

## Military uniforms and the law of war

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The use of uniforms is found everywhere. Schoolchildren often wear uniforms distinguishing them from pupils of other schools; boy scouts proudly don military-like uniforms with insignia indicating membership and rank. Bus drivers, sportsmen and women, milk deliverers, monks, nurses and security personnel of private companies all wear clothes identifying them as belonging to a particular group, service, firm or profession. They may wear uniforms of plain fabric or of a distinctive design. By its lack of variation and diversity, the uniform promotes a sameness of appearance and brings homogeneity to an otherwise heterogeneous group of people.

Other groups indicate their membership of a particular segment of the population more discreetly. Companies, institutions and administrations prescribe dress codes; a particular haircut or even posture shows obedience or devotion to a group, mission or goal; the wearing of symbols such as pins or badges fosters a cooperative image or national pride. The similarity in salient details distinguishes such groups from other groups or the general population.

Armies both past and present have continued to do the same: their best-known distinctive sign is the military uniform. Literally, the word uniform derives from the words “*una*” (one) and “*forma*” (form). Its general meaning is clothing in a particular fabric and with a particular design, colour and insignia, defined in regulations and/or by tradition for all members of one and the same military unit. Military uniforms are intended to demonstrate that their wearers belong to the armed forces of a State. They may differ according to the particular branch of the armed services and army, navy and air force uniforms may be of different colour but they are mostly similar in style. The accessories and insignia are often war- or weapons-related.

The military uniform is a form of clothing with a particular symbolism and a long history and tradition. Even individual regiments may dress differ-

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ently to reflect their history and reputation. The uniform reflects order and discipline, and calls for subordination by displaying a variety of insignia, including badges that indicate rank and emphasize the hierarchical structure of armies. It also calls for respect and fear and symbolizes strength and power: it includes features designed to make its wearer appear broader or taller, and thus to enhance the soldiers' stature in the eyes of comrades, civilians and the enemy. Finally, it helps to create an identity of appearance and an *esprit de corps* and is thereby conducive to the bonding process.

The military uniform distinguishes the members of armed forces from the rest of the population. In international armed conflicts, members of the armed forces can lawfully take part in combat on the battlefield. Inversely, they can be lawfully attacked. The absence of a military uniform usually indicates that a person is a civilian, is therefore not allowed to perform military functions and must not be attacked.

On the battlefield, the proudly worn dress uniform may sometimes become a burden and counterproductive in military terms. Distinctive signs may be reduced to a minimum or dispensed with entirely to reduce the visibility of combatants and to enhance operational flexibility, especially in covert operations. In guerrilla warfare, combatants often do not display any distinctive signs but blend in with the rest of the population in order to avoid identification. In other circumstances, however, the fighters of the various parties to internal armed conflicts want to be perceived clearly as combatants and choose to wear all kinds of uniforms demonstrating this identity.

In this article the issue of military uniform is examined by observing trends from ancient times to the creation of State armies and the practice of belligerents in armed conflicts today. The historic perspective will show that the wearing of military uniforms had other objectives and even today has mainly different functions than those attributed to it by the requirements of international humanitarian law, namely to ensure the clear distinction between civilians and the military.

This principle of distinction determines the legal ramifications related to the wearing of a military uniform. The question will be examined if the military uniform as a distinctive sign fulfils this requirement of the law of war. The prominence of the distinctive sign and its most important manifestation, the military uniform, was often also considered as an essential element of the definition of armed forces. The examination of this question leads to the further enquiry of whether only uniformed members of the

armed forces are to be considered as lawful combatants when engaged in military hostilities and prisoners of war in case of capture. The question arose recently in relation to the captured Taliban soldiers who were denied prisoner of war status in the armed confrontation between Afghanistan and the United States of America, *inter alia* on the basis that they were not wearing uniforms. Finally, it will be shown that the question of the military uniform does not have the same implications in non-international armed conflicts.

### **An historical perspective**

Among ancient warriors one of the most important considerations in warfare was already to maintain the solidarity of the fighting group. Techniques of warfare and details of weaponry enabled the members of a group to determine at a glance to which group a person or item belonged.<sup>1</sup> One of the first forms of identification was the use of protective devices consisting of wooden or leather shields and occasional head or body armour made of skins. These were the first signs of specific items being used to single out those who took part in fighting.

#### First signs of uniforms

Early evidence has been recorded of military formations and uniforms more than five thousand years ago, and in ancient history uniformed soldiers were found in particular in militarized civilizations. In Mesopotamia, exposed to outside intrusion, warfare dominated Sumerian life in the third millennium BC and led to military specialization; an army of more than 5,000 soldiers wore metal helmets, cloaks and fringed kilts. In the second millennium BC the rulers in Mesopotamia maintained out of their revenue bodies of armed men ready to go to war.<sup>2</sup> In Babylonia, Persia, Rome, Turkey, Japan and Peru conscription was often used by centralized political and military authorities.<sup>3</sup> Their newly formed armies, which were larger organized forces trained to make war, often added various types of armour and helmets to the body protection of the shield and used them as elements of identification. The less centralized governments of Sumeria, India and China relied throughout much of their history on the use of volunteers or militia armies.

<sup>1</sup> J. L. Myres (ed.), *The Evolution of Culture and Other Essays of the Late Lt-Gen. A. Lane-Fox Pitt-Rivers*, Clarendon Press, Oxford 1906, p. 51.

<sup>2</sup> John Keegan, *A History of Warfare*, Pimlico, London, 1993, pp. 131-136.

<sup>3</sup> Quincy Wright, *A Study of War*, 2nd edition, University of Chicago Press, Chicago, 1965, pp. 145-151.

Military Egypt had a war style as distinctive to itself, and almost as long lasting, as its own civilization. The many depictions of warfare in its sculpture and wall paintings show that its soldiers did not wear armour of any sort, but marched to battle bare-chested and bareheaded, with only short shields for protection. Apparently, Egyptian warfare was stylized and perhaps even ritualized.<sup>4</sup> Battle was not ceremonial, however, when fought against foreigners.<sup>5</sup>

#### Emergence of large standing armies

Chandragupta, who inaugurated the Maurya Empire immediately after the time of Alexander the Great, is said to have already had an army of 600,000 infantry, 30,000 horsemen, 36,000 men with elephants and 24,000 men with chariots.<sup>6</sup> The Assyrians also established large standing armies and the principles of military bureaucracy<sup>7</sup> on which the Romans built. The Roman army at the time of Augustus numbered more than a half a million men at its height. The backbone of the Roman army was formed by a hard core of professional soldiers wearing clothing and equipment clearly identifying them as belonging to it.

Although Rome was the mother of modern armies, Europe was a continent without armies after the dissolution of the Roman Empire. Between the disciplined armies of Rome and the reappearance of State forces in the sixteenth century, the precursors of military uniforms largely disappeared. In the second half of the first millennium, Arab fighters successfully set out to extend the boundaries of Islam. Despite their lack of experience in warfare, they were victorious against the disciplined, organized and uniformed armies of Byzantium and Persia. Their unconventional fight for their faith made them formidable in the field. It enabled them to prosecute the campaign into Spain and Central Asia, and revealed the incomprehension of traditional armies when confronted by an opponent who refused to share their cultural assumptions. Another clash of two quite different military cultures came when Genghis Khan

<sup>4</sup> Keegan, *op. cit.* (note 2), p. 131.

<sup>5</sup> The sanctions of the rules of war have been inadequate between peoples of similar civilizations, but observance of such rules has been almost entirely lacking in wars between different civilizations. Among the Greek city-states, for example, rules recognized in hostilities between them were considered inapplicable in war with barbarians. See: Wright, *op. cit.* (note 3), pp. 812-813.

<sup>6</sup> According to Wright, *op. cit.* (note 3), p. 148.

<sup>7</sup> Keegan, *op. cit.* (note 2), p. 267.

and the Mongols acquired a reputation of invincibility by subjecting large parts of Asia and Europe to military domination through an unparalleled system of terror. Despite Genghis Khan's strong military organization, the Mongolian horsemen were hordes rather than uniformly dressed armies.<sup>8</sup>

#### Appearance of a distinctive sign

The Middle Ages, including the period of the Crusades, and the Renaissance made extensive use of heraldic signs (of communities, corporations or families) for identification in battle, but also for symbolic or aesthetic reasons or as a demonstration of strength.<sup>9</sup> There were two kinds of bodies of armed men, retainers and mercenaries, and while the former often wore their master's livery, the latter were dressed each according to his own taste or means. Even if the generals ordered the men to wear some improvised badge such as a sprig of leaves, or to leave their shirt outside their coat, such indications were easily lost or removed.<sup>10</sup> Initially they were simply "field signs" — tufts of grass or leaves or anything to insert in the hatband or the belt-sash.

Soldiers also wore distinctive signs sown on their clothes. An early example is the white cross, in the form of two white bands set at right angles, which appeared for the first time in 1339 in a battle where fighters of a Swiss region wanted to distinguish themselves from the Austrians and the Lansquenets of the King of Burgundy.<sup>11</sup> In the subsequent wars, the Swiss wore the distinctive sign in order to be recognized and not be attacked by other Swiss fighting with the enemy.

The absence of uniforms accounted largely for the significance attached to the colours and standards, which alone formed rallying points for the soldier and his comrades. A man who left the colours or wanted to desert wandered into the terrifying unknown, for there was nothing to distinguish friend from foe, notwithstanding the outlawing of possible deserters.

<sup>8</sup> Keegan, *op. cit.* (note 2), pp. 188-217.

<sup>9</sup> Franco Cardini, *La culture de la guerre, X<sup>e</sup> – XVIII<sup>e</sup> siècle*, Gallimard, Paris, 1992, pp. 217-220.

<sup>10</sup> See: "Evolution of the uniform", War Planning and Training Division O.Q.M.G., USA, published in *The Quartermaster Review*, March-April 1928, also available at: [http://www.qmfound.com/uniform\\_evolution.htm](http://www.qmfound.com/uniform_evolution.htm) (visited on 16 February 2004).

<sup>11</sup> Peter F. Kopp, "Croix fédérale" in: *Dictionnaire historique de la Suisse*, available at: <http://lexhist.ch/externe/protect/textes/f/F10104.html> (visited on 16 February 2004).

### Spread of the military uniform

Developments in military equipment in the sixteenth and seventeenth centuries led to the disappearance of heavy armour and the helmet. At the same time, the wearing of a military uniform became a major element of identification. When large standing armies began to be established after the Peace of Westphalia, the need for distinctive attire on the battlefield spread throughout all European armies.

Insignia such as the white and red roses of the Yorkists and Lancastrians in the War of the Roses were progressively phased out and in the “New Model Army”, which came into effect in England after 1640, the distinctive sign of each detachment, otherwise previously dressed identically even to the enemy, was abolished in favour of clothing that was uniform first in colour and then in cut. As a first step a scarf of uniform colour was introduced, such as that supposed to have been worn by the “green”, “yellow” and other similarly named brigades of the Swedish Army under Gustav Adolph during the Thirty Years’ War. The colours of the coat were then standardized, and during the English Civil War the Royalists wore coats in regimental colours. The French use of grey and the English use of red were consolidated on the European battlefields.<sup>12</sup>

At the end of the seventeenth century, the concept of military uniform was largely accepted in all European armies. During the Napoleonic Wars, military uniforms evolved further and fashion and glamour became the rule. The soldier was showier and less comfortable than ever before or since. Some special troops, such as the Hussars of Polish origin, distinguished themselves by the elegance of their uniforms.

Frederick the Great could not have developed his infantry firepower had his soldiers worn tight sleeves, yet in his old age the tendency to sacrifice comfort for smartness gradually crept in. Nevertheless, military uniforms started to shed many ornaments and became more practical. Towards the end of the nineteenth century and by the start of the Boer War, attempts to wear dress uniform on active service had been given up by practically all countries.<sup>13</sup> In the twentieth century all armies wore service uniforms, as evidenced in particular by armies in the two world wars. At the same time, battledress became increasingly prevalent during actual hostilities. In addition, internal armed conflicts outnumbered international ones in the second half of the century, and since then warfare has been increasingly influenced by irregular

<sup>12</sup> See “Evolution of the uniform”, *op. cit.* (note 10).

<sup>13</sup> Cardini, *op. cit.* (note 9), pp. 217-220.

forces largely unaffected by regulations concerning the uniforms or insignia of State armies. But it is astonishing how similar military uniforms, their accessories and insignia appear in traditional armies despite different cultural and geographical environments.<sup>14</sup> This shows how the traditions of European armies have influenced the military history of the last three centuries, especially through their colonial outreach.

### **Present wearing and appearance of military uniforms and insignia**

Today, most armies have regulations on uniform policy and penal laws may punish a soldier for the unlawful wearing of a specific military uniform. Military regulations usually prescribe the appearance of uniforms and insignia and how they are to be properly worn by officers and enlisted personnel of the armed forces. The current US Army regulations on uniform policy contain, for example, 369 pages of rules, tables and figures.<sup>15</sup> The absence of written regulations on military uniforms does not, however, mean that uniforms are not usually worn. Custom and cultural traditions may be followed more scrupulously than detailed rules.

The US Army regulation, entitled “Wear and Appearance of Army Uniforms”, states that:

“The Army is a uniformed service where discipline is judged, in part, by the manner in which a soldier wears a prescribed uniform, as well as by the individual’s appearance. Therefore, a neat and well-groomed appearance by all soldiers is fundamental to the army and contributes to building the pride and *esprit* essential to an effective military force. A vital ingredient of the Army’s strength and military effectiveness is the pride and self-discipline that American soldiers bring to their Service through a conservative military image. (...) Soldiers must take pride in their appearance at all times, in or out of uniform, on and off duty. (...)”<sup>16</sup>

The quotation shows that the primary purpose of wearing the uniform is not to respect the law of war, but to keep up the military uniform’s traditional functions, such as identification, maintaining discipline, taking pride in wearing the uniform, and creating bonds and an *esprit de corps*.

<sup>14</sup> See the photos of traditional but current uniforms at the end of this article.

<sup>15</sup> *Army Regulation 670-1* issued by the Headquarters Department of the Army on 1 July 2002, Washington DC, and effective as of 1 August 2002 (hereinafter “US Army Regulation 670-1”). The regulation can be found at: <[http://www.usapa.army.mil/pdffiles/r670\\_1.pdf](http://www.usapa.army.mil/pdffiles/r670_1.pdf)> (visited on 16 February 2004).

<sup>16</sup> Chapter 7, Art. 1.a (Personal appearance policies) of US Army Regulation 670-1, *op. cit.* (note 15).

### Operational and unconventional use

Members of armed forces wear service uniforms for social functions and other uniforms are utilized for hospital or other organizational or technical tasks. The typical uniform during actual hostilities is nowadays camouflage clothing. Such clothing is largely adapted to the colour of the environment in which the army is operating, in order to make the wearer less visible and more difficult for enemy forces to target. Uniforms worn on the battlefield are mainly designed to meet combat requirements; they are only marginally geared to disciplinary requirements and even less to those of the law of war. The distinction between civilians and combatants is less important for the latter, even though the protection of civilians may be a key consideration in some types of modern armed conflict and may require precautionary measures to avoid civilian casualties.

The operational military criteria of functionality, flexibility, visibility and even material cost determine the uniform's appearance. Distinction is still important in the conduct of warfare, but what is particularly relevant on the battlefield is the ability to distinguish between friends and foes, and modern technology has helped in this regard.<sup>17</sup> Nowadays, armies are more concerned about finding new types of uniforms that can make soldiers invisible in particular circumstances and provide enhanced protection. Efforts are under way to devise armour that could detect threats and protect against projectiles and biological and chemical weapons by developing particle-sized materials and devices nestled in the uniform's fabric.<sup>18</sup>

In combat situations, distinctive signs may replace service and even battle uniform, in particular in covert operations. They are often used to mark an item of uniform — such as a beret, arm patch or lanyard.<sup>19</sup> Other insignia such as branch insignia, shoulder or sleeve markings, army nametapes or personal nametapes may indicate that a person belongs to an armed force, but are mostly not recognizable at a distance. Again, their purpose may be more to enable friendly combatants to recognize the wearer as one of theirs.

<sup>17</sup> See Identification Friend or Foe (IFF), also called “Blue Force Tracking”. Self-inflicted casualties (“Blue-on-blue fire”), often referred to in the media as “friendly fire”, is a major problem in modern warfare.

<sup>18</sup> See Curt Biberdorf, “Institute for Soldier Nanotechnologies opens”, available at: <<http://www.dtic.mil/armylink/news/May2003/a20030528nanotechnologies.html>> (visited on 16 February 2004).

<sup>19</sup> Whereas many special tasks identified by armbands are listed in regulations, e.g. military police, gas experts, photographers, and personnel protected under the Geneva Conventions, no provision for armbands is made in US Army Regulation 670-1 — *op. cit.* (note 15) — dealing with uniforms. See its Chapter 28, Art. 29.



With the growing discrepancy between opposing States in terms of military equipment and training, armed confrontations today are increasingly asymmetrical. Unequal warring parties might, for example, be a militarily powerful modern army fighting against the weak and poorly equipped army of another State or, in an extreme case, the armed forces of a State fighting against a handful of individuals. In such situations, the almost certain loser has no interest in wearing military uniforms or other distinctive signs. Obviously, the weak army will tend to dispense with its means of identification sooner rather than later, and individuals fighting in an asymmetrical conflict are even more likely to conceal their membership of an illegal organization. But the powerful army, if engaged in such an unequal struggle — insofar as it takes place in the context of an armed conflict — is also tempted to give up, at least partially, its means of identification.<sup>20</sup>

#### Non-uniformed members of armed forces

It is within the competence of the armed forces to decide if and when their members are allowed to wear civilian clothes. Not all members of the armed forces wear a uniform. Even the commander-in-chief of the armed forces, who is often the head of State,<sup>21</sup> usually wears civilian clothes. Other members of the armed forces may be exempted from wearing uniform when not performing combat functions. They include in particular back-office and headquarters staff, sometimes working in militarily decisive posts.<sup>22</sup> Even front-line combat personnel may temporarily be allowed to wear civilian clothes (holidays, etc.). Undercover work or espionage by members of armed forces will, for obvious reasons, mostly take place without proper identifying clothing, even though such activities may be unlawful under international law.

<sup>20</sup> See the State practice in W. Hays Parks, “Special forces’ Wear of Non-Standard Uniforms”, *Chicago Journal of International Law*, Vol. 4, No. 3, 2003, pp. 524-539 and 547-560.

<sup>21</sup> The Iraqi head of State Saddam Hussein was captured on 11 December 2003 wearing civilian clothes and declared a prisoner of war by the American authorities owing to his function as Commander of the Iraqi Armed Forces. Earlier, in 1990, Panama’s head of State Manuel Noriega surrendered in full military dress to the Americans and was recognized by an American tribunal on the same grounds as a prisoner of war. See: United States, *United States of America v. Manuel Antonio Noriega*, District Court for the Southern District of Florida, Decisions of 8 June 1990 / 8 December 1992, 746 F. Supp. 1506 (1990) / 808 F. Supp. 791 (1992), reproduced in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect In War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, International Committee of the Red Cross, Geneva, 1999, pp. 923-943.

<sup>22</sup> In technologically highly sophisticated societies, some of those functions and personnel are “outsourced” and no longer come within the remit of the armed forces (e.g. weapons development, but also logistical and technical services).

### Uniforms in internal armed conflicts

In internal armed conflicts, members of armed groups or other persons taking part in hostilities often appear in various types and styles of uniforms, if any. Government armed forces engaged in non-international armed conflicts usually wear their uniforms. Non-governmental organized armed groups often have an interest similar to that of the armed forces of States in wearing military-style uniforms. Identification, obedience, comradeship and a display of strength are as important for non-State contenders as they are for the armed forces of States, and these considerations may induce armed groups to wear uniforms. Sometimes, they may imitate official armed forces and wear military uniforms to gain respectability.

Paramilitaries, dissident military groups and armed groups fighting in civil wars often wear or at least imitate military uniforms, mostly battledress, which does not prevent them from discarding the uniform if operations so require. Often military uniforms are taken from the armed forces by armed groups, adapted to their group if time permits, but sometimes worn unchanged, thus adding to the confusion on the battlefield. Other civil war fighters dress in every imaginable kind of shirt or top, pants, jeans, shorts or shoes. Even these diverse garments may enable the wearers to be identified as belonging to a particular armed group, and thus as distinguishing themselves from other fighters and also from civilians.<sup>23</sup>

### Generally accepted practice to wear uniforms

International humanitarian law has taken the important function of the military uniform for the armies into account when affirming in Article 44(7) of Additional Protocol I the “generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict”. Although this provision was introduced to counterbalance the loosening in Protocol I of the identification requirement for guerrilla fighters,<sup>24</sup> it was also intended to point out that regular troops normally wear uniforms.

The section above on the present wearing and appearance of military uniforms and insignia testifies to this practice. A brief survey of some State

<sup>23</sup> In the fighting between religious groups in the Moluccas in Indonesia (1999-2001), for instance, Christian fighters wore red, Muslims white and partisans of the Sultan yellow headbands to distinguish themselves from each other during hostilities, whereas women and children hid in the nearby mountains.

<sup>24</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross/Martinus Nijhoff Publishers, Geneva, 1987, p. 542 (n. 1723).

practice, heavily influenced by international humanitarian law, furthermore shows that many States implement the rule that their soldiers must distinguish themselves from the civilian population by means of a distinctive sign, usually a military uniform, as well as by carrying their weapons openly. However, in their military manuals only very few States maintain the rule without reservation that their combatants must wear a uniform and, if such a rule is stated, it applies only to members of regular armed forces.<sup>25</sup> Many States add qualifying adjectives to the general rule that soldiers of regular armed forces must wear uniforms.<sup>26</sup> Other States refer to the uniform or a distinctive sign<sup>27</sup> and also to the condition of carrying arms openly.<sup>28</sup> A considerable number of States require as a minimum distinction that “at least” arms must be carried openly.<sup>29</sup> Finally, some States mention irregular forces, militias or guerrilla rebels, members of which must distinguish themselves by a distinctive sign and/or the open carrying of arms.<sup>30</sup>

### **The principle of distinction and the significance of the military uniform in international humanitarian law**

In accordance with the tradition progressively adopted by armies since the seventeenth century, it was assumed by the early drafters of the law of war that regular armies at least would distinguish themselves from the civilian

<sup>25</sup> Dominican Republic, *Military Manual* (1980), p. 3; Netherlands, *Military Manual* (1993), p. III-4 (see also *Military Handbook* (1995), p. 7-39); New Zealand, *Military Manual* (1992), para. 805(3); Sweden, *IHL Manual* (1991), Section 3.2.1.4, pp. 36; Switzerland, *Basic Military Manual* (1987), Article 26(1).

<sup>26</sup> Australia (“normally”), *Defence Force Manual* (1994), paras. 512–513; Belgium (“customary rule”), *Law of War Manual* (1983), p. 20; Colombia (“normally”), *Instructors’ Manual* (1999), p. 16; Kenya (“customary”), *LOAC (Law of Armed Conflict) Manual* (undated), Précis No. 2, p. 8; Madagascar (“usually”), *Military Manual* (1994), Fiche No. 2-SO, para. A; South Africa (“normally”), *LOAC Manual* (1996), para. 26; UK (“usually”), *LOAC Manual* (1981), Section 3, p. 9, para. 2 and (“customary”) Section 3, p. 8, para. 1.

<sup>27</sup> Israel, *Manual on the Laws of War* (1998), p. 38.

<sup>28</sup> Australia, *Defence Force Manual* (1994), paras. 512–513; Cameroon, *Instructors’ Manual* (1992), pp. 17 and 77; Croatia, *LOAC Compendium* (1991), p. 6; Germany, *Military Manual* (1992), para. 308; Hungary, *Military Manual* (1992), p. 17; Netherlands, *Military Manual* (1993), p. III-4 (see also *Military Handbook* (1995), pp. 7-39); New Zealand, *Military Manual* (1992), para. 805(3); Togo, *Military Manual* (1996), Fascicule I, p. 13; US, *Air Force Pamphlet* (1976), para. 3-2(b)(3) (see also *Field Manual* (1956), para. 61(a)(2) and US, *Naval Handbook* (1995), para. 5.3).

<sup>29</sup> Benin, *Military Manual* (1995), Fascicule I, p. 12; Croatia, *LOAC Compendium* (1991), p. 6; France, *LOAC Summary Note* (1992), para. 1.2; *LOAC Teaching Note* (2000), p. 2; *LOAC Manual* (2001), p. 39; Italy, *LOAC Elementary Rules Manual* (1991), para. 2; Kenya, *LOAC Manual* (undated), Précis No. 2, p. 8. Madagascar, *Military Manual* (1994), Fiche No. 2-O, para. 2.

<sup>30</sup> Colombia, *Instructors’ Manual* (1999), p. 16; Kenya, *LOAC Manual* (undated), Précis No. 2, p. 8; South Africa, *LOAC Manual* (1996), para. 26.

population by their uniform. It is therefore not surprising that uniform was seen as a distinguishing feature of armed forces. The purpose of the basic principle of international humanitarian law that a clear distinction must be made between combatants and civilians was obviously in tune with the requirement of wearing a military uniform.

The principle of distinction is the foundation on which the laws and customs of war rests. Article 48 of the Additional Protocol I to the Geneva Conventions explicitly defines the principle for the first time. The provision reads as follows:

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to a conflict are required at all times to distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly must conduct their operations only against military objectives.”

This requirement is the result of the desire to restrict warfare to acts of violence against the enemy, which are strictly necessary from a military standpoint. The provision is a cardinal rule and principle not only of the Additional Protocol, but also of the whole of international humanitarian law.

In terms of international humanitarian law, the multifaceted goal of the historic use of military uniforms has been largely replaced by the relatively new requirement of distinction from the civilian population. This obviously coincides with the factual development that modern warfare is no longer restricted to warring armies, and that civilians are not anymore only bystanders and spectators of armed confrontations between States, but are directly affected by the hostilities. The uniform as an identification element of armies does not anymore only and primarily relate to the need to distinguish one army from the next as in the past, but has shifted largely to be the distinctive element in relation to the civilian population.

While there is a practice to wear uniforms in armies, there is not an obligation in international humanitarian law to wear them.<sup>31</sup> The wearing of civilian clothes is only illegal if it involves perfidy. Moreover, none of the instruments of international humanitarian law give a definition of a military uniform. The term itself is used in connection with the generally

<sup>31</sup> Knut Ipsen however speaks of a “self-evident” (selbstverständlich) obligation enshrined in customary law to wear uniform in hostilities (see Dieter Fleck (ed.), *Handbuch des humanitären Völkerrechts*, München, 1994, p. 65, n. 308).

accepted practice of States as regards the wearing of uniforms by combatants,<sup>32</sup> perfidy, emblems of nationality and to regulate the wearing of enemy uniform.<sup>33</sup> But international humanitarian law remains silent on the constituent elements of a military uniform and implicitly instructs the States Parties to specify it in their national legislation and especially their military manuals. State practice therefore determines what constitutes a military uniform.

The historical origin of the distinctive sign to identify either individual groups, units within armies or even nationalities within different armies shows that the various kinds of distinctive elements were intended to reflect the military traditions of armies or regiments rather than to distinguish the force from other armies, and even less to distinguish it from the civilian population. Nonetheless, the distinctive sign was taken as a substitute for the uniform for purposes of identification in the law of war newly emerging in the nineteenth century. As shown, many armies in this century did not necessarily possess plain cloth uniform but only shoulder bands of a particular colour or other distinctive signs to indicate to which side combatants in the field belonged. Even with the spreading of the use of uniforms, the simple wearing of armllets was in exceptional situations still acceptable to the armies enabling them to identify and to affiliate a soldier to a party to the conflict. Consistent with this tradition, international humanitarian law often refers to a distinctive emblem or sign. The earlier reference to the emblem<sup>34</sup> instead of a sign underlines again the origin of the sign as an element of affiliation.

<sup>32</sup> Art. 44 (7) of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter "AP I" or "Additional Protocol I"); see also AP I, Art. 46 (2) (on spies and uniforms).

<sup>33</sup> Artt. 63 and 83 of the *Instructions for the Government of Armies of the United States in the Field*, 24 April 1863, reprinted in Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts*, Martinus Nijhoff Publisher, Dordrecht, 1988, pp.3-23 (also known as the "Lieber Code"); Art. 23 (f) of the Regulations respecting the Laws and Customs of War on Land, annexed respectively to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899 (hereinafter "1899 Hague Regulations") and Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereinafter "1907 Hague Regulations"); Art. 27 of the Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (hereinafter "GC III" or "Third Geneva Convention"); Art. 39 (1) and (2) AP I. See also AP I, Art. 37(1)(d) (on perfidy with regard to uniforms of the United Nations).

<sup>34</sup> See the different wording in the 1907 Hague Regulations and the Third Geneva Convention of 1949 (below in the section on the armed forces and military uniforms).

### The military uniform as a distinctive sign

The term “fixed distinctive [emblem/sign] recognizable at a distance” in Article 1(2) of the Hague Regulations and Article 4(A)(2)(b) of the Third Geneva Convention relates to and clearly includes a uniform in a traditional military sense. It has already been pointed out above that uniforms can be of various designs and colours, and that in the absence of a general definition States must decide which criteria a uniform must meet. What matters for international humanitarian law is that combatants can be distinguished from the civilian population.

The ability to recognize combatants as such is particularly important for enemy forces, both for military purposes and to protect the civilian population and avoid civilian casualties. As there is no requirement for the formal notification of uniforms by warring parties in international law,<sup>35</sup> armies should brief each other on their respective distinctive signs and uniforms, thereby enabling the adversaries to be identified as combatants.

However, combatants who are captured while engaged in espionage, i.e. when gathering information through an act of false pretences or deliberately in a clandestine manner in territory controlled by an adverse party, may be tried as spies. It should be emphasized that here a distinctive sign does not replace the uniform.<sup>36</sup> This applies in particular to members of the armed forces acting in “disguise or under false pretence”,<sup>37</sup> and in particular if instead of their own uniform they wear civilian clothes or the uniform of the enemy. Additional Protocol I<sup>38</sup> and numerous military manuals<sup>39</sup> explicitly mention the wearing of uniforms as an essential factor in deciding whether or not a soldier was engaged in spying.

<sup>35</sup> Only Additional Protocol I requires a party to a conflict to notify the other parties to the conflict of the incorporation of paramilitary or law enforcement agencies such as police forces or gendarmerie into its armed forces: API, Art. 43(3).

<sup>36</sup> See, however, Sandoz, Swinarski and Zimmermann (eds.), *op. cit.* (note 24), p. 566, n. 1776: “[It] is understood that the word “uniform” applied not only to a uniform in the conventional sense, but to any distinguishing sign which warranted that the activity in question had nothing clandestine about it.”

<sup>37</sup> Art. 88 of the Lieber Code; Artt. 19 and 22 of the Brussels Declaration of 1874; Art. 24 of the Oxford Manual (*The Laws of War on Land*, Oxford, 9 September 1880); Art. 29 of the 1899 and 1907 Hague Regulations.

<sup>38</sup> Art. 46 (2) “A member of the armed forces (...) shall not be considered as engaging in espionage, if, while so acting, he is in the uniform of his armed forces.”

<sup>39</sup> Argentina, *Law of War Manual* (1989), para. 1.09(1), and *Law of War Manual* (1969), para. 2.009(1); Australia, *Commanders’ Guide* (1994), paras. 707 and 913; Canada, *LOAC Manual* (1999), pp. 3-4, para. 33; Ecuador, *Naval Manual* (1989), para. 12.8; Germany, *Military Manual* (1992), para. 321; Netherlands, *Military Manual* (1993), p. III-5; New Zealand, *Military Manual* (1992), para. 506(2); Nigeria, *Manual on the Laws of War* (undated), para. 31; Spain, *LOAC Manual* (1996), Vol. I, para. 1.4.a; US, *Naval Handbook* (1995), para. 12.8. See also Chile, *Code of Military Justice* (1925), Articles 252–253.

The rare jurisprudence dealing with uniforms has emphasized the role the uniform plays as a distinctive sign. The element of distinction was emphasized in 1969 by a Malaysian Court in the *Osman case*<sup>40</sup> and an Israeli military court which ruled in the *Kassem case* in the same year that the wearing of mottled caps and green clothes fulfilled the requirement of distinction, as this was not the usual attire of inhabitants of the area in which (the Palestinian partisans) were operating.<sup>41</sup> The US Air Pamphlet states that a uniform ensures that combatants are clearly distinguishable but that “less than a complete uniform will suffice provided it serves to distinguish clearly combatants from civilians”.<sup>42</sup> This example also shows that the primary aim of the distinctive sign should no longer be to identify a particular group within the army, but to distinguish from the civilian population.<sup>43</sup> For the purposes of humanitarian law, a military uniform should therefore meet the same requirements as other distinctive signs to serve this purpose.

The sign must be fixed, or must not be too easily taken off.<sup>44</sup> However, even dress uniforms can be easily disposed of if necessary. What constitutes a distinctive sign is left undefined, but it is widely agreed that an armband, insignia or distinctive headgear, beret or coat meets the requirement,<sup>45</sup> thus placing in question the stipulation that the sign must be fixed.<sup>46</sup>

<sup>40</sup> The Malaysian trial judge ruled that two Indonesians claiming to be members of the Indonesian armed forces (but without uniform and identification papers) were not entitled to POW status. “It is not, however, stated that such members (of the armed forces) must at the time of their capture be wearing ‘a fixed distinctive sign recognizable at a distance’. International law, however, recognises the necessity of distinguishing between belligerents and peaceful inhabitants.” (House of Lords (Privy Council) on Appeal from the Federal Court, 1969, cited in Sassòli and Bouvier, *op. cit.* (note 21), p. 773.

<sup>41</sup> Israel, Military Court at Ramallah, *Kassem case*, Judgement, 13 April 1969, reproduced in: Sassòli and Bouvier, *op. cit.* (note 21), pp. 806-811.

<sup>42</sup> US Air Force Pamphlet (1976) para. 3. Cf. also Parks, *op. cit.* (note 20), pp. 493-560 and p. 516.

<sup>43</sup> Israel’s Manual on the Laws of War states: “it is prohibited to use civilians for the purpose of masking military movements or hiding among them. From this provision stems the soldiers’ obligation to wear a uniform or identifying symbol to clearly distinguish them from civilians.” Israel, *Manual of the Laws of War* (1998), p. 38.

<sup>44</sup> Jean Pictet, *The Geneva Conventions of 12 August 1949, Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War*, International Committee of the Red Cross, Geneva, 1960, p. 60; Percy Bordwell, *The Law of War between Belligerent: A History and Commentary*, Fred B. Rothman & Co., Chicago, 1908, p. 232.

<sup>45</sup> Thomas Mallison and Sally V. Mallison, “The juridical status of irregular combatants under international humanitarian law of armed conflict”, *Case Western Journal of International Law*, Vol. 9, 1977, p. 56/57; Pictet, *op. cit.* (note 44), p. 60.

<sup>46</sup> See, however, *United States of America vs. John Walker Lindh*, Criminal case No. 02-37-A in the District Court for the Eastern District of Virginia, Alexandria Division (US government’s opposition to the defendant’s motion to dismiss count one of the indictment for failure to state a violation of the charging statute – combat immunity). The US government refused, *inter alia*, to consider the black turban of Taliban members as a distinctive sign.



The sign should be “recognizable at a distance”. While this requirement is hardly compatible with normal military tactics to avoid discovery and not to present an easy target, it nevertheless pertains to the ability of combatants to recognize a civilian at a distance at which weapons could be used to target such persons. The camouflaged battle dress worn by virtually all armies demonstrates that this criterion of visibility cannot be applied too stringently for combatants who do not wear uniforms but other distinctive signs. However, camouflage cannot be equated with a disguise in ordinary civilian clothing.<sup>47</sup>

The line between wearing a distinctive sign and dressing as a civilian<sup>48</sup> may sometimes be difficult to draw, and attempts to call civilian attire “non-standard-uniforms” sound rather euphemistic.<sup>49</sup> In covert operations, identification by means of fixed distinctive signs visible at a distance or a distinguishable uniform seems to be a contradiction in terms. Special forces may operate without wearing a military uniform and they will naturally avoid using another distinctive sign visible at distance so as not to jeopardize their operation. There is a definite temptation to give up even that requirement of identification in order to merge with the civilian population.

All those considerations demonstrate that it cannot necessarily be established, from the sole fact of wearing of a military uniform or a distinctive sign recognizable at distance, whether a fighter has distinguished himself from the civilian population.

### **Armed forces and uniforms**

The rules laid down in Article 4 (A) of the Third Geneva Convention of 1949 dealing with the status of prisoners of war have their source in the 1907 Hague Regulations and the underlying concept of “belligerent status”. Under the heading “The Qualification of Belligerents”, Article 1 of the 1907 Regulations states that:

<sup>47</sup> See Richard Baxter, “The duties of combatants and the conduct of hostilities (Law of the Hague)” in: *International Dimensions of Humanitarian Law*, UNESCO/Henry Dunant Institute, Paris/Geneva, 1988, p. 229.

<sup>48</sup> ABC NEWS’ correspondent John McWethy, who was with CIA operatives and 52 US Special Operations soldiers at Tora Bora, Afghanistan, does not recall them wearing any distinguishing scarves, hats or other items that would openly establish them as American soldiers, and reported that they wore local Afghan clothes and beards. Upon close examination, it was clear they were not Afghans, partly because of physical characteristics, boots and fancy weaponry, he says.

See <[http://www.abcnews.go.com/sections/world/Primetime/iraq\\_asymetrico30411.html](http://www.abcnews.go.com/sections/world/Primetime/iraq_asymetrico30411.html)>.

<sup>49</sup> Cf. Parks, *op. cit.* (note 20), pp. 493-560.



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

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.”<sup>50</sup>

“In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army’.”<sup>51</sup>

These four elements indicated the common features of an army, mainly composed of front line soldiers, as seen at the turn of the twentieth century. Taking into account the fact that soldiers did not always wear uniforms, but had other means of identification especially during combat, the requirement of wearing uniforms was replaced by that of a “fixed distinctive emblem recognizable at a distance”.

The law of war was intended to apply principally to armies; only armies and their soldiers, including militias and volunteers forming part of the armed forces, were supposed to be allowed to fight wars. It was already recognized at the time that the armed forces consist not only of combatants but also of non-combatants, and that both were to be treated as prisoners of war if captured by enemy forces (1907 Hague Regulations, Article 3).<sup>52</sup> The criteria laid down in the Hague Regulations clearly relate to and are relevant in the battlefield environment and not in back offices far away from the fighting. At the beginning of the twentieth century, however, non-combatants such as medical personnel, but more importantly the numerous categories of non-combatant support staff backing up combatants, still formed a small minority of the armed forces.

Under the 1907 Hague Regulations, to qualify as belligerents, militias and corps of volunteers not forming part of the regular armed forces were subject to the conditions set out above. Only in situations of a *levée en masse*, in which civilians spontaneously take up arms to resist invading troops, was there no requirement that some distinctive sign be displayed, but such fight-

<sup>50</sup> 1907 Hague Regulations, Art. 1. The same wording was already contained in Art. 9 of the Project of an International Declaration concerning the Laws and Customs of War adopted at the Brussels Conference of 1874.

<sup>51</sup> 1907 Hague Regulations, Art. 1 (2).

<sup>52</sup> The term “armed forces” used in article 3 contrasts well with the term “armies” used in article 1.

ers still have to carry arms openly and respect the laws and customs of war when organizing resistance.<sup>53</sup> The waging of war by other private persons has remained outlawed: persons not forming part of the regular or irregular armed forces do not qualify as combatants, are not prisoners of war if captured, and can be punished for their mere participation in hostilities.

#### 1949 Convention relative to the Treatment of Prisoners of War

The Third Geneva Convention of 1949 deals in principle not with armies, but with the specific category of prisoners of war and their treatment and conditions of detention. It applies, however, the same underlying concept as the Hague Regulations; it did not change the substance thereof, but altered the wording in its Article 4(A) which determines who is a prisoner of war.<sup>54</sup> Members of the armed forces (sub-paragraph 1) were separated from members of militias and voluntary corps that are not part of the armed forces (sub-paragraph 2). The four above-mentioned criteria were spelt out only with regard to the latter category as necessary elements to be considered as prisoners of war when falling into the hands of the enemy.

The 1949 POW Convention is complementary to Section I, Chapter II of the 1907 Hague Regulations,<sup>55</sup> which implies that the foregoing Chapter I of those Regulations on belligerency remains unaffected and that non-combatant members of the armed forces also enjoy POW status in the event of capture. As in the Hague Regulations, “[m]embers of the armed forces” in the sense of Article 4 of the Third Geneva Convention therefore also embraces non-combatant members of the armed forces.<sup>56</sup> Another reading could possibly exclude the growing number of members of the armed forces not directly participating in hostilities from the status of prisoner of war. The Convention grants specific non-combatant POW status only to medical personnel and chaplains.<sup>57</sup>

<sup>53</sup> Art. 2 of the 1907 Hague Regulations.

<sup>54</sup> See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A, pp. 237-8 and 242. The POW Convention of 1929 simply referred to the 1907 Regulations: see Art. 1(1) of the Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929.

<sup>55</sup> GC III, Art. 135.

<sup>56</sup> Pictet, *op. cit.* (note 44), p. 51 (on Art. 4 A.1 GCIII).

<sup>57</sup> GC III, Art. 4 (c). See also: M. H. F. Clark, T. Glynn and A. P. V. Rogers, “Combatant and prisoner of war status” in: Michael A. Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, British Institute of International and Comparative Law, London, 1989, pp. 107-128. The authors speak of a “special non-combatant standing which is restricted to medical personnel and chaplains” (p. 110).

Thus, a civilian who is incorporated into the armed forces becomes a member of the military and a combatant in a legal sense, whether or not he or she actually participates in combat or is armed and uniformed.

Members of regular armed forces who profess allegiance to a government or an authority not recognized by the adverse party include the same categories of persons.<sup>58</sup> The only distinguishing feature of such armed forces is simply the fact that these otherwise regular members of the armed forces are not or no longer operating under the direct authority of a government recognized by the adversary.<sup>59</sup> The provision is reinforced by the established rule in general international law, and specifically in the rules on State responsibility, that the *de facto* government or authority is liable for acts committed by its organs.<sup>60</sup>

The early drafters of the 1899 and 1907 Hague Conventions and Regulations, but also the drafters of the 1949 Geneva Conventions, considered that regular armed forces implicitly have all those characteristics, thereby also meeting the criteria pertaining to identification, and that there was consequently no need to specify those requirements for the said forces.<sup>61</sup> This does not necessarily mean that the individual members do not qualify as prisoners of war if they do not fulfil them. States Parties are expected to take the requisite steps to give effect to these implied elements and specifically ensure that the members of their armed forces distinguish themselves from the civilian population, usually by wearing a military uniform.

The case is different for irregular forces. By definition their fighters are not members of the regular armed forces. Contrary to persons taking part in a *levée*

<sup>58</sup> GC III, Art. 4 A. (3).

<sup>59</sup> Pictet, *op. cit.* (note 44), p. 63 (on Art. 4 A.3). Whereas this rule was based on the specific case of the forces of General de Gaulle during the Second World War, it recently acquired renewed relevance in the armed conflict between Afghanistan and the United States. Like the large majority of States, the United States of America did not recognize the Taliban regime. In terms of the application of international humanitarian law, this does not matter, as the Taliban regime was undoubtedly the *de facto* government of Afghanistan in 2002.

<sup>60</sup> See Artt. 9 and 10 of the Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001 and taken not of by the General Assembly of the United Nations on 28 January 2002, UN Doc. A/Res/56/83(2002). See also: Marco Sassòli, "State responsibility for violations of international humanitarian law", *International Review of the Red Cross*, No. 846, June 2002, pp. 401-434; Derek Jinks, "State responsibility for the acts of private armed groups", *Chicago Journal of International Law*, Vol. 4, Spring 2003, pp. 83-95.

<sup>61</sup> "These 'regular armed forces' have all the material characteristics and all the attributes of armed forces in the sense of subparagraph (1): they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2)(a)(b)(c)(d).", Pictet, *op. cit.* (note 44), p. 63 (on Art. 4 A. 3).

en masse, “irregular combatants” — partisans, saboteurs or *franc-tireurs* as they were called in earlier times — are not entitled to participate in hostilities<sup>62</sup> unless they have acquired belligerent status under the 1907 Hague Regulations<sup>63</sup> and/or enjoy POW status under the Third Geneva Convention.<sup>64</sup> Under both bodies of law, irregular forces have to fulfil the four criteria of command structure, identification, carrying arms openly and conducting operations in accordance with the laws and customs of war, and they must fight on behalf of a party to an international armed conflict. In fact, they have to be as equal as possible to regular armed forces to enable their members to enjoy rights as prisoners of war.

In particular, the element of identification may be lacking, as it conflicts with the possible military strategy of irregular forces of blending in with the civilian population. In occupied territories, resistance fighters with distinctive signs recognizable at a distance or military uniforms, if available, would risk almost certain discovery, killing or capture.<sup>65</sup> It is nevertheless the risk an irregular fighter has to take if he wants to qualify as a prisoner of war if captured. Contrary to regular forces, in the case of irregular forces the four elements are not implied but are an explicit *conditio sine qua non* for prisoner-of-war status.

#### Additional Protocol I of 1977

Article 43 of 1977 Additional Protocol I to the Geneva Conventions defines armed forces of a party to a conflict as consisting “of organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates (...). Such armed forces shall be subject to

<sup>62</sup> See: Knut Doermann, “The legal situation of ‘unlawful/unprivileged’ combatants”, *International Review of the Red Cross*, No. 849, March 2003, pp. 45-74. In the so-called “Case of the German Saboteurs”, the US Supreme Court heard the case of German sympathizers who landed by submarine in the US with a view to committing acts of sabotage. It stated: “By the Rules of Land Warfare our government has recognized those who during war pass surreptitiously from enemy territory into our own, discarding their uniform before entering for the commission of hostile acts, involving the destruction of life and property, have the status of unlawful combatant.” (*Ex parte Quirin* (1942) 317 U.S.1).

<sup>63</sup> Art. 1 of the 1899/1907 Hague Regulations.

<sup>64</sup> GC III, Art. 4 A.(2).

<sup>65</sup> G.I.A.D. Draper, “The Legal Qualification of Belligerent Individuals” writes “Where a military occupation of enemy territory exists the existing protection accorded by Article 4 (A)(2) of the Geneva (POW) Convention is based upon conditions sufficiently stringent as to preclude any effective military resistance to the armed forces of the occupant.” (text on file with author). Similarly, the Israeli Military Manual says: “Undoubtedly, the conditions mentioned [in GC III, Article 4(A)(2)] make it very difficult for non-regular forces for which, in many cases, the fulfilment of the cumulative conditions of openly bearing arms and wearing a recognizable distinctive sign may be suicidal.” (Israel, *Manual on the Laws of War* (1998), p. 50.

an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.”The Protocol provides that all “members of the armed forces are combatants”.<sup>66</sup> Only medical personnel and chaplains are still considered non-combatants. The Protocol thereby definitively abolishes the general distinction between combatant and non-combatant members of armed forces, which has become more and more obsolete in present-day warfare. In modern armies, only a minority of members of the armed forces carry out direct combat functions, but they rely heavily on other members responsible for backing them up.<sup>67</sup>

Additional Protocol I provides a generic definition of armed forces, which was lacking until its adoption. Every single criterion describing the army seventy years ago has been further adapted to new interpretations made necessary by the developments in warfare. The new definition also allows liberation fighters within the meaning of Article 1(4) to be included in the definition of armed forces. Most strikingly, the element of identification (the distinctive sign) is entirely lacking in the new definition. Despite this shift, the definition was unanimously adopted during the Diplomatic Conference leading to the adoption of the Additional Protocols.<sup>68</sup>

### **Military uniform and prisoner-of-war status**

“Members of the armed forces of a Party to the conflict, as well as members of militias or volunteers forming part of such armed forces”, “who have fallen into the power of the enemy” are prisoners of war (Third Geneva Convention, Article 4A(1)).<sup>69</sup>

Several authors emphasize that members of the armed forces do not need to fulfil more specific criteria than that of membership of the armed forces to be granted prisoner-of-war status if captured.<sup>70</sup> Others affirm that

<sup>66</sup> AP I, Art. 43(2).

<sup>67</sup> See Sandoz, Swinarski and Zimmermann (eds.), *op. cit.* (note 24), p. 515, n. 1677.

<sup>68</sup> Diplomatic Conference on the Reaffirmation and Development of International Law applicable in Armed Conflicts (CDDH), *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

<sup>69</sup> Additional Protocol I has similar wording. “Members of the armed forces of a Party to a conflict (...) are combatants” and “[a]ny combatant shall be a prisoner of war”, see AP I, Artt. 43 and 44.

<sup>70</sup> See for example Jordan J. Paust, “There is no need to revise the laws of war in light of September 11th”, <<http://www.asil.org/taskforce/paust.pdf>> (visited on 17 February 2004), p. 9; Avril McDonald, “Defining the war on terror and the status of detainees: Comments on the presentation of Judge George Aldrich”, *Humanitäres Völkerrecht*, Vol. 4, 2002, pp. 207 ff.; George H. Aldrich, “The Taliban, al Quaida and the determination of illegal combatants”, *Humanitäres Völkerrecht*, Vol. 4, 2002, p. 208 (even though he leaves the question open).

despite the wording, a captured combatant has to fulfil every individual criterion indicated in Article 4(A) (2) of the said Convention in order to qualify as a prisoner of war, as only those elements describe properly a member of the armed forces.<sup>71</sup>

#### Members of regular armed forces are prisoners of war

Like other treaties, the Geneva Conventions must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose.<sup>72</sup>

Neither the 1907 Hague Regulations nor the Third Geneva Convention explicitly stipulate that a member of regular armed forces has to fulfil the four criteria in order to be a prisoner of war in the event of capture. On the contrary, the four criteria, including wearing a uniform or at least a distinctive sign, are mentioned only for irregular forces and not for regular ones. The 1949 Geneva Conventions endorse this literal reading by separating the two categories into two subparagraphs.

The legal history of Article 4 (A) of the Third Geneva Convention shows clearly that only irregular forces must fulfil the four criteria in order to qualify as prisoners of war, and that the two categories were separated deliberately. Early on, the Rapporteur of the Special Committee dealing with the question of definition of prisoners of war specified that only militias and volunteers not forming part of the regular armed forces should be subject to the four criteria, and that the division into two separate subparagraphs dealing with this question was done “[in] order to avoid any possibility of misunderstanding”.<sup>73</sup> A proposal by a working committee created to deal with the crucial provision on prisoner-of-war status, which again took over the wording of the 1907 Hague Regulations, was rejected,<sup>74</sup> the separation was reintroduced and was approved without discussion or any changes in the plenary session.<sup>75</sup>

<sup>71</sup> See in this direction Draper, *op. cit.* (note 65), p. 203 (speaking of “disjunctive nature of the conditions”); Baxter, *op. cit.* (note 47), p.105; Alan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts*, Helsinki, Suomalainen Tiedeakatemia, 1976, p. 328; Mallison and Mallison, *op. cit.* (note 45), pp. 44-48.

<sup>72</sup> Article 31 (1) Vienna Convention on the Law of Treaties, 1969.

<sup>73</sup> *Final Record of the Diplomatic Conference of Geneva*, 1949, Vol. II A., p. 387.

<sup>74</sup> See the objections of the Soviet Union to including identical conditions both for armed forces and militias and volunteers forming part of the armed forces and for irregular forces (*Final Record of the Diplomatic Conference of Geneva*, 1949, Vol. II A., pp. 466-7).

<sup>75</sup> *Final Record of the Diplomatic Conference of Geneva*, 1949, Vol. II B. pp. 267 ff.

In addition to the ordinary reading of Article 4 (A) (1), the *travaux préparatoires* show, therefore, that the regular members of armed forces, including members of militia and volunteer corps forming part of them, do not have to formally fulfil the four criteria to qualify as prisoners of war.

Captured members of regular forces automatically have prisoner-of-war status because of their link with their *de jure* or *de facto* government and the armed forces to which they belong. That status reflects the relationship between the State as a subject of international law, the armed forces as organs of the State and the members of the armed forces as combatants. The very spirit of the Third Geneva Convention is contingent on this relationship which entails that members of the armed forces of a State engaged in an international armed conflict are lawfully participating in hostilities and must not be punished for their mere participation in the conflict. It is up to the State to determine who is a member of those forces, but it can be reasonably presumed that regular forces usually fulfil the implied criteria for armed forces. Irregular forces cannot, however, be so easily expected to be more or less equivalent to regular forces. Partisans, *franc-tireurs* or resistance fighters are entitled to POW status only if they formally fulfil conditions that resemble those implied for regular forces. The requirement that members of irregular forces must fulfil the said criteria in order to obtain prisoner-of-war status is thus fraught with meaning. A differentiated approach between regular and irregular forces, as in Article 4(A), accounts for this difference and it makes sense that only members of irregular forces are required to fulfil the four criteria.<sup>76</sup>

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. Only non-integrated militias or volunteers would therefore have to undergo what some have termed the “legal test for prisoner-of-war status”<sup>77</sup> in order to establish that they were operating in accordance with the four above-mentioned conditions.

<sup>76</sup> In the *Swarska case* however, an Israeli military court ruled that even regular soldiers of the Egyptian army operating under orders from their commander could not benefit from POW status, since they wore civilian clothes while carrying out their mission. The court observed that it would be quite illogical to regard the duty to wear a uniform (in the sense of a distinctive sign) as imposed only on the quasi-military units referred to in GC III, Article 4(A)(2), and not on soldiers of regular armed forces. The court concluded that the defendants were to be prosecuted as saboteurs. (Israel, Military Court, *Swarska case*, Judgement, 1974.)

<sup>77</sup> Paust, *op. cit.* (note 70), pp. 8ff.



### Collective status determination?

Along the same lines, it would be a misinterpretation of the Third Geneva Convention if States parties were collectively and systematically to question its applicability to regular enemy armed forces engaged in an international armed conflict, by asking whether the adversary's armed forces as a whole do not fulfil a particular criterion and calling for their members not to qualify as prisoners of war if captured. In the heated environment of war, every party to a conflict usually accuses the enemy of not conducting its operations in conformity with the laws and customs of war and being responsible for gross and systematic violations. It might also be argued that enemy soldiers do not wear uniforms or even a "fixed distinctive sign recognizable at a distance".<sup>78</sup>

Such arguments were recently advanced in the international armed conflict between the United States of America and Afghanistan in 2001. Conflicting statements by the US administration<sup>79</sup> seem to converge on the point that, although the Third Geneva Convention applies to the Taliban forces, the captured Taliban soldiers *per se* do not qualify as prisoners of war. While the White House has not clarified exactly why these fighters do not merit prisoner-of-war status, the US Secretary of Defense has argued that the Taliban soldiers failed to meet the requirements set out in Article 4(A)(2). In particular, he mentioned the absence of uniforms.<sup>80</sup>

This is not the place to establish whether the Taliban soldiers failed to wear uniforms or other distinctive signs recognizable at a distance and whether they did or did not distinguish themselves from the civilian population.<sup>81</sup> Suffice it to say that in practical terms the distinction between the Taliban forces and civilian

<sup>78</sup> As early as 1907, during adoption of the Hague Regulations, it was mentioned that militias forming part of the army were fighting without a distinctive mark. See Bordwell, *op. cit.* (note 44), pp. 228 ff.

<sup>79</sup> See: "Contemporary practice of the United States: Decision not to regard persons detained in Afghanistan as POWs", *American Journal of International Law*, Vol. 96, 2002, pp. 475-480.

<sup>80</sup> "With respect to the Taliban, the Taliban also did not wear uniforms, they did not have insignia, they did not carry their arms openly and they were tied closely at the waist to al Quaida (...)" The last argument (referral to al Quaida) seems to refer to the element of (failure to) respect for the laws and customs of war. The Secretary added that "there isn't any question in my mind ... (...) they are not, they would not rise to the standard of a prisoner of war." (US Department of Defense News Transcript, cited from "Contemporary practice of the United States", *op. cit.* (note 79), p. 479.) The statements of other US officials also referred to the (factually very doubtful) absence of responsible command, to the legally irrelevant fact that the Taliban regime was not recognized by the US and to arguments stemming from the nature and origin of the war and the motives for deposing the Taliban regime (*ibid.*, p. 480).

<sup>81</sup> See e.g. Robert K. Goldman and Brian D. Tittmore, "Unprivileged combatants and the hostilities in Afghanistan: Their status and rights under international humanitarian and human rights law", available at: <<http://www.asil.org/taskforce/index.htm>>(visited 16 February 2004).



Afghans does not seem to have been a general problem for the players engaged in the military confrontation between the United States and Afghanistan,<sup>82</sup> even though the problem did arise occasionally and certainly more and more frequently after the dissolution of the Taliban forces. On the other hand, the Taliban forces certainly were not standard armed forces and did not wear clothing that resembled traditional military uniforms.<sup>83</sup> From a standpoint of humanitarian law, and for the sake of the civilian population, it is the overall requirement of distinction between military and civilian which is important, and not a rather formal element that can, however, greatly facilitate the distinction.

In the Second World War of 1939-1945, there was no precedent for a general refusal of prisoner-of-war status for members of the armies which failed as a collective unit to comply with one of the four criteria, in particular the obligation to conduct operations in conformity with the laws and customs of war. Even Nazi Germany did not refuse POW status to members of armed forces on such grounds,<sup>84</sup> nor were German soldiers denied prisoner-of-war status because of military orders contrary in many respects to the law of war. Practice after the Second World War furthermore shows that such an interpretation, in particular that soldiers should be deprived of prisoner-of-war status for allegedly having committed war crimes, was vehemently opposed, including by the United States.<sup>85</sup> The latter country in particular was rather generous in extending POW status to members of non-State entities even if they did not necessarily fulfil all the criteria of Article 4 (A) (2).<sup>86</sup>

<sup>82</sup> See in particular the article by Stephen Biddle, "Afghanistan and the future of warfare", *Foreign Affairs*, Vol. 82, March/April 2003, pp. 31-46: "Interviews with a broad range of key American participants in the war, along with a close analysis of available official documentation on the war effort and personal inspection of its battlefields, lead to the conclusion that the war as a whole was much more orthodox, and much less revolutionary, than most now believe" (At p. 32).

<sup>83</sup> See AP I, Art. 44 (7) (on the wearing of uniforms by regular troops) and the illustrations at the end of the present article. See also *United States of America vs. John Walker Lindh*, Criminal case No. 02-37-A in the District Court for the Eastern District of Virginia, Alexandria Division (US government's opposition to the defendant's motion to dismiss count one of the indictment for failure to state a violation of the charging statute (combat immunity)).

<sup>84</sup> They refused, however, to give POW status to the French forces of exiled General de Gaulle.

<sup>85</sup> See Goldman and Tittmore, *op. cit.* (note 81), pp. 11 ff.; Paust, *op. cit.* (note 70), p. 10; Aldrich, *op. cit.* (note 70) p. 208.

<sup>86</sup> In particular to the Viet Cong, see Paust, *op. cit.* (note 70), p. 10. See also *The Commander's Handbook on the Law of Naval Operations* (NWP 1-14M) of October 1995 stating (in the case of false claims of non-combatant status): "It is the policy of the United States, however, to accord illegal combatants prisoner-of-war protection if they were carrying arms openly at the time of capture" (12.7.1).

Resurgence of the belligerency concept?

The concept of belligerency was developed during the nineteenth century to bring the law of war into operation in internal wars that were equivalent in intensity, scale and duration to regular international wars.<sup>87</sup> With the growing reliance on objective criteria in contemporary humanitarian law<sup>88</sup> and the unwillingness to take the politically loaded decision of recognition of belligerency, this instrument is now almost obsolete.<sup>89</sup>

In inter-State armed conflicts, the equality between warring parties was supposed to exist between the opposing States and their respective armed forces. The members of the armed forces were likewise supposed to be on an equal footing and not to be punished for their mere participation in hostilities. In basing arguments to deny prisoner-of-war status to a whole group of fighters of regular armed forces on a single and rather formal element, there is the obvious danger that States would be tempted to deny belligerent status to their adversaries because of the nature or origin of the conflict or even cultural differences.

### **The failure of a combatant to distinguish him or herself from the civilian population**

Normally, a captured member of the armed forces is a prisoner of war and is entitled to the protection of the Third Geneva Convention. The automatic granting of prisoner-of-war status to captured members of regular armed forces does not imply that in the present law of armed conflict the dis-

<sup>87</sup> Dietrich Schindler, "State of war, belligerency, armed conflict" in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editorial Scientifica, Naples, 1979, pp. 1-20; Eibe H. Reibel, "Recognition of belligerency", in: Rudolf Bernhardt (dir.), *Encyclopaedia of Public International Law*, No. 4, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 1982, pp. 167-170.

<sup>88</sup> In the said internal armed conflicts, entirely discretionary measures in qualifying a situation of armed conflict have nowadays been replaced by the definitions of armed conflicts contained in Art. 3 common to the 1949 Geneva Conventions, in Art. 1 of Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977 (hereinafter "AP II" or "Additional Protocol II"), and in AP I, Art. 1(4).

<sup>89</sup> Schindler, *op. cit.* (note 87), pp.19-20, notes: "[It] is hardly more than a relict of a past time [and] plays only a marginal role in contemporary international law. (...) On the other hand, it is not to be excluded that the state of war or belligerency may witness a certain revival in future wars. The new significance which the concept of just war has gained in recent times may cause a state of war to be declared more often in relation to States or regimes against which an allegedly just war is conducted. (...) The old concept of war as a legal condition with particular rights and duties might well be replaced by a concept of war which has a primarily symbolic, political and psychological significance."

distinctive sign recognizable at distance and its most representative form, the military uniform, are not relevant. On the contrary, to protect the civilian population as much as possible from the effects of war, combatants must distinguish themselves from the civilian population.

“A fundamental premise of the Geneva Conventions has been that to earn the right to protection as military fighters, soldiers must distinguish themselves from civilians by wearing uniforms and carrying their weapons openly (...). Fighters, who attempt to take advantage of civilians by hiding among them in civilian dress, with their weapons out of view, lose their claim to be treated as soldiers. The law thus attempts to encourage fighters to avoid placing civilians in unconscionable jeopardy.”<sup>90</sup>

As we have seen in the State practice, a considerable number of States firmly hold on to the traditional requirement of wearing a uniform, even though it is often accompanied by qualifying adjectives. In the light of this practice, it would be difficult to affirm that soldiers are not obliged to wear a distinctive sign in military operations in addition to carrying their arms openly. On the other hand, it would be contrary to the current practice if overly stringent conditions were to be attached to this criterion of identification solely by uniforms or distinctive signs. Only an examination on a case-by-case basis, taking into account all circumstances, makes it possible to assess whether the principle of distinction between combatants and civilian population was upheld in a particular situation or not.<sup>91</sup>

It is an open question whether or not a member of the regular armed forces who falls into the power of an adverse party while failing to meet the requirement of distinction does forfeit his right to be a prisoner of war. Such a forfeiting of the status is not explicitly mentioned in the 1907 Hague Regulations nor in the Third Geneva Convention. Additional Protocol I foresees the forfeiting for spies<sup>92</sup> and in particular

<sup>90</sup> Remarks by Judge Abraham D. Sofaer, Legal Adviser, US Department of State, at the Sixth Annual American Red Cross-Washington College of Law “Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions”, published in: *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 466.

<sup>91</sup> Similarly in the Malaysian *Osman case*. “It is not, however, stated that such members (of the armed forces) must at the time of their capture be wearing “a fixed distinctive sign recognizable at a distance. International law, however, recognizes the necessity of distinguishing between belligerents and peaceful inhabitants.” (House of Lords (Privy Council) on Appeal from the Federal Court, cited from Sassòli and Bouvier, *op. cit.* (note 21), p. 773.

<sup>92</sup> AP I Art. 46 (l); in another situation also for mercenaries cf. AP I Art. 47 (l).

in Article 44(4)<sup>93</sup> if combatants fail to meet the requirement of distinction. However, the specific rule in Protocol I is related to an exceptional situation and the purpose of this provision is to accommodate combatants in situations of warfare in occupied territories and in conflicts described in Article 1(4) of the Protocol.<sup>94</sup> The provision comes close to Article 4(A)(2) of the Third Geneva Convention insofar as members of irregular forces do not qualify as prisoners of war if they fail to distinguish themselves from the civilian population and in particular do not fulfil the requirement of wearing a distinctive sign and of carrying weapons openly mentioned in this disposition.

But State practice<sup>95</sup> and jurisprudence<sup>96</sup> indicate clearly that combatants who do not distinguish themselves from the civilian population while engaged in an attack or in a military operation prior to an attack shall forfeit their rights as prisoners of war. During the First and Second World Wars, armed persons who were captured not wearing uniforms, were often executed on the spot as they were not considered to be combatants, but outlaws.<sup>97</sup> The system of the Third Geneva Convention and the Additional Protocol I which foresees a status determination by a competent tribunal if there is

<sup>93</sup> “A combatant who falls into the power of an adverse party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Geneva Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.” (Art. 44(4) AP I).

<sup>94</sup> Michael Bothe, Karl Joseph Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1982, p. 253. Upon signing and/or ratifying Protocol I, Australia, Belgium, Canada, France, Germany, Ireland, South Korea and the UK stated that the situation described in the second sentence of AP I, Article 44(3), could exist only in occupied territories or in armed conflicts covered by AP I, Article 4(1) (wars of national liberation). (Australia, Declarations made upon ratification of AP I, 21 June 1991, para. 2; Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, para. 4; Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, para. 6(a); France, Reservations and declarations made upon ratification of AP I, 11 April 2001, para. 8; Germany, Declarations made upon ratification of AP I, 14 February 1991, para. 3; Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, para. 7(a); South Korea, Declarations made upon ratification of AP I, 15 January 1982, para. 1; UK, Declarations made upon signature of AP I, 12 December 1977, para. c; UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, para. g).

<sup>95</sup> See as an example the practice of the United States (*The Commander's Handbook on the Law of Naval Operations* (NWP 1-14M) of October 1995 (N. 12.7.1)).

<sup>96</sup> *Osman* case, *op. cit.* (note 91) and *Kassem* case, *op. cit.* (note 41). In both cases, members of armed forces forfeited POW-status according to the courts by failing to distinguish from the civilian population.

<sup>97</sup> Cf. Sandoz, Swinarski and Zimmerman, (eds.), *op. cit.* (note 24), p. 465, n. 1572.

doubt as to his or her prisoner of war status<sup>98</sup>, seems to reinforce the position that there is a possibility for the forfeiting of prisoner-of-war status when a combatant fails to distinguish himself.

The failure of a combatant to distinguish himself from the civilian population is certainly a breach of the law of war, but may even constitute perfidy.<sup>99</sup> In particular, the wearing of civilian clothes as a disguise to kill, wound or capture the enemy is considered perfidious.<sup>100</sup> Acts of perfidy may moreover be punished as war crimes.<sup>101</sup>

A member of the armed forces who falls into the power of an adverse party while engaged in espionage does as well not have the right to the status of prisoner of war and may be treated as a spy.<sup>102</sup> Contrary to perfidy, the resorting to this method of combat is not prohibited and the gathering of information in uniform is not considered as espionage. A captured member of the armed forces engaged in espionage is not protected by the Third Geneva Convention, but as any other spy, who is not member of the armed forces, he is a civilian protected by the Fourth Geneva Convention.

### **Military uniform and humanitarian law in non-international armed conflicts**

The element of distinction between combatants and civilians is a valid requirement in non-international armed conflicts as well. While combatants in international armed conflicts are defined as members of armed forces, persons taking a direct part in an internal armed conflict are often also called “combatants”. Here, this designation is a generic term. Such fighters are thus not defined by it in terms of lawful participation in hostilities, but of direct participation in hostilities of a non-international character. As in international

<sup>98</sup> GC III, Art. 5 (2) and AP I Art. 45. See also Yasmin Naqvi, “Doubtful prisoner-of-war Status”, *International Review of the Red Cross*, No. 847, September 2002, pp. 571-595.

<sup>99</sup> An act of perfidy invites the confidence of an adversary and leads him to believe that he is entitled to, or should provide, protection under international humanitarian law. AP I Art. 37 (1)(c). See also Art. 23 (b) of the 1907 Hague Regulations (“[t]o kill or wound treacherously individuals belonging to the hostile nation or army”).

<sup>100</sup> On the other hand, such acts may also be carried out while wearing uniforms of enemy forces, possibly in a manner contrary to the law of war (see AP I, Art. 39(2)). See also Valentine Jobst, “Is the wearing of the enemy’s uniform a violation of the laws of war?”, *American Journal of International Law*, Vol. 35, 1941, pp. 435-442. The general prohibition on the use of enemy uniforms is generally recognized at least in combat missions, but not necessarily in other military operations (e.g. favouring, protecting or impeding military operations) cf. Parks, *op. cit.* (note 20), p. 522-523.

<sup>101</sup> See e.g. Art. 8 (2)(b)(xi) of the Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183.9.

<sup>102</sup> Cf. AP. I, Art. 46 (1) and (2).

armed conflicts, civilians lose their protection when and for such time as they take direct part in hostilities, and may then be the object of an attack.<sup>103</sup>

Armed forces and even dissident armed forces<sup>104</sup> may wear uniforms or distinctive signs in civil wars. The lawfulness of wearing this element of identification is governed by national law, as is the question of direct participation in hostilities. Conversely, non-State parties to a non-international armed conflict are not allowed to wear military uniforms according to national law, which restricts their use. Under international humanitarian law, however, nothing prevents dissident armed forces or other organized armed groups from wearing such a distinctive sign, although they are not obliged to do so. For instance, a Report on the Practice of Indonesia based on interviews with senior army officers states:

“There is no national regulation for the implementation of the distinction principle in non-international armed conflict. However, in certain insurgencies during the 1950’s and the 1960’s, Indonesian armed forces used uniforms as one of the criteria to distinguish between rebels and civilians (...). Though the uniforms used by some rebels did not resemble the military uniform, for example, the rebels used no insignia or other emblems, their differing colour was the main criterion by which the military was able to distinguish them from civilians.”<sup>105</sup>

But even non-State entities and individuals engaged in non-international armed conflicts are obliged to observe the rules on the conduct of hostilities and notably to uphold the principle of distinction in their operations.<sup>106</sup> All standards that must be respected are included in the prohibition of indiscriminate attacks, the requirement of proportionality and of the precautions to be taken in attacks. In particular, in order to protect the civilian population and civilian objects, the latter requirement of precautions against the effects of attacks can only be met by fighters visibly distinguishing themselves from the civilian population.

<sup>103</sup> AP II, Art. 13(3), and Art. 3 common to the 1949 Geneva Conventions (protection of “persons taking no active part in hostilities”).

<sup>104</sup> AP II, Art. 1(2).

<sup>105</sup> Report on the Practice of Indonesia, 1997, Interviews with senior army officers, (on file with the author).

<sup>106</sup> See International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 225: “State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaged in military operations.” (Decision available on the ICTY’s website: <<http://www.icty.org>>).

## Conclusion

From its origins, the military uniform which came into general use with the appearance of large national armies in the 17th century had the primary function of identification. The belonging to a particular armed force distinguished the soldiers from their enemies and the military uniform had and has other welcomed functions such as promoting obedience, comradeship and a display of strength. International humanitarian law introduced to this identification element another dimension, namely the cardinal principle of distinction between combatants and civilians. Combatants when engaged in military operations have to distinguish themselves from the civilian population to protect them from the effects of hostilities and to restrict warfare to military objectives. The general use of military uniforms on the battlefield doubtless helps to achieve this overall goal. There is however no general obligation for soldiers to wear uniform. The fact that wearing of military uniforms is potentially able to reduce the dangers for the civilian population during war and even if the practice of wearing uniforms is expected and is commonly followed, it is not a prerequisite for the definition of armed forces. States are under the obligation to implement the principle of distinction, but the uniform is not the only and sufficient means to do so. Armies sometimes, at least in exceptional circumstances and especially in covert operations, do not always wear uniforms when engaged in military operations.

The wording, legal history and the teleological interpretation of the Third Geneva Convention shows, furthermore, that members of regular armed forces — as opposed to irregular armed forces — are combatants owing to their affiliation with a party to an international armed conflict and do not have to fulfil specific constitutive criteria — including a distinctive sign and in particular the wearing of a military uniform — to qualify as prisoners of war in case of capture. At the same time, it is a misinterpretation of the Geneva Conventions to deny prisoner-of-war status to all captured combatants belonging to the regular armed forces of a State on the sole basis that they failed to wear a uniform. However, individual members of regular armed forces can possibly violate the requirement of distinction from the civilian population when not wearing a uniform — and especially in case of perfidy — and can forfeit their status as prisoners of war. For the sake of the protection of the civilian population, the military uniform can and should play an important part in meeting the requirement of distinction.

## Résumé:

### *Les uniformes militaires et le droit de la guerre*

*Toni Pfanner*

Depuis ses origines, l'uniforme militaire, qui a connu une utilisation générale avec l'apparition de grandes armées nationales au XVII<sup>e</sup> siècle, avait une fonction primaire d'identification. L'appartenance à une force armée particulière distinguait les soldats de leurs ennemis. En outre, l'uniforme militaire avait et a d'autres fonctions complémentaires comme la promotion de l'obéissance, la camaraderie et la manifestation de la force. Le droit international humanitaire ajoute à la fonction d'identification une autre dimension, à savoir la distinction entre combattants et civils. Les combattants engagés dans des opérations militaires doivent se distinguer de la population civile pour protéger celle-ci des effets des hostilités et limiter la conduite de la guerre aux objectifs militaires. Dans cet article, l'auteur montre les ramifications juridiques liées au port de l'uniforme militaire et le principe de distinction. Il postule en particulier que les membres de forces armées régulières — par opposition aux forces armées irrégulières — ont le droit de participer aux hostilités de par leur affiliation avec une partie à un conflit armé international et ils ne doivent pas remplir des critères constitutifs spécifiques — comme un signe distinctif (généralement le port d'un uniforme militaire) — pour être prisonniers de guerre en cas de capture. L'auteur considère que refuser collectivement le statut de prisonnier de guerre à des combattants capturés qui appartiennent à des forces armées d'un État en se basant sur le seul fait qu'ils n'ont pas endossé l'uniforme militaire est une interprétation erronée des Conventions de Genève. Les membres individuels des forces armées peuvent cependant violer l'exigence de distinction de la population civile s'ils ne portent pas l'uniforme militaire — en particulier, dans le cas de la perfidie — et perdre en conséquence leur droit à être considérés comme prisonniers de guerre. Pour la protection de la population civile l'uniforme militaire peut et doit jouer un rôle important pour satisfaire l'exigence de distinction entre combattant et civil.