague Regulations), Article 25.

¹⁶ Greenwood, C., (2008). Historical Development and Legal Basis. In: *The Handbook of International Humanitarian Law*. (2008). /Ed. Fleck, D. 2nd ed. New York: Oxford University Press, p 21.

¹⁷ Corn et al. (2012). *The Law of Armed Conflict: An Operational Approach*. New York: Wolters Kluwer Law&Business, p 38.

¹⁸ *Ibid*, p 39.

¹⁹ Greenwood (2008), *supra nota* 16, p 28.

²⁰ The Hague Regulations, Article 1.

²¹ GC III, Article 4(2) states that “Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil 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; (d) that of conducting their operations in accordance with the laws and customs of war.”

Geneva Law stands for the Geneva Conventions for the Protection of War Victims, also known as the “Red Cross Conventions”.²² Geneva Law was founded in 1864 when the first Geneva convention was adopted. Conventions have been amended and updated after each major armed conflict in the world. Nowadays, Geneva Law consists of four conventions adopted in 1949:

- 1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949;
- 2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949;
- 3) Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949;
- 4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

Those conventions are aimed to protect people who are not participating or are no longer able to participate in a conflict: wounded, sick, shipwrecked, prisoners of war and civilians. Therefore, they do not regulate warfare, including principle of distinction, the same way as Hague Law.

With Hague and Geneva Law combined in Additional Protocols, the principle of distinction can now be found in AP I Articles 48, 51(2), 52(2) and AP II Article 13(2). Those articles create very clear obligations to states to protect civilians and civilian objects and to attack only military objects.

Principle of distinction is two-folded. First of all, it requires states to direct their use of force only against military objects. And second of all, it requires that combatants are distinguished from civilians in order to protect civilians from getting harmed during an armed conflict. Although the principle of distinction may appear to be simple and straightforward at first sight, the transformation of warfare in the past century has put considerable strain on its practical application.²³

Even though, principle of distinction poses two distinctive parts of the same obligation to states, this thesis will further focus on the obligations on how combatants are obligated to distinguish themselves from civilians. Furthermore, this chapter will analyse what is the impact of AP I concerning principle of distinction.

²² Dinstein (2016), *supra nota* 11, p 22.

²³ Melzer (2014), *supra nota* 9, p 297.

1.2. Geneva Conventions

All countries today have ratified the 1949 Geneva Conventions and thus they represent the minimum obligations of States in any international armed conflict.²⁴ ICJ has stated in its *Legality of the Threat or Use of Nuclear Weapons Opinion*:

“It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”²⁵

Therefore, taking into consideration the extent of ratification of the Geneva Conventions, they are considered to be customary international humanitarian law. Geneva Conventions were complemented in 1977 with Additional Protocols. However, not all states have ratified AP I. Therefore, the Geneva Conventions form the minimum baseline for IHL.

As was mentioned earlier, the so called “four combatant requirements” stipulated in Hague Regulations are also mentioned in GC III. Obligation of combatants to distinguish themselves from civilians is connected to establishing the status of PW. Article 4(A)(2) of GC III sets conditions that combatants must meet in order to receive PW status upon their capture: (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.²⁶

²⁴ Corn, et al. (2012), *supra nota* 17, p 46; also see ICRC homepage for the number of signatories to each convention: <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>, 19 March 2019.

²⁵ ICJ, *Legality of the Threat or Use of Nuclear Weapons Opinion*, Advisory Opinion, I.C.J Reports 1996, para 79.

²⁶ GC III, Article 4(A)(2).

However, Article 4(2) of GC III states that status of prisoners of war is given to members of militias, other volunteer corps and organized resistance movements.²⁷ Question is whether those conditions apply to regular armed forces as well. According to Article 4(1) of GC III it appears that members of armed forces are entitled to PW status, regardless whether they fulfil the conditions regulated in Article 4(2). Regular armed forces are not on the list of combatants for being obligated to wear “fixed distinctive sign recognizable at a distance”. This idea is supported by scholarly opinion as well. Pfanner says “A literal, historical and teleological reading of Article 4(A) thus shows that all captured members of regular armed forces automatically have prisoner-of-war status. The decisive criterion for entitlement to prisoner-of-war status is solely membership in regular armed forces”.²⁸ In addition, codified law does not make a reference to the wearing of any uniform when designating members of the armed forces, furthermore, the term “uniform” has not been defined in any IHL treaty.²⁹

The Hague Regulations, however, include armed forces into this list of combatants who are obligated to wear a distinctive sign.³⁰ This would mean that armed forces are also obligated to wear at least a “fixed distinctive sign recognizable at a distance”. During the drafting process of the Geneva Conventions delegates to the 1949 Diplomatic Conference were of the opinion that "regular armed forces" have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war, meaning that there was no need to specify the four combatant requirements for the armed forces.³¹ In addition, this idea is also supported by scholarly opinion saying that “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”.³² Concerning the topic of this thesis, it means that regular armed forces are required to wear at least fixed distinctive sign in order to distinguish themselves from civilian population. Furthermore, the minimum requirement for distinction would be fixed distinctive sign and not a standard uniform.

²⁷ *Ibid.*, Article 4(2)(b).

²⁸ Pfanner, T. (2004). Military Uniforms and the Law of War - *International Review of the Red Cross*, Vol. 86, No. 853, 93-124, p 115.

²⁹ Cowling, M., Bosch, S. Combatant Status at Guantanamo Bay - *International Humanitarian Law Detained Incarcerado - Comparative and International Law Journal of Southern Africa*, Vol. 1, 1-35, p 9.

³⁰ The Hague Regulations, Article 1.

³¹ Preux (1960), *supra nota* 3, p 63.

³² Preux (1960), p 49 cited in Ferrell, W. (2003). No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict. – *Military Law Review*, Vol. 178, 94-140, p 101.

Therefore, it can be concluded that even though members of armed forces are not explicitly required to fulfil the “combatant requirements”, it was still the intent of the drafters of the Conventions. Thus, according to GC III it is obligatory for members of armed forces, amongst other requirements, to at least wear a distinctive sign recognizable at a distance and carry their arms openly in order to distinguish themselves from civilians.

1.3. Additional Protocol I

Additional Protocol I has been ratified by 174 states.³³ However, Additional Protocols of 1977 have not yet achieved the near-universal acceptance achieved by the 1949 Geneva Conventions.³⁴ Many countries like USA and a number of other significant military powers (Iran, Israel and India) have so far decided not to become parties to AP I.³⁵ The reasons provided for not accepting AP I included concerns about the politicization of humanitarian law and the relaxing of the criteria for combatancy.³⁶ United States President said in his letter of submittal to the Senate³⁷ that, amongst other reasons, “Protocol I suffers from fundamental shortcomings that cannot be remedied through reservations or understandings,” and “Protocol grants guerrillas a legal status that often is superior to that accorded to regular forces”.³⁸ While some of the rules in AP I are considered customary international humanitarian law,³⁹ rules concerning distinguishing combatants from civilians under Article 44 of AP I are not amongst them.

The general distinction between lawful and unlawful combatant – put in place by the Hague Regulations and strengthened by the Geneva Conventions – is completely subverted.⁴⁰ Combatant

³³ *Treaties, States Parties and Commentaries*. International Committee of the Red Cross. Accessible: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470. 28 January 2019.

³⁴ Greenwood (2008), *supra nota* 16, p 29.

³⁵ *Ibid.*, p 29-31.

³⁶ Watkin, K. (2005). Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy. *Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series*, No. 2, p 44.

³⁷ Corn, et al. (2012), *supra nota* 17, p 93 says that “To date, the Senate has yet to act on President Reagan’s request for advice and consent, nor President Clinton’s 1999 request.”

³⁸ Sassòli, M., Bouvier, A.A. (1999). *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*. Geneva: International Committee of the Red Cross, p 603.

³⁹ Fleck, D. (1990). The Protocols Additional to the Geneva Conventions and Customary International Law - *Military Law and the Law of War Review*, Vol 29, 497-517, p 501. According to Fleck following Articles of AP I are *ius cogens* norms: Articles 12-23, Article 38, Article 53 (1), Article 37, Article 41, Article 51 (1-5), Article 52.

⁴⁰ Dinstein (2016), *supra nota* 11, p 61.

status is regulated in Articles 43 and 44 of AP I in conjunction with Article 4 of GC III. Article 43 of AP I defines who are combatants⁴¹ and regulates the right of combatants to directly participate in hostilities.⁴² Article 44(3) of AP I provides an exemption for distinction when “owing to the nature of hostilities and armed combatant cannot distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly during each military engagement and during each time he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate”.⁴³ However, Article 44(7) of AP I states that “this Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units”.⁴⁴

Article 44 has turned out to be one of the most controversial articles in AP I resulting in many reservations made by states upon ratification or, in worse cases, not being ratified by many states at all.⁴⁵ The most problematic clause in Article 44 is paragraph 3.⁴⁶ The aim of this article is to broaden the status of PW as to include persons who until 1977 were regarded illegal belligerents.⁴⁷ Reservations have been made by states concerning application of paragraph 3, and how should the term “deployment” be interpreted. Ten States (Australia, Belgium, Canada, France, Germany, Ireland, the Netherlands, New Zealand, the Republic of Korea and the United Kingdom) consider that the provision is only applicable in cases of occupation and in conflicts of self-determination covered by Article 1(4).⁴⁸ Spain and Italy limit the “situations” to cases of occupation alone.⁴⁹ All twelve States further interpret the term “deployment” in the broad sense, as referring, in the best interests of the civilian population, to “any movement towards a place from which an attack is to be launched”.⁵⁰

Even though the most problematic paragraph is Article 44(3) of AP I, this thesis will focus on Article 44(7) of AP I concerning the “generally accepted practice of States with respect to the

⁴¹ AP I, Article 43(1).

⁴² *Ibid.*, Article 43(2).

⁴³ *Ibid.*, Article 44(3).

⁴⁴ *Ibid.*, Article 44(7).

⁴⁵ Watkin (2005) *supra nota* 36.

⁴⁶ Dinstein (2016), *supra nota* 11, p 62.

⁴⁷ Zachary, S. (2005). Between the Geneva Conventions: Where Does the Unlawful Combatant Belong? – *Israel Law Review*, Vol. 38, No. 1-2, 378-417, p 382.

⁴⁸ Gaudreau, J. (2003). The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims - *International Review of the Red Cross*, No 849, 143-184, p 10.

⁴⁹ *Ibid.*, p 10.

⁵⁰ Bothe, Partsch, Solf, op. cit., p. 254; Commentary, paras 1709-1712 cited in Gaudreau (2003), *supra nota* 48, p 10.

wearing of the uniform by combatants assigned to the regular, uniformed armed units”. No reservations have been made concerning interpretation of this clause by states upon ratification. Regardless, in practical terms this clause has caused confusion to regular armed forces. It implies that members of regular armed forces must wear uniform compared to guerrillas and freedom fighters, who can distinguish themselves from civilians amongst other requirements by only wearing a distinctive sign recognizable at a distance. Furthermore, the latter can enjoy the exemption of the distinction rule in cases of “owing to the nature of the hostilities” according to Article 44(3) of AP I.

Commentary to the AP I says the following about Article 44(7):

“This does not mean that a combatant of a regular army can never dispense with wearing a uniform while he is engaged in hostile acts. However, this possibility is open to him, as we have seen above, only in the same situations and under the same exceptional conditions as those which apply to members of guerrilla forces. Although not explicitly stated, this article is primarily aimed at guerrilla fighters”.⁵¹

Text of Article 44(7) of AP I clearly states that members of regular armed forces are obligated to wear uniform. However, wording of the text of Article 44(7) is impaired by the interpretation provided in the Commentary, thus, creating confusion about whether regular armed forces are obligated to wear a uniform or not. Confusion created by AP I concerning uniform requirement is covered in the next section.

1.4. Impact of AP I to the principle of distinction

Since AP I is fusing together the Hague and Geneva law and, thus, being more practical tool for international armed conflicts, it nevertheless has its flaws. Concerning uniform requirement AP I creates a confusion on its application – it is not explicitly clear whether members of regular armed forces should wear uniform or they can enjoy the relaxation of the uniform requirement similarly to guerrillas.

⁵¹ Sandoz, et al. (1987), *supra nota* 6, p 542.

Aim of Article 44(7) is understandable from the perspective of the drafters of the Protocols –armed forces have traditionally worn uniforms, however, the drafters of the Protocol were not able to foresee the dilemmas of what the future warfare will bring – increase of deployment of SOF units. Regardless, special tactical units have always existed, although, they were not used as widely as SOF units nowadays. Increasing importance of SOF units and their clandestine operations has put military legal advisors into a difficult position. Legal advisors have to advise their commanders in a way which would have, on the one hand, practical input for the SOF operators and, on the other hand, conformity with IHL. This issue is especially important because states’ armed forces are reflecting states’ practice, and as Kolb and Del Mar write that: “...military and state practice can only be one and the same...”.⁵² Furthermore, state practice is itself separately an indication of what that state considers the law to be. Therefore, military manuals and advice given by legal advisors are important, because it is part of creating the law as such.

Scholars’ views differ concerning the interpretation of Article 44(7) of AP I. Ipsen is of the opinion that Article 44(7) of AP 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.⁵³ He goes even further and says that this rule of international customary law had by the nineteenth century already become so well established that it was held to be generally acceptable at the Conference in Brussels 1874.⁵⁴ However, Article 9 of Brussels Declaration of 1874 does not reflect this idea – Article 9 of Brussels Declaration states that, amongst other requirements, combatants must have “a fixed distinctive emblem recognizable at a distance”.⁵⁵ It was discussed during the Conferences, however, the general consensus agreed not to pose uniform requirement on regular armed forces due to financial reasons.⁵⁶ Therefore, the final draft of Brussels Declaration of 1874 does not mention uniform at all, and mentions only distinctive emblem.

Opposing view is recognized by several scholars. Parks wrote one of the ground breaking articles about SOF’s wear of non-standard uniforms.⁵⁷ His idea is that standard uniform is not the only

⁵² Kolb, R., Del Mar, K. (2014). Treaties for Armed Conflict. In: *The Oxford Handbook of International Law in Armed Conflict* (2014). /Eds. Clapham, A., Gaeta, P. New York: Oxford University Press, p 57.

⁵³ Ipsen, K., (2008). Combatants and Non-combatants. In: *The Handbook of International Humanitarian Law* (2008). /Ed. Fleck. D. 2nd ed. New York: Oxford University Press, p 90.

⁵⁴ *Ibid.*, p 90.

⁵⁵ Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874.

⁵⁶ Dowdeswell, L.T. (2017). The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification – *Osgoode Hall Law Journal*, Vol. 54, No. 3, 805-850, p 830.

⁵⁷ Parks, W. H. (2003). Special Forces’ Wear of Non-Standard Uniforms - *Chicago Journal of International Law*, Vol. 4, No. 2, 493-560.

way to distinguish combatants from civilians – it can either be physical separation from civilians or indigenous clothing or civilian clothes in cases where those clothes are not normally worn by local people.⁵⁸ Furthermore, he makes a point that wearing those so called “non-standard uniforms” must not fall under perfidy clause aimed to kill treacherously.⁵⁹ Dinstein agrees with Parks on the non-standard uniform matter.⁶⁰ He makes a further point that SOF units must “retain some distinctive feature telling them apart from civilians”.⁶¹ Corn *et al* are also in favour of wearing “non-standard” uniforms by SOF units to associate themselves with the irregular forces they are advising.⁶² The Mallisons are of the opinion that if Article 44(3) of AP I would apply only to guerrillas, it would be unjust and unworkable in situations where members of regular armed forces are serving as adviser to irregular forces.⁶³ In addition, they say that “Regulars are entitled to meet the minimum requirements of Article 44(3) of AP I in other situations as well – including those where they are conducting guerrilla warfare in enemy-occupied territory”.⁶⁴ Green is also of the opinion that Article 44(3) of AP I applies to members of regular armed forces stating that even though in cases they are not in uniform it does not affect their status and rights as combatants in situations they fulfil the conditions of Article 44(3) of AP I.⁶⁵ Ferrell recites Michael Bothe in his article: “Despite Article 44(3)’s focus on guerrilla 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 guerrillas”.⁶⁶ Therefore, it can be interpreted that regular armed forces can also benefit from exemptions of Article 44 (3) of AP I concerning the timing of distinction.

Therefore, taking under consideration scholarly opinion it can be concluded that members of regular armed forces are entitled to the same conditions as guerrillas under Article 44(3) of AP I. However, this concept has its limitations concerning the timing of when members of regular armed forces can enjoy the benefits of Article 44(3) of AP I. Scholars, who support the idea, are of the opinion that this rule applies in certain circumstances only – in an enemy occupied territory, assisting irregulars, during actions outside combat zone, etc. This question, when members of

⁵⁸ *Ibid.*, p 543.

⁵⁹ *Ibid.*, p 544.

⁶⁰ Dinstein (2016), *supra nota* 11, p 52.

⁶¹ *Ibid.*, p 52.

⁶² Corn, et al. (2012), *supra nota* 17, p 138.

⁶³ Mallison, W. T., Mallison, S. V. (1978). The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts. - *Law and Contemporary Problems*, Vol. 42, No. 2, 4-35, pp 25-26.

⁶⁴ *Ibid.*, p 26.

⁶⁵ Green, L. C. (2000). *The Contemporary Law of Armed Conflict*. 2nd Ed. Manchester: Manchester University Press, p 113.

⁶⁶ Ferrell (2003), *supra nota* 32, p 110.

regular armed forces are allowed to deviate from the uniform requirement, is analysed in the next chapter. In addition, in order to have the final answer to whether members of regular armed forces are required to wear a uniform according to Article 44(7) of AP I, it is still necessary to analyse other aspects of the uniform requirement. Next chapter will also focus on how not wearing a uniform affects the status of personnel and whether it leads to perfidy.

2. LEGAL ASPECTS OF MILITARY UNIFORMS

Uniforms are not merely matter of armed forces. Uniforms belong to many different occupations – police, pilots, nurses etc. Uniforms are a way of identifying one’s profession and affiliation. In addition, uniform is also an indication of certain legal status. It provides an understanding of what legal rights and obligations does the named person have. When we see a police officer in a uniform, we automatically know or at least have a general understanding that he or she has the right, for example, to detain a criminal or to stop a vehicle. The same applies to military uniforms. On the one hand, military uniforms are an indication of combatants rights to directly participate in hostilities. On the other hand, uniform provides protection to civilians by distinguishing combatants from civilians. In other words, it makes combatants legal targets to the adversary. However, when combatants deviate from the uniform requirement or they fail to distinguish themselves from civilians completely, then this affects their legal status. Whilst uniform is an indication of certain legal status, it is also important to analyse when exactly it is required to wear a uniform, because members of regular armed forces are not always wearing uniform, e.g. when they are off duty or doing sports.

This chapter will analyse how not wearing a uniform affect the legal status of personnel and whether it leads to perfidy. Furthermore, it will analyse under what circumstances can members of regular armed forces deviate from uniform requirement.

2.1. Categories of uniforms

Uniform has been a way to identify oneself with the unit he or she is serving in, and their State affiliation. Throughout history uniforms have had a role of armour or protection alongside with its role as a method of identification. Uniforms have been very festive with bright colours and feathers decorating a head cover. Soldiers have always taken pride in their uniform and what it represents. United States Army Regulation 670-1 concerning uniforms states that “A Soldier’s appearance measures part of his or her professionalism. Proper wear of the Army uniform is a matter of personal pride for all Soldiers. It is indicative of *esprit de corps* and morale within a unit. Soldiers

have an individual responsibility for ensuring their appearance reflects the highest level of professionalism”.⁶⁷

Before analysing legal implications of uniforms, it is important to define uniform and what it consists of. Parks divides military related clothing into five categories: “(a) uniform such as BDU⁶⁸; (b) uniform worn with some civilian clothing; (c) civilian clothing only, but with a distinctive emblem to distinguish the wearer from the civilian population; (d) civilian clothing only, with arms and other accoutrements (such as loadbearing equipment or body armour) that, combined with actions and circumstances, clearly manifest military status; (e) civilian clothing, with weapon concealed and no visual indication that the individual is a member of the military”.⁶⁹ Following provides more detailed description⁷⁰ of what those uniforms entail.

Traditional uniform

Traditional uniform can be divided into 2 parts: battle dress uniform (BDU) and dress uniform. BDUs are worn while conducting combat functions and dress uniform is worn during formal occasions. BDUs worn by armed forces consist of mostly the same elements – combat boots, T-shirt, trousers, jacket, socks, belt and headgear. Compared to uniforms in history, modern uniform design is more simple and its main purpose is to provide protection from harsh weather conditions and to provide camouflage. Dress uniforms, on the other hand, are more festive by design and colours and are useless on a battlefield. Each country’s uniform differs by pattern of the uniforms and by emblems. Traditional uniforms of armed forces have changed in design and colours, however, there has always been a traditional uniform for every State and for each branch of the armed forces.⁷¹

BDU patterns are designed in a way so it would make soldier invisible or at least more difficult to detect by the enemy depending on the terrain – green colour for forest, grey colour for urban terrain, blue colour for water and beige colour for desert. Regardless, modern uniforms are not entirely without some physical protection elements – soldiers still wear helmets and body armour

⁶⁷ Army Regulation 670-1 "Wear and Appearance of Army Uniforms and Insignia" (Washington DC: The Headquarters Department of the Army, 2014), p 1.

⁶⁸ Battle dress uniform – camouflage uniform worn during combat.

⁶⁹ Parks (2003), *supra nota* 57, p 518.

⁷⁰ Author of the thesis works for the Estonian Defence Forces, therefore knowledge of the specific descriptions of uniforms is common knowledge to the author based on the experience and tactical military training. Thus, there are no specific citations for the uniform descriptions.

⁷¹ Usually Navy, Army and Air Force have a different types and colours of uniforms.

which protects vital organs. However, uniform *per se* is not specifically designed to provide physical protection to the entire body compared to, for example, knight's armour during Middle Ages.⁷²

Uniform mixed with civilian clothing

This type of uniform category means that combatant is wearing some piece of uniform together with civilian clothing. For example, combatant wears uniform pants and civilian jacket or vice versa. Uniform is mixed with civilian clothing mostly due to two reasons: either combatant lacks all pieces of proper uniform or the purpose is to provide combatant with better disguise from the enemy. The first situation might occur hypothetically when during full scale mobilization armed forces are not able to provide full set of uniforms to all soldiers and soldiers might have to use some of their personal clothes.

Civilian clothing and distinctive emblem

This type of uniform consists of entirely civilian clothes worn together with a distinctive emblem, e.g. armband, hat, etc. It is mostly worn by forces or units that are not able to provide uniforms for its troops - resistance fighters, guerrillas, partisans, etc.⁷³ In addition, it must be taken under consideration that uniform may not be worn due to disguise purposes. Their aim might be to move around blended in to local population and they attach an armband when it becomes necessary prior to an operation or an attack.

Civilian clothing with arms carried openly

Whether arms carried openly would qualify an element of a uniform depends on the culture of the country. In some countries (e.g. Iraq and Afghanistan) it is part of the culture to own a weapon and to carry it with you all the time. Therefore, it does not automatically mean the person carrying arms openly is a combatant. This person might be a civilian. This is a category of a uniform that causes not only legal problems concerning the status of those persons, but also problems for the soldiers in identifying the enemy. In order to identify the enemy under those circumstances it requires more thorough intelligence work. Small details will play an important role in identifying possible enemy. For example, if most of the population owns and carries AK-47 weapons and then

⁷² *Medieval Warfare Armour&Shields*. Accessible: <http://www.medievalwarfare.info/armour.htm>, 19 March 2019.

⁷³ For example, members of French Resistance wore white armbands with Cross of Lorraine on it. In Colombia paramilitary organizations also wear armbands.

soldiers encounter a group of males in the same age range, moving in a tactical manner and wearing more advanced weapons, then soldiers might come to a conclusion that those are enemy combatants. However, until their status is determined by competent tribunal, it must be assumed that they are civilians and, hence, they enjoy protective status of civilians.⁷⁴ This might be nearly impossible during combat activities when soldiers are expected to react fast, and thus, might lead to violations of IHL.⁷⁵

Civilian clothing

Mostly civilian clothes cannot be considered uniform category at all. They are a clear sign of civilians and it involves protected status of a civilian. However, there are certain circumstances that it might be classified as a uniform. Civilian clothes can be worn by soldiers on two purposes. First, to blend in with locals while wearing local style of civilian clothes. Then the situation can be construed as perfidy. Secondly, soldiers wear civilian clothes that are not common for civilians in that area. If local people wear Arabic style clothes and soldiers are wearing western style tactical clothes, then the purpose is not to blend in with locals and they are distinguished from locals as such. However, they are distinguished from locals, but not from civilians. Other actors might also wear tactical civilian clothes – members of civilian companies or other organizations or private security companies, etc.

2.2. Role of a uniform in defining status of personnel

As was mentioned before, uniform is an indication of certain rights and obligations. In an armed conflict uniform is an indication of combatant status. The term “combatant” was first used in AP I Article 43, which incorporates by reference the GC III definition of PW as the benchmark for determining who qualifies as a combatant.⁷⁶ The key rule for determining a person’s status as combatant is contained in Article 43 AP I, which defines armed forces and provides that members of the armed forces (not including the medical and religious personnel) are combatants.⁷⁷

⁷⁴ GC III, Article 5.

⁷⁵ Fox News Insider, *Army Lt. Jailed 20 Years for Battlefield Shooting: Could New Evidence Free Him?* Accessible: <https://insider.foxnews.com/2014/12/15/army-lt-clint-lorance-jailed-20-years-battlefield-shooting-could-new-evidence-free-him>, 20 January 2019. According to the article 1Lt Lorance was leading a platoon in Afghanistan in 2012, when three men on a motorcycle suddenly came toward the troops. Lorance ordered his men to open fire, leaving two of the Afghan men dead. He was of the opinion that they had ties to terrorism. However, he did not confirm this information accordingly.

⁷⁶ Jensen (2005), *supra nota* 7, p 136; AP I Article 1(3).

⁷⁷ Ipsen (2008), *supra nota* 53, p 84.

Combining the GC III with Article 43 of AP I indicates that combatants include the following categories of individuals: members of the armed forces of a party to the conflict; members of militias and organized resistance movements belonging to a party to the conflict; members of regular armed forces belonging to governments not recognized by the Detaining Power; and inhabitants of non-occupied territory who spontaneously take up arms to resist invading forces (the so called *levee en masse*).⁷⁸

Combatants are persons who are entitled to take a direct part in the hostilities and they may not be punished for the mere fact of fighting.⁷⁹ This means that acts committed during peace time which are considered to be illegal (e.g. taking another person's life; damaging property etc), are considered to be lawful acts conducted by combatants during an international armed conflict. Furthermore, those activities are normal for combatants and they are specifically trained to do that.

This so called "combatant's privilege" includes that combatant is entitled to the status of PW.⁸⁰ PW status is a privileged status given by capturing party as an international obligation to a captured enemy combatant, if and when the enemy's previous lawful actions in armed conflict demonstrate that PW status is merited.⁸¹ Requirements for obtaining status of PW are closely connected to the requirements of combatants.

The first chapter of this thesis covered the four requirements for obtaining PW status under GC III Article 4(A)(2): (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. In addition, that all those requirements apply to members of regular armed forces as well, even though it is not explicitly mentioned in the text of GC III.⁸²

Traditional uniforms are mostly worn by members of regular armed forces (compared to other types of combatants). Each State's armed forces have detailed regulations in order to ensure

⁷⁸ Jensen (2005), *supra nota* 7, p 136; GC III Article 4; AP I Article 43.

⁷⁹ Ipsen (2008), *supra nota* 53, pp 80-82.

⁸⁰ GC III, Article 4; AP I, Article 44.

⁸¹ Bialke. J. P. (2004) Al-Qaeda and Taliban – Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict. - *The Air Force Law Review*, Vol. 55, 1-85, p 2.

⁸² See *supra notas* 31 and 32.

uniform is worn correctly by members of the armed forces.⁸³ However, regular armed forces also include SOF units. SOF unit's tactics differ from conventional forces tactics. Conventional tactics are considered to be "World War II-like clashes of manoeuvre warfare – massive tank battles surging across the countryside, accompanied by apocalyptic doses of artillery and airpower".⁸⁴ Special forces, on the other hand, often operating deep inside enemy held territory have become a significant means of executing military tasks that could, only with great difficulty, be carried out by other means.⁸⁵ SOF units conduct mostly three types of operations, which are common to all NATO state SOF units: military assistance (MA) special reconnaissance (SR) and direct action (DA).⁸⁶ Those operations as defined in Moon's report the following: "MA consists of training, educating, advising, and supporting partners (most often in the partner's area of responsibility). SR tasks are essentially ISR⁸⁷ activities for informing areas or mission sets that are extremely dangerous, hostile, or politically sensitive. DA can be defined as any action taken by the Allied SOF forces from precision strike operations from targeted killings to arrests of war criminals, etc. to complete a mission".⁸⁸ Those types of operations (mostly SR) require that SOF operators blend in with the local environment as much as possible. Meaning, they would not wear standard uniforms or even no uniform at all.⁸⁹ In those cases the legal status of SOF operators depends on the level of altering their uniform.

2.2.1. Distinctive sign

It is of course obvious that uniform has been considered to be the best known distinctive sign.⁹⁰ Therefore, when uniform is worn properly, it does not cause any confusion concerning the status of personnel. Uniformed personnel are combatants according to IHL and upon capture by the

⁸³ E.g. "Army Dress Manual" (Canberra: Australian Government Department of Defence, 2013). Estonian Defence Forces also have a guidance on wearing a uniform. However, this guidance is declared as "Official Use Only" and the content of it cannot be used in public.

⁸⁴ Adams, T. K. (1998), *US Special Operations Forces in Action: the Challenge of Unconventional Warfare*. Abingdon and New York: Frank Cass Publishers, p 1.

⁸⁵ Rowe, P. (1994). The Use of Special Forces and the Laws of War - Wearing the Uniform of the Enemy or Civilian Clothes and of Spying and Assassination. – *The Military Law and Law of War Review*, Vol. 33, 207-239, p 209.

⁸⁶ Moon, M (2018), *NATO Special Operations Forces in the Modern Security Environment*. NATO Parliamentary Assembly: Defence and Security Committee. Accessible: <https://www.nato-pa.int/download-file?filename=sites/default/files/2018-04/2018%20-%20NATO%20SPECIAL%20OPERATIONS%20FORCES%20-%20DRAFT%20REPORT%20MOON%20-%20064%20DSCFC%2018%20E.pdf>, p 4.

⁸⁷ Intelligence, Surveillance and Reconnaissance (ISR).

⁸⁸ Moon (2018), *supra nota* 86, p 4.

⁸⁹ Kelly, M., Rostrup, M. (2002) *Identify Yourself: Coalition Soldiers in Afghanistan Are Endangering Aid Workers*. Accessible: <https://www.theguardian.com/society/2002/feb/01/comment>, 21 January 2019.

⁹⁰ Pfanner (2004), *supra nota* 28, p 93.

adversary they receive status of PW. Problems rather occur when uniform is altered or mixed with other components of clothing.

Since this thesis focuses on appearance of combatants, therefore, it must be analysed what is meant by “distinctive sign recognizable at a distance”. The codified law fails singularly to provide definitive criteria on what constitutes a fixed distinctive sign or what standard is to be applied.⁹¹ The lack of certainty in “distinctive sign” requirement leaves considerable room for states to employ personnel, such as special forces, wearing only a portion, or no parts of conventional uniforms and still claim the requirements of international humanitarian law are being met.⁹² Any discussion about the requirement of a distinguishing sign ultimately leads to questions about how fixed, how distinctive, and what is an appropriate sign.⁹³

Commentary of GC III says “the distinctive sign should be recognizable by a person at a distance not too great to permit a uniform to be recognized” and “such a sign need not necessarily be an arm-band. 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 coloured sign worn on the chest”.⁹⁴ Assessing the meaning of having a fixed distinctive sign and carrying arms openly has been the most problematic of the combatant’s criteria particularly because of the vagueness of the terms.⁹⁵

Parks mentions in his article that US and British Special Forces wore indigenous overcoats over their BDUs to counter one of the coldest winters on record in Iraq during the 1990-1991 war to liberate Kuwait.⁹⁶ If the purpose of mixing uniform and civilian clothes is other than disguise, then mostly uniform element is used for the mere purpose of not violating IHL - partial uniform would be able to distinguish combatant from civilians. Piece of uniform would still constitute “distinctive sign recognizable at a distance” according to Article 4 of GC III. Status of personnel in case of wearing uniform elements together with civilian clothing depends on whether so called four combatant requirements have been met. The same applies when uniform is replaced with civilian clothing worn together with a distinctive emblem and arms carried openly. Person is combatant and has a right to PW status provided that the four combatant requirements have been met.

⁹¹ Watkin (2005), *supra nota* 36, p 30.

⁹² *Ibid.*, p 31. See also Parks (2003), *supra nota* 57, p 497.

⁹³ *Ibid.*, p 29.

⁹⁴ Preux (1960), *supra nota* 3, p 60.

⁹⁵ Watkin (2005), *supra nota* 36, p 29.

⁹⁶ Parks (2003), *supra nota* 57, p 518.

2.2.2. Civilian clothes

Determining legal status is not so easy when only civilian clothes is worn with arms carried openly. This type of a distinguishing measure is turning out to be the most difficult in most modern conflict situations. The danger of relying too heavily on the carrying of arms as an indication of combatancy is that it may lead to a very narrow and unrealistic view of what actually constitutes taking an active part in hostilities.⁹⁷ It implies that the person might be combatant, however, it is not a clear sign that other combatant requirements are fulfilled. Thus, further investigation is required to be certain. Good examples of wearing this type of clothing are T.E. Lawrence, when he wore Arab clothes as he lead Arab revolt against Ottoman rule, and by US SOF in Afghanistan in 2001 where they wore Massoud *pakol* and Massoud checkered scarf in order to look like indigenous forces they supported.⁹⁸ Parks is of the opinion that dressing in the manner of local indigenous forces who are not wearing a uniform, can be described as wearing a “non-standard uniform” rather than “dressing as civilians”.⁹⁹ This is not to blend in with the civilian population, but rather to lower the visibility of your forces.¹⁰⁰ However, it is important to distinguish whether indigenous clothes worn by SOF operators are an indication of local forces or local people. As was mentioned above, wearing of tactical civilian clothes might distinguish combatant from locals, but not from civilians in general.

Aim of principle of distinction is to distinguish combatants from civilians and in most cases it is done via uniform or distinctive emblem and carrying arms openly. However, there are situations where civilian clothing can also be considered a uniform. In those cases, it is important to establish whether indigenous clothes are considered to be uniforms or distinctive element by the locals. Nobuo Hayashi addresses this issue indirectly in his article - he writes that in identifying the status of combatants, judges should take under consideration how the facts of the situation appeared for the adversary, and not how the facts should have been according to IHL.¹⁰¹ Therefore, if local population knows that certain type of indigenous clothes identify combatants, then it can be concluded that combatant requirements are met.

⁹⁷ Watkin (2005), *supra nota* 36, p 32.

⁹⁸ Parks (2003), *supra nota* 57, pp 496-497.

⁹⁹ *Ibid.*, pp 497-498.

¹⁰⁰ *Ibid.*, p 497.

¹⁰¹ Hayashi, N. (2006). The Role of Judges in Identifying the Status of Combatants – *Acta Societatis Martensis*, Vol. 2, 69-92.

However, wearing of civilian clothes may also result in losing combatant's status and, thus, status of PW. In the case of *Osman Bin Mohammed v. Public Prosecutor* (1968), the Privy Council in London held that members of the Indonesian armed forces who placed bombs in a bank in Singapore during an international armed conflict while wearing civilian clothes were not entitled to receive a status of PW.¹⁰²

In *Osman Bin Mohammed v. Public Prosecutor* court also cited an earlier case of *Ex Parte Quirin*¹⁰³ which dealt with a similar issue. Eight German members of regular armed forces were landed from German submarines to the United States.¹⁰⁴ Upon their arrival, they wore German military uniforms, but then changed into civilian attire. They were instructed to destroy war industries and war facilities in the United States.¹⁰⁵ The captured personnel were charged with espionage, aiding the enemy, and unlawful combatancy.¹⁰⁶ Court said in their opinion: "... an enemy combatant who without a uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are... generally deemed not to be entitled to the status of prisoners of war...".¹⁰⁷ However, in *Ex Parte Quirin* the court went further concerning status of spies. Conducting operations in civilian clothes may also refer to espionage. Espionage is not illegal under IHL, however, a spy must take under consideration that he or she might lose his status of prisoner of war upon capture.¹⁰⁸ Case of *Ex Parte Quirin* brought confusion concerning legal consequences of espionage, because the court considered espionage to be subject to punishment as an international crime.¹⁰⁹ In doing so, the court opened the door questioning whether participation in irregular warfare is an international crime or simply a crime during war.¹¹⁰ Baxter says in his article "that view... fails to find support in contemporary doctrine regarding such activities in wartime".¹¹¹ Espionage is not illegal under IHL, however, it most likely is illegal under the laws of capturing state. Therefore, a spy who has fallen in the hands of an adversary might be tried in accordance with the law of the capturing state.

¹⁰² *Osman Bin Haji Mohamed Ali and Another Appellants vs the Public Prosecutor* (1968), Judicial Committee of the Privy Council, Great Britain (UK), cited in Sassòli & Bouvier (1999), *supra nota* 38, p 767-775.

¹⁰³ *Ex Parte Quirin et al* 317 U.S. 1 (1942), United States Supreme Court.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Watkin (2005), *supra nota* 36, p 47.

¹⁰⁷ *Ex Parte Quirin et al* (1942), *supra nota* 103, p 31.

¹⁰⁸ AP I, Article 46(1).

¹⁰⁹ Prof Hyde. (1943). Aspects of the Saboteur Case. – *American Journal of International Law*, Vol. 37, p 88, cited in Baxter, R. R. (1951). So-Called Unprivileged Belligerency: Spies, Guerillas, and Saboteurs. – *British Yearbook of International Law*, Vol. 28, 323-345, p 331.

¹¹⁰ Watkin (2005), *supra nota* 36, p 48.

¹¹¹ Baxter (1951), *supra nota* 105, p 331.

2.2.3. Application of Article 44(3) of AP I

Other aspect of wearing civilian clothes with arms carried openly that must be considered is how guerrilla forces conduct their operations. Article 44(3) of AP I provides an opportunity to not always having to wear distinctive sign. According to the clause “there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate”.¹¹²

This means guerrilla forces are not obligated to even wear a distinctive sign anymore. The term “owing to the nature of the hostilities” can be interpreted in a broad sense, and thus, can be quite problematic. Since the guerrilla commonly seeks to overcome technological, economic, or manpower deficiencies, the exception to the normal requirement of distinguishing clothing “owing to the nature of the hostilities,” will undoubtedly become the rule in guerrilla warfare.¹¹³ It creates an opportunity for guerrilla forces to interpret each situation as “owing to the nature of hostilities”. Furthermore, it puts civilians into more danger due to the fact that it is more difficult to distinguish guerrilla forces from them. This was also one of the main reason many countries did not ratify AP I.¹¹⁴

Regardless, as was mentioned in previous chapter of this thesis, the commentary to the AP I and many scholars are of the opinion that those exempting rules also apply to members of regular armed forces.¹¹⁵ For those states that have ratified Additional Protocol I, Article 44(7) contemplates that “regular, uniformed armed units of a Party to the conflict” may conduct operations while meeting the more relaxed standards of combatancy although for many nations such a claim to lawful combatancy is limited to occupied territory or operations in respect of national liberation movements.¹¹⁶ Some countries interpret that members of armed forces can

¹¹² AP I, Article 44(3), the second sentence.

¹¹³ Hacker, D. E. (1978). The Application of Prisoner-Of-War Status to Guerillas Under the First Protocol Additional to the Geneva Conventions of 1949. - *Boston College International and Comparative Law Review*, Vol. 2, No. 1, 131-162, p 152.

¹¹⁴ Watkin (2005), *supra nota* 36.

¹¹⁵ *Supra notas* 63 and 65.

¹¹⁶ Watkin (2005), *supra nota* 36, p 41.

enjoy advantages of Article 44(3) in an enemy occupied territory and/or when they are working together with guerrilla forces. Therefore, it must be analysed when members of regular armed forces have the same rights to deviate from the uniform requirement as guerrilla forces.

Wording of Article 44(3) of AP I does not provide a limitation to when and where these conditions apply. Ten States (Australia, Belgium, Canada, France, Germany, Ireland, the Netherlands, New Zealand, the Republic of Korea and the United Kingdom) consider that the provision is only applicable in cases of occupation and in conflicts of self-determination covered by Article 1(4).¹¹⁷ Spain and Italy limit the “situations” to cases of occupation alone.¹¹⁸ These reservations are in line with the intent of the drafters of AP I. It is said in the Official Records of the Diplomatic Conference concerning Article 44(3) “That exception recognized that situations could occur in occupied territory and in wars of national liberation in which a guerrilla fighter could not distinguish himself throughout his military operations and still retain any chance of success”.¹¹⁹ In circumstances in which an armed movement clearly controls a territory, i.e. when that territory is not subject to the enemy’s sovereignty, as is the case in wars of national liberation, or is not occupied, recourse to guerrilla tactics that are harmful to the civilian population must be precluded.¹²⁰ Therefore, it was the intent of the drafters to limit those situations when guerrilla forces are able to not distinguish themselves properly, with occupied territory and wars of national liberation. Thus, the same logic of application of Article 44(3) of AP I should be applied to members of regular armed forces as well.

In addition to when the above mentioned exception applies, it must also be analysed what is meant in more details with the term “military deployment preceding the launching of an attack in which he is to participate”. Only reservations concerning this concept was made by twelve states mentioned above. All twelve states further interpret the term “deployment” in the broad sense, as referring, in the best interests of the civilian population, to “any movement towards a place from which an attack is to be launched”.¹²¹ According to the Official Records of the Diplomatic Conference “Some delegations stated that they understood it as meaning any movement toward a

¹¹⁷ Gaudreau (2003), *supra nota* 48, p 10.

¹¹⁸ *Ibid.*

¹¹⁹ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-1977), vol. XV, CDDH/407/Rev.1, p 453, para 19.

¹²⁰ Cyril Laucci. (2001). La France adhère au protocole 1 relatif à la protection des victimes des conflits internationaux. - *Revue Générale de Droit International Public* (RGDIP), Vol. 3, 677-704, p 691, cited in Gaudreau (2003), *supra nota* 48, p 10.

¹²¹ Bothe, Partsch, Solf, *op. cit.*, p. 254; Commentary, paras 1709-1712 cited in Gaudreau (2003), *supra nota* 48, p 10.

place from which an attack was to be launched. Other delegations stated that it included only a final movement to firing positions. Several delegations stated that they understood it as covering only the moments immediately prior to attack”.¹²² Most of the states, including Estonia, have made no official reservations concerning the interpretation of deployment. Therefore, it is up to each state to interpret in detail what is meant by the term “deployment”. NATO¹²³ provides four different definitions for deployment:

- 1) In naval usage, the change from a cruising approach or contact disposition to a disposition for battle.
- 2) The movement of forces within areas of operations.
- 3) The positioning of forces into a formation for battle.
- 4) The relocation of forces to desired areas of operations.

Estonia uses the last two of the definitions from the list - positioning of forces into a formation for battle and/or relocation of forces to desired areas of operations.¹²⁴ The term can be used for two different situations. Firstly, taking under consideration conventional tactics, it can either mean that forces are positioning themselves in order to attack adversary or take up positions in order to defend an object or territory, e.g. dig trenches. For example, in Afghanistan where Estonian troops were participating in a NATO International Security Assistance Force (ISAF) operation,¹²⁵ this would have meant situations where troops are going out of their camp to patrol the area. However, taking under consideration SOF tactics “positioning forces into a formation for battle” would also cover “moments immediately prior to an attack”. Article 44(3) of AP I connects the term deployment to situations where “he is visible to the adversary”. SOF units are not patrolling the area similarly to conventional forces whilst always being visible to the adversary. SOF units might become visible to the enemy just immediately prior to an attack.

Secondly, deployment also means the logistical movement of troops from one location to another. For example, flying or shipping troops to another country where military operations are taking place. However, deployment in that meaning is too broad concept because troops are not then

¹²² Report of Committee III, Official Records, vol. XV, CDDH/407/Rev.1, p 453, para 20.

¹²³ NATO. (2018). AAP-06 *Edition 2018 NATO Glossary of Terms and Definitions (English and French)*. Accessible: <https://nso.nato.int/nso/nsdd/ListPromulg.html>, 11 February 2019, p 40.

¹²⁴ Militerm, Accessible: <http://termin.eki.ee/militerm/>, 11 February 2019.

¹²⁵ Estonian Defence Forces. (2018). *Operations Abroad*. Accessible: <http://www.mil.ee/en/defence-forces/operations-abroad>, 13 February 2019.

visible to the adversary. There is no need to distinguish yourself, when you have not yet reached the country, where military operation is taking place.

Therefore, it can be concluded that SOF operators would still remain their status as combatant and are entitled to the status of PW in the following situations:

- 1) While they wear a uniform;
- 2) While they wear partial uniform or distinctive sign recognizable at a distance with arms carried openly;
- 3) While they wear indigenous civilian clothes, with arms carried openly in cases where indigenous clothing is a clear sign amongst the locals and the adversary as a distinction element for combatants. Although in those cases SOF units must take into account that upon capture they might be construed as spies;
- 4) While they wear civilian clothes with arms carried openly in situations of occupation and working together with guerrilla forces, and wars of national liberation, when “owing to the nature of the hostilities cannot so distinguish himself” during each military engagement and during each time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Military deployment in the sense can be interpreted as moments immediately prior to an attack.

Even though SOF units might use the exemption of Article 44(3) of AP I, it is still up to the adversary upon capture to determine the status of personnel. However, the imprecise criteria for attaining combatant status and the fact that the determination of legitimacy rests largely with the detaining power can mean that any claim to be a lawful combatant is subject to considerable uncertainty.¹²⁶ Therefore, it must be analysed whether deviating from uniform requirement would qualify as a perfidy.

2.3. Problems with perfidy

When combatants fail to distinguish themselves from civilian population it might lead to violations of IHL, more specifically – to perfidy. The Lieber Code was one of the first attempts at a

¹²⁶ Watkin (2005), *supra nota* 36, p 74.

comprehensive definition of perfidy.¹²⁷ One of the first perfidy prohibitions on which the international community agreed upon was born of the 1907 Hague Convention on land warfare.¹²⁸ The Hague Regulations Article 23(b) states that it is forbidden “To kill or wound treacherously individuals belonging to the hostile nation or army”. Perfidy is defined in Article 37(1) of AP I as “It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.”¹²⁹

There are three main constituent elements of perfidy: (i) a norm of IHL must exist, granting protection that the enemy is entitled to or is obliged to accord; (ii) an act has to be committed, inviting the enemy to trust that such protection is due; and (iii) an intentional betrayal of that trust must follow.¹³⁰

Perfidy is unlawful under the Rome Statute Article (2)(b)(xi) which qualifies “Killing or wounding treacherously individuals belonging to the hostile nation or army”¹³¹ as a serious violation of the laws and customs applicable in international armed conflict.¹³² AP I for the first time presented a robust definition of perfidy, but the Rome Statute harkens back to earlier, weaker definitions by using imprecise language like “treacherous” and “improper.”¹³³ However, the term “*trahison*” in the French text is too restricted in its meaning, and for that reason the term “*perfidie*”(perfidy) was preferred in AP I.¹³⁴ Therefore, the term “treachery” was abandoned in favour of the term “perfidy”; moreover, the capture of the adversary was added to the two former prohibitions on

¹²⁷ Greer, M. J. (2015). Redefining Perfidy. – *Georgetown Journal of International Law*, Vol. 47, 241-277, p 247. Article 101 of the Lieber Code defines perfidy as “While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them.”

¹²⁸ *Ibid.*, p 249.

¹²⁹ AP I, Article 37(1).

¹³⁰ Dinstein (2016), *supra nota* 11, p 266.

¹³¹ UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998, ISBN No. 92-9227-227-6, Article 8(2)(b)(xi).

¹³² Greer (2015), *supra nota* 127, in p 251 also states that additionally, the Rome Statute makes it a war crime to commit a serious violation of the laws and customs applicable in international armed conflict, including what appear to be some perfidious acts (Article 8(2)(b)). Specifically, treacherously killing or wounding combatant adversaries (Article 8(2)(b)(ix)); making improper use of a flag of truce (Article 8(2)(b)(vii)); and intentionally directing attacks against buildings, material, medical units and personnel using the distinctive emblems of the Geneva Conventions (Article 8(2)(b)(xxiv)) are war crimes.

¹³³ *Ibid.*

¹³⁴ Sandoz, et al. (1987), *supra nota* 6, p 431, para. 1488.

"killing" and "injuring".¹³⁵ The addition of capture to the definition of unlawful perfidy is binding on Contracting Parties to AP I, but not otherwise.¹³⁶ The Rome Statute is the most recent international legal treatment of perfidy and by using the term "treacherously", it muddies the waters.¹³⁷ Although, Rome Statute does not include capture, it might only indicate that it is not a serious enough crime to warrant the expenditure of the Court's resources, rather than that it is not a war crime at all.¹³⁸

Regardless, these limitations on the activities of combatants are not based upon any denial of the opportunity to deceive an enemy; ruses of war were expressly permitted by Article 24 of the Hague Regulations 1907 (as they are by Article 37 Protocol I).¹³⁹ The concept of perfidy is very closely linked to ruses of war. Article 37(2) of AP I defines ruses as: "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 that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation."¹⁴⁰ Sun Tzu has said that "All warfare is based on deception. Hence, when able to attack, seem as if unable to attack; when using forces actively, seem inactive; when nearby, make the enemy believe you are far away; when far away, make the enemy believe you are nearby."¹⁴¹ His understanding of deception is what we call ruses nowadays – legal activities taken in order to deceive the enemy.

Combining the two terms on a battlefield creates a very thin line of when an act is being considered as perfidy and when as permissible ruses of war. The grey area between them creates serious problems for combatants who must adhere to the law of war's strictures.¹⁴² If an act is not aimed at killing, injuring or capturing an adversary, then it means it cannot be qualified as perfidy. For example, feigning a status of civilian in order to escape the enemy would not be considered perfidy, because it lacks the intent of killing, injuring or capturing an adversary. Good example of this grey

¹³⁵ *Ibid.*, p 432, para. 1491.

¹³⁶ Dinstein (2016), *supra nota* 11, p 266.

¹³⁷ Greer (2015), *supra nota* 127, p 251.

¹³⁸ Dehn, J. C. (2008). Permissible Perfidy? – *Journal of International Criminal Justice*, Vol. 6, 627-653, p 640.

¹³⁹ Rowe (1994), *supra nota* 85, p 211.

¹⁴⁰ AP I, Article 37(2).

¹⁴¹ Cantrell (2003), *supra nota* 1, p 77.

¹⁴² Greer (2015), *supra nota* 127, p 242.

area is the *Skorzeny* case.¹⁴³ Colonel Otto Skorzeny was the commander of 150th Panzer Brigade.¹⁴⁴ He divided the Brigade into three combat groups, who were tasked to infiltrate American lines while wearing American uniforms in order to secure three bridges. They were charged with participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the armed forces of the United States.¹⁴⁵ Firing and killing of US forces, however, was not proved. Skorzeny and his soldiers were not guilty of perfidy because they did not engage in combat (or at least that could not be proven) so they lacked the necessary intent to kill, wound, or capture their enemies.¹⁴⁶

When SOF units are operating behind enemy lines wearing civilian clothes then the intent of their actions is an essential key element in order to qualify their actions as perfidy. The wearing of civilian clothes is only illegal if it involves perfidy.¹⁴⁷ There is a correspondence between Article 44(3) and Article 37 as acts that comply with the obligation to distinguish “shall not be considered to be perfidious”.¹⁴⁸ If combatant fulfils the conditions set in Article 44(3) of AP I, then his or her actions are not perfidious. In addition, if combatant lacks the intent to kill, injure or capture the enemy, then those actions cannot be considered perfidious as well.

Definition of perfidy in AP I allows combatants to play around with the term considerably. In 2008 Colombian government conducted a daring operation to free several hostages from FARC (*Fuerzas Armadas Revolucionarias de Colombia*).¹⁴⁹ Rescue operation involved the use of a fictional international humanitarian mission as an aid to disguise commandos and intelligence agents as non-combatants protected under international humanitarian law (IHL), as well as the capture of two FARC operatives.¹⁵⁰ This thesis does not analyse legal aspects of applicability of AP I in conflict between Colombian Government and FARC, but merely the facts of a case as if they would be applicable in an international armed conflict. During the rescue operation Colombian security forces also captured members of FARC, and thus, it can be concluded that this was perfidious under Article 37 of AP I. However, hypothetically if they hadn't captured any of the members of FARC, it would not be considered perfidy, because they did not use any emblems

¹⁴³ Trial of Otto Skorzeny and Others, General Military Government Court of the U.S Zone of Germany, 18th August to 9th September 1947.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Greer (2015), *supra nota* 127, p 258.

¹⁴⁷ Pfanner (2004), *supra nota* 28, p 104.

¹⁴⁸ Watkin (2005), *supra nota* 36, p 63.

¹⁴⁹ Dehn (2008), *supra nota* 138, p 630.

¹⁵⁰ *Ibid.*, p 628.

of existing organizations. Dehn calls it in his article “permissible perfidy”.¹⁵¹ Greer is of the opinion that current definitions of perfidy and ruse fail to serve the essential purposes of the law of war by providing inadequate protection to non-combatants and means used to end conflicts and by failing to prohibit actions that lead to unnecessary brutality and suffering.¹⁵² Therefore, he proposes that new definitions for perfidy and ruses are required.¹⁵³

In conclusion, even though new definition of perfidy might be required, forces still need to operate with the existing definition. This allows combatants to operate more freely without having to worry about violating IHL. Therefore, if SOF operators have no intent to kill, injure or capture the enemy, their actions are not perfidious according to IHL. However, it is very concerning because those actions still might put civilians in danger.

¹⁵¹ Dehn (2008), *supra nota* 138.

¹⁵² Greer (2015), *supra nota* 127, p 273.

¹⁵³ *Ibid.*, p 267. Greer proposes the following definitions:

“Perfidy: Actions taken with the intent to deceive an enemy constitute unlawful perfidy if the actions create an increased risk of harm to non-combatants; promote disproportionate chaos or destruction; or inhibit the swift and peaceful resolution of the conflict.

Ruse: Actions taken with the intent to deceive an enemy that do not constitute perfidy.”

3. ROLE OF A UNIFORM IN MODERN TYPE OF ARMED CONFLICT

War has always been a collateral of human action and there have always been attempts to regulate and humanize methods of war. Nowadays we are facing new type of warfare – hybrid warfare, which creates new type of problems concerning rules of IHL. Cullen and Reichborn-Kjennerud describe hybrid warfare as: “the synchronized use of multiple instruments of power tailored to specific vulnerabilities across the full spectrum of societal functions to achieve synergistic effects”.¹⁵⁴ Methods of hybrid warfare are not limited to military activities. However, very often armed forces are required to act, because law enforcement organizations are not ready to face hybrid threats. This might be due to lack of resources or absence of necessary procedures. In turn, this creates huge challenge for armed forces by pushing them to use new tactics (e.g. cyber activities, psychological operations etc.).

This chapter gives an overview of military practice concerning wearing of uniforms. More specifically, it will analyse whether new tactical situation should be followed with updating rules of IHL. Lastly, this chapter will analyse one of the dilemmas SOF units are dealing with when they are choosing their combat attire. Their actions might have serious consequences and SOF units must be able to analyse all aspects that affect their operations – reaction of international community; how their actions might be perceived by the adversary; how their actions might affect the protection of civilians and future operations; and whether or not their actions might constitute violations of IHL.

3.1. Analyses of military manuals

Many countries regular armed forces have their own military manuals. Military manuals contain instructions by states restraining their soldier’s actions, thus making them important sources for identifying state practice.¹⁵⁵ Manuals are an important mode for making international law as well

¹⁵⁴ Cullen, P. J., Reichborn-Kjennerud, E. (2017). *MCDC Countering Hybrid Warfare Project: Understanding Hybrid Warfare*. Accessible: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/647776/dar_mcdc_hybrid_warfare.pdf, 12 March 2019, p 8.

¹⁵⁵ Sassòli & Bouvier (1999), *supra nota* 38, p 108

as evidencing its existence.¹⁵⁶ Because international law notoriously lacks its own enforcement system, national implementation is often a critical factor in successful international law-making.¹⁵⁷ The content of manuals, while not absolutely probative that particular international norms are being effected at the national level, is a *conditio sine qua non* for their implementation.¹⁵⁸ However, clear evidence of actual military practice is exceedingly difficult to obtain, especially if it is based not only on the activities of some selected states, but on a universal approach confronting the practice of all states in the world.¹⁵⁹

Database of the International Committee of the Red Cross (ICRC)¹⁶⁰ was used for analysing military manuals for this section. Most of the military manuals are not available in English and are not available to the public in general or there are no military manuals. Therefore, using ICRC database, which contains many of the countries' specific regulations of their military manuals or other similar documents, provides the best overall situation concerning how principle of distinction, and more specifically, uniform requirement is regulated. In addition to ICRC database, US updated version of their military manual¹⁶¹ was used because ICRC database did not include the updated version of US military manual.

Analysing military manuals only rules concerning members of regular armed forces were taken into account. Irregular forces or members of non-regular armed forces were not analysed due to the fact that this thesis is focusing on obligations of regular armed forces.

Altogether 32 military manuals were analysed that were included in ICRC's database. Either ICRC does not have access to the military manuals of the rest of the states or they do not have military manuals, including Estonia. List of how uniform requirement is regulated in military manuals can

¹⁵⁶ Reisman, M. W., Leitzau, K. W. (1991). Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict. – *International Law Studies Series. US Naval War College*, Vol. 64, 1-18, p 7.

¹⁵⁷ *Ibid.*, p 8.

¹⁵⁸ *Ibid.*

¹⁵⁹ Kolb & Del Mar (2014), *supra nota* 52, p 58.

¹⁶⁰ International Committee of the Red Cross. *IHL Database. Customary IHL. Practice Relating to Rule 106. Conditions for Prisoner-of-War Status*. Accessible: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule106, 17 March 2019.

¹⁶¹ Office of General Council Department of Defense. (2015, updated 2016). *Department of Defense Law of War Manual*. Accessible: <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>, 17 March 2019.

be found in Appendix 1. Analysed military manuals had 11 different types of regulations concerning how members of regular armed forces should distinguish themselves from civilian population:

- 1) Only uniform required;
- 2) Uniform **or** distinctive sign required;
- 3) Uniform required **or** arms carried openly;
- 4) Uniform **or** distinctive sign required **and** arms carried openly;
- 5) Uniform **and** arms carried openly required;
- 6) Uniform worn together with a distinctive sign **and** arms carried openly;
- 7) Distinctive sign visible from a distance required **and** carry their arms openly;
- 8) Uniform **or** recognizable distinctive sign required **or** at least by carrying their arms openly;
- 9) Only carrying arms openly;
- 10) General obligation for combatants to distinguish themselves from civilians (no further conditions provided);
- 11) Exemption to principle of distinction provided in Article 44(3) of AP I apply to members of regular armed forces as well.

Number of differences in the regulations in military manuals is an indication that states do not have a common understanding of principle of distinction. Vague wording of Geneva Conventions and AP I concerning obligations of principle of distinction of members of regular armed forces allows different interpretations by states. Some of those regulations are not in coherence with the GC III and AP I - e.g. only carrying arms openly or in other cases only uniform or distinctive sign required, however no carrying of arms openly required. In those cases, state creates a situation to its members of regular armed forces where soldiers will violate principle of distinction. Regardless that they follow the instructions regulated in military manual. Thus, states knowingly endanger civilian population due to the fact that members of regular armed forces are more difficult to identify amongst civilians.

Some of the rules are providing stricter conditions compared to GC III and AP I - e.g. wearing uniform and distinctive sign together, even though according to IHL it is not required to wear them both.¹⁶² This in turn might propose another problem concerning SOF units. States that have more strictly regulated conditions for distinction in their military manuals and they still deploy SOF

¹⁶² GC III, Article 4A(2).

units, who might not follow the rules stated in military manuals. However, those SOF units still act in accordance with IHL and, thus, they are conditioned to violate those military manuals. Internal disciplinary proceedings might follow. In order to avoid those situations, it might be practical to include separate set of rules for SOF units. This would ensure more flexibility for the state to deploy different units and still make sure their actions are in accordance with IHL.

Concerning principle of distinction, military manuals mostly cite the text of international treaties – The Hague Regulations, Geneva Conventions and AP I. There are no practical and specified instructions in military manuals on when and where members of regular armed forces have to wear uniforms and to what level they can deviate from the uniform requirement. Article 44(3) of AP I provides an exemption for uniform requirement, however, there are limitations to its application concerning timing. Thus, military manuals should provide instructions accordingly. Otherwise commanders are the ones who will decide the legal outcome by choosing the attire their subordinates have to wear based on solely on the operational situation and military necessity. Commanders might be tempted to choose in favour of the lives of their soldiers instead of legal correctness.

Military necessity in its material sense may weigh heavily the way in which a given rule of international humanitarian law is formulated.¹⁶³ Each situation, as also each operation, requires assessment and analyses. When military manuals provide very general rules concerning attire then it is not enough, at least not for SOF unit commanders. They need more precise instructions on when and in which situation they can change the attire in order to not deviate from the conditions of gaining combatant and PW status. Thus, it leads to a question whether new tactics also require new and more specific rules?

3.2. Do changing tactics require new rules?

It is now commonplace to observe that the Second World War – a “total” war, in which the great powers mobilized vast armies and applied the full industrial and economic resources of their

¹⁶³ Hayashi, N. (2010). Requirements of Military Necessity in International Humanitarian Law and International Criminal Law. – *Boston University International Law Journal*, Vol. 28, No. 1, 39-140, p 45.

respective nations to the defeat and occupation of enemy states – is no longer the prototype.¹⁶⁴ The military trains for tasks far from conventional combat – local diplomacy, intelligence gathering, humanitarian reconstruction, urban policing, or managing the routine tasks of local government.¹⁶⁵ Some of those tactics are conducted by SOF units. Thus, the importance of SOF units have increased. SOF is specially trained and equipped for conducting operations behind enemy lines. According to NATO SOF concept SOF units are conducting three types of operations – military assistance, special reconnaissance and direct action.¹⁶⁶ Each state might have specific additional types of operations according to their requirements – e.g. Estonian SOF has an additional task of conducting unconventional warfare,¹⁶⁷ US SOF tactics also include civil affairs, psychological operations and information warfare.¹⁶⁸

Those are not new tactics, however, these tactics are becoming more common. Thus, more attention is required from the legal perspective. Throughout history militaries have used spies and undercover units who conducted their operations in a clandestine manner. Even though IHL regulates that combatants must distinguish themselves from civilians, states have always knowingly deployed units who do not follow those rules, e.g. Israel.¹⁶⁹ For example, Israel has established three undercover units throughout the years: Duvdevan, Shimshon (dissolved in 1994) and Yamas.¹⁷⁰ All of those units' *modus operandi* is very similar – fighters disguise themselves as locals in order to capture and detain suspects in West Bank.¹⁷¹ However, it has been identified by Rosenzweig in his Policy Paper that Israel should try to use undercover units only in law enforcement situations; during armed conflict, Israel should avoid executing these operations in a perfidious way.¹⁷²

Warfare on land can take many forms and the international laws of war must be equally applicable in whatever form it takes.¹⁷³ It seems likely, however, that the framers of the Hague Regulations 1907 did not have directly in mind the covert activities of special forces, operating at long distance

¹⁶⁴ Kennedy, D. (2007). Modern War and Modern Law. – *Minnesota Journal of International Law*, Vol. 16, No. 2, 471-494, p 474.

¹⁶⁵ *Ibid.*

¹⁶⁶ Moon (2018), *supra nota* 86.

¹⁶⁷ Kaitseväe põhimäärus, RT I, 29.03.2019, 15, § 16.

¹⁶⁸ Adams (1998), *supra nota* 84, p 15.

¹⁶⁹ Rosenzweig, I. (2014). *Combatants Dressed as Civilians? The Case of Israeli Mista'arvim Under International Law*. Policy Paper. Jerusalem: The Israel Democracy Institute.

¹⁷⁰ *Ibid.*, pp 23-24.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, p 78.

¹⁷³ Rowe (1994), *supra nota* 85, p 210.

from the main area of military operations, when setting down the main treaty rules of land warfare.¹⁷⁴ Nevertheless, both the Hague Regulations (which have been added to by the First Additional Protocol 1977) and of customary international law must be applied to the operations of these forces.¹⁷⁵

As was mentioned above military manuals still contain general wordings and direct quotations of codified law concerning principle of distinction. This is not very helpful to commanders who are facing new types of warfare. Commanders need more precise guidance in order to fulfil their tasks and still act in accordance with IHL. Modern type of warfare has shifted from medieval honour based warfare. Regular armed forces have to deal with freedom fighters, irregular fighters, guerrillas etc. and very often their tactics are to terrorise civilian population in order to achieve their end state. Treacherous acts and targeting civilians are common tactics for the adversary. However, this does not mean members of regular armed forces can fall on the same level as they are. Regardless, those tactical situations require more precise rules for soldiers.

Lauterpacht is of the opinion that even if international lawyer feels the law of war is at the vanishing point, he or she still must continue to expound and to elucidate the various aspects of the law of war for the use of armed forces, governments, etc.¹⁷⁶ The first step for it is to update military manuals or, if military manual does not exist in that country, then at least more precise guidance should be given. Military lawyer should combine legal advice with the actual operational situation taking into account the aspect of military necessity. Only then can commander make a correct decision. Otherwise, commanders will interpret military necessity to remain undercover, to be more important than acting in accordance with IHL.

Decisions made by commanders reflect practice used by that state in matters of military conduct and interpretation of IHL. It is relevant to point out that according to Beck customary law does not necessarily need to reflect very long standing practice.¹⁷⁷ In the light of today's instant communications and rapid developments, a virtually uniform, widespread and representative

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Lauterpacht, H. (1952). The Problem of the Revision of the Law of War. – *British Yearbook of International Law*, Vol 29, 360-382, p 382.

¹⁷⁷ Beck, D. L. (2005). Developments in Customary International Law. – *Swiss Review of International and European Law*, Vol. 15, No. 3, 471-498, p 477.

practice can emerge within a few years.¹⁷⁸ This possibility of fast emergence of customary international law was confirmed by the International *Court of Justice in the North Sea Continental Shelf Case*.¹⁷⁹ Customary international law shaped by military practice can moreover sometimes be used fruitfully in order to interpret general principles contained in treaties, which need to be concretized.¹⁸⁰

Therefore, the answer to the question, whether changing tactics need new rules, is that new rules are not required, however, more precise guidance is required. Commanders need more detailed instructions on when and how their soldiers are required to distinguish themselves. Military manuals analysed for this thesis did not provide those detailed instructions. Those states that have military manuals should revise their manuals so that those would cover legal aspects of SOF tactics as well. Countries, that do not have military manuals, should provide detailed guidance concerning principle of distinction in another document – e.g. code of conduct, rules of engagement, operational plan, etc.

3.3. Dilemmas of SOF units in choosing their attire

When armed forces conduct their operational planning they mostly take under consideration tactical aspects – how far is the enemy, when to engage them, with what force to engage them with and whether those means are legal. In choosing their attire for operations, SOF units must take under consideration several aspects in addition to the previously mentioned – if they wear the clothes of local fighters, partial civilian clothes or all civilian clothes then what would be the international reaction (media coverage), interpretation of their status upon capture, ethics, etc. The list may continue depending on the operation. However, the author of this thesis is of the opinion that those aspects have the ability to affect the outcome of the entire mission the most.

Importance of media in modern armed conflicts has increased. Reporters deploy to conflict areas on a daily basis and they follow units during their operations. The term “strategic corporal” is used in military circles more often. Strategic corporal can be defined as: “A strategic corporal is a soldier that possesses technical mastery in the skill of arms while being aware that his judgment,

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*; ICJ, *North Sea Continental Shelf Case*, Judgement, 20 February 1969, ICJ Reports 1969, p 43, para 74.

¹⁸⁰ Kolb & Del Mar (2014), *supra nota* 52, p 57.

decision-making and action can all have strategic and political consequences that can affect the outcome of a given mission and the reputation of his country.”¹⁸¹ Even though media would not have access to SOF units operations due to being mostly classified, their actions might still have the same effect as strategic corporal. If SOF units would be spotted conducting clandestine operations while they are not distinguishing themselves according to IHL, it might have negative effect on the entire mission. In addition, even if SOF units would distinguish themselves in a way which is allowed (e.g. Art 44(3) of AP I), it still provides room for interpretation for media or the adversary. Thus, it might lead to a situation where SOF units are accused of violating principle of distinction. Depending on how it might look on media. The adversary will most definitely use it for their advantage.

Media coverage leads to international reaction. However, media is not the only one that can affect the international reaction. Also non-governmental organizations (NGO) have an impact on that. For example US SOF units were assisting to prevent the assassination of President Karzai in Afghanistan while they were wearing parts of local civilian attire and they had beards.¹⁸² Photos of that event lead to NGO-s starting to pressure Washington claiming that SOF operators are violating principle of distinction.¹⁸³ Soon after that SOF units were ordered to wear uniforms and shave their beards.¹⁸⁴ Even though SOF operators were clearly distinguishable from locals and not in clear violation of principle of distinction, they still had to change their attire due to international reaction.

SOF units should also take into account how their attire might be interpreted by the adversary upon their capture. This is crucial because SOF units might conduct their operations behind enemy lines and, thus, the risk of getting captured by the adversary is very high. If they are not distinguished properly they might be perceived as spies. According to Article 44(4) of AP I combatants who fail to meet the requirements set forth in Article 44(3) of AP I are still entitled to the protections accorded to prisoners of war.¹⁸⁵ Regardless, the situation might be different in reality – the

¹⁸¹ Liddy, L. (2005). Strategic Corporal. Some Requirements in Training and Education. – *Australian Army Journal*, Vol. 2, No. 2. 139-148, p 140.

¹⁸² Brooke, J. (2002). Vigilance and Memory: Kandahar; Pentagon Tells Troops in Afghanistan: Shape Up and Dress Right. – *The New York Times*, 12 September. Accessible: <https://www.nytimes.com/2002/09/12/us/vigilance-memory-kandahar-pentagon-tells-troops-afghanistan-shape-up-dress-right.html>, 9 April 2019.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ AP I, Article 44(4).

adversary's actions might not be in accordance with IHL. Thus, SOF operators must prepare for the worst case scenario. In addition to being considered as spies, SOF units must also take into account that when they are not distinguished properly the adversary might claim there is a violation of IHL.

Ethical aspect in military planning is very often disregarded. Military planning is directed to mission accomplishment and the only limits are either legal or tactical – not all actions are allowed according to IHL and not all activities can be carried out due to either lack of resources or unsuitable operational environment. Ethical approach depends on a personal view of the commanders. However, this should not be the case. Liivoja writes in his article that “The law of armed conflict can only be made sense of if one bears in mind the most rudimentary considerations of military honour.”¹⁸⁶ Meaning that IHL originates from traditional military customs that always have been related to honour. Therefore, tactical decision should not only be made based on operational, tactical and political requirements, but also ethical aspects should be considered.

The case of hostage rescue operation in Colombia¹⁸⁷ mentioned above is a good example of what might be the ethical aftermath of a successful operation. Hypothetically, if no FARC members would have been captured, the operation might be considered in accordance with IHL, because Colombian forces used emblems of fictitious NGOs. However, after that operation FARC will not trust NGOs anymore. Thus, as a result, members of existing organizations are in danger when they attempt to communicate with the FARC. Therefore, even if SOF units are conducting their operations in accordance with IHL, they should bear in mind what the consequences of their actions might bring to locals and other institutions operating in a conflict zone.

Liivoja also cited a young marine officer in his article who acknowledged that getting his men back home alive was not his only concern – it was also important for his men to realise that they had fought with honour and retained their humanity.¹⁸⁸ Thus, ethical aspect is not only important for the activities of soldiers to be in accordance with IHL, but also for the benefit of the soldiers' mental health as well.

¹⁸⁶ Liivoja, R. (2012). Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict. – *ENDC Proceedings*, Vol 15, p 77.

¹⁸⁷ Dehn (2008), *supra nota* 138.

¹⁸⁸ Fick, N. (2005). *One Bullet Away: The Making of a Marine Officer*. Boston, MA: Houghton Mifflin, p. 241 cited in Liivoja (2012), *supra nota* 178, p 96.

In conclusion, even though SOF operations are mostly conducted in a clandestine manner and operators might fall under the conditions of Article 44(3) of AP I, the results of those operations might have a negative impact on the overall mission. In addition, it might also have negative impact on their own status upon their capture by the adversary. Furthermore, clandestine activities of SOF operators might also endanger civilians in general. Therefore, broader approach should be taken when deciding to use civilian clothes during an operation.

CONCLUSION

In modern types of warfare, the importance of SOF units have increased. SOF units mostly conduct clandestine operations behind enemy lines, where they are required to blend in to local population and environment as much as possible. Military practice has shown that members of armed forces, especially SOF units, tend to deviate from uniform requirement. Depending on operational requirements they might either change out of their uniform completely and act as civilians and identify their combatant status on the very last minute prior to an attack. Thus, their status and activities propose a legal challenge.

Aim of this thesis was to analyse principle of distinction and what specific requirements does it entail concerning combat attire of SOF operators during clandestine operations in an international armed conflict. More specifically, to find an answer to the following question: taking into consideration of modern types of warfare and states' practice concerning deployment of SOF units, are members of SOF units, due to being part of regular armed forces, required to wear a uniform according to AP I?

SOF units are also part of regular armed forces. Thus, obligations to distinguish themselves from civilians, apply to SOF operators the same as to other members of regular armed forces. According to GC III it is obligatory for members of armed forces, amongst other requirements, to at least wear a distinctive sign recognizable at a distance and carry their arms openly in order to distinguish themselves from civilians.

Geneva Conventions were complemented in 1977 with Additional Protocols. Article 44(3) of AP I provides an exemption for distinction when "owing to the nature of hostilities an armed combatant cannot distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly during each military engagement and during each time he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate".¹⁸⁹ However, Article 44(7) of AP I states that "this Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units".

¹⁸⁹ GC III, Article 44(3).

Thus, AP I establishes rules for distinction that can be interpreted ambiguously – on one hand, rules can be interpreted in a way that standard uniform for regular armed forces is required and, on the other hand, that armed forces can also enjoy the conditions of Article 44(3) of AP I in the same manner as guerrilla forces. However, taking under consideration scholarly opinion and the intent of the drafters, it can be concluded that members of regular armed forces are entitled to the same conditions as guerrillas under Article 44(3) of AP I. Regardless, this concept has its limitations concerning the timing of when members of regular armed forces can enjoy the benefits of Article 44(3) of AP I. This exemption is considered to apply in certain circumstances only – in an enemy occupied territory, assisting irregulars, during actions outside combat zone.

Analyses conducted for this thesis establishes that SOF operators would still remain their status as combatant and are entitled to the status of PW in the following situations:

- 1) While they wear a uniform;
- 2) While they wear partial uniform or distinctive sign recognizable at a distance with arms carried openly;
- 3) While they wear indigenous civilian clothes with arms carried openly in cases where indigenous clothing is a clear sign amongst the locals and the adversary as a distinction element for combatants;
- 4) While they wear civilian clothes with arms carried openly in situations of occupation or working together with guerrilla forces, when “owing to the nature of the hostilities cannot so distinguish himself” during each military engagement and during each time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Military deployment in the sense can be interpreted as moments immediately prior to an attack.

Therefore, it can be concluded that SOF operators, as also other members of regular armed forces, are not always required to wear a uniform according to AP I. They can enjoy the exemption provided in Article 44(3) of AP I in certain cases mentioned above. Furthermore, uniform is not defined in any of the IHL treaties. It is up to states to provide specific guidance on what state is considering as a uniform and what requirements it must fulfil.

However, SOF operators must still take under considerations other aspects concerning their combat attire – international reaction, interpretation of their status by the adversary, ethics, etc.

Even though, their actions might be in accordance with IHL concerning their wear of “non-standard uniforms”, it might still affect their status in the eyes of the adversary upon their capture. In addition, those operations might have negative impact on the locals and other actors who are operating in a conflict zone – e.g. NGOs. The adversary might be of impression that SOF operators are using their protective status, and thus, civilians are put in danger.

Military manuals were analysed for this thesis concerning how countries have regulated the obligation for armed forces to distinguish themselves from civilians. Military manuals mostly use very generic language and cite codified law. Some manuals were not even in accordance with IHL. Military manuals are written to the entire armed forces. However, SOF units’ tactics differ from regular armed forces. Therefore, SOF units require more precise guidance concerning their combat attire in order for them to still be able to conduct a successful operation and act in accordance with IHL. Otherwise the decision concerning wearing or not wearing a uniform is done by operators themselves and this might lead to violations of IHL.

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APPENDICES

Appendix 1. Overview of military manuals

Rule	Countries	Remarks
Only uniform required	Australia* Belgium Burundi Colombia Côte d'Ivoire Germany Kenya South Africa Switzerland	Australia recognizes that even though normally uniform is required also Article 44(3) of AP I conditions apply when operating covertly or as guerrillas.
Uniform or distinctive sign	Israel	-
Uniform or arms carried openly	Switzerland*	Switzerland has different requirements in different documents – Basic Military Manual requires regular armed forces to wear a uniform and their Regulation on Legal Bases for Conduct during an Engagement requires uniform or arms carried openly
Uniform or distinctive sign and arms carried openly	Togo UK* US*	UK also recognizes that Article 44(3) of AP I applies to members of armed forces in occupied territory to which Article 4(1) of AP I applies. US Law of War Manual (2015, updated 2016) however recognizes that members of regular armed forces who are accompanying other forces are allowed to wear the uniforms of those forces. In addition, non-standard uniforms are allowed in order to blend in with local forces, but still remain distinguished from civilians.
Uniform and arms carried openly	The Netherlands Sweden	-
Uniform worn together with a distinctive sign and arms carried openly	Cameroon Croatia Hungary	-
Distinctive sign visible from a distance and carry their arms openly	Greece Guinea New Zealand	-

	Spain	
Uniform or recognizable distinctive sign or at least by carrying their arms openly	Benin Croatia* France Italy Madagascar	Croatia has different requirements in different documents – LOAC Compendium requires uniform worn together with a distinctive sign and arms carried openly and their Commander’s Manual requires that either uniform or distinctive sign or arms carried openly.
Only carrying arms openly	Russian Federation Ukraine	-
General obligation for combatants to distinguish themselves from civilians	Argentina Dominican Republic	-
Art 44(3) conditions apply to members of regular armed forces	Australia Canada UK	-

Source: International Committee of the Red Cross. *IHL Database. Customary IHL. Practice Relating to Rule 106. Conditions for Prisoner-of-War Status*. Accessible: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule106, 17 March 2019; author’s conclusion of the data.