

MISUSE OF UNIFORMS, EMBLEMS, FLAGS, INSIGNIA, AND THE UKRAINE CONFLICT

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“Saboteur elements of the Russian military have now started wearing a distinct yellow band in an attempt to infiltrate and mix in with Ukrainians who wear the bands for easy identification and to avoid ‘friendly fire.’”¹

I. INTRODUCTION

For two decades, the international legal community has focused on counterinsurgency and counter-terrorism operations. This did not mean that inter-state conflict was non-existent. Hostilities such as the 2003 invasion of Iraq, the 2008 Russia-Georgia conflict, and the conflict between Iran, Israel, and the United States² reflected that inter-state warfare had continued throughout the post-9/11 period.³ However, the 2022 Russian invasion of Ukraine significantly increased the legal analysis of inter-state warfare.⁴ The intensity and scale of the Ukrainian conflict, the unique employment of existing and emerging weapons systems (e.g., drones, unmanned surface vessels, hypersonic weapons, missiles), and the staggering number of alleged Russian war crimes⁵ have forced a major shift in attention towards the analysis of how international humanitarian law impacts on contemporary inter-state warfare.⁶

Much of the contemporary discussion concentrates on what might be called “overt” conventional operations.⁷ In respect of Ukraine, this has included its halting of the Russian armored push towards Kyiv in February 2022; the late summer and early fall 2022 Ukrainian counter-offensive in the Kherson region;⁸ the stalemate that unfolded in Bakhmut, which has included “old fashioned” trench warfare;⁹ and the 2023 Ukrainian offensive with

1. Geeta Mohan, *Exclusive: Change of Colours in Ukraine Camp to Foil Infiltration by Russia's Saboteurs*, INDIA TODAY, <https://www.indiatoday.in/world/russia-ukraine-war/story/exclusive-change-of-colours-in-ukraine-camp-to-foil-infiltration-by-russia-saboteurs-1924688-2022-03-12> (last updated Mar. 13, 2022, 8:21 AM IST).

2. See Kenneth Watkin, *Exercising Self-Defence in 21st Century Shadow Wars*, 52 ISR. Y.B. ON HUM. RTS. 1 (2022).

3. Ken Watkin, *Special Forces, Unprivileged Belligerency, and the War in the Shadows*, LIEBER INST. W. POINT: ARTICLES OF WAR (Mar. 8, 2022) [hereinafter *Special Forces*], <https://lieber.westpoint.edu/special-forces-unprivileged-belligerency-war-shadows/>.

4. See, e.g., *id.* (showcasing an example of an analysis of the Russian invasion).

5. Amanda Macias, *Russia Has Committed More than 65,000 War Crimes in Ukraine, Prosecutor General Says*, CNBC, <https://www.cnbc.com/2023/02/01/ukraine-russia-war-65000-war-crimes-committed-prosecutor-general-says.html> (last updated Feb. 1, 2023, 9:14 PM).

6. See *Special Forces*, *supra* note 3.

7. See *infra* Section IV.A (providing information on overt operations such as the widespread use of camouflage).

8. Hanna Arhirova, *Ukraine Works to Stabilize Kherson After Russian Pullout*, MILITARY.COM (Nov. 12, 2022), <https://www.military.com/daily-news/2022/11/12/ukraine-works-stabilize-kherson-after-russian-pullout.html>.

9. Jake Epstein, *PHOTOS: Inside the Front-Line Trenches Around a Destroyed Town Where Ukraine Is Fighting the War's Longest and Bloodiest Battle*, BUS. INSIDER (Mar. 29, 2023, 1:05 PM), <https://www.businessinsider.com/photos-inside-front-line-trenches-of-ukraines-bloodiest-battle-2023-3>.

Western-trained and equipped forces.¹⁰ However, as with any inter-state conflict, there has also been considerable irregular warfare involving covert and clandestine operations.¹¹ Much of that warfare has involved operations behind enemy lines, such as Russian forces seeking to infiltrate Kyiv during the opening stages of the war, Ukraine forces mobilizing their resistance forces operating in Russian-occupied Ukraine, and intelligence sources on both sides providing information that is ultimately used for targeting.¹²

These irregular operations are part of a “war in the shadows” where hostilities occur in “an area of darkness in which people and things cannot be seen.”¹³ Activities are intended to be shaded from view with the protagonists seeking to blend into the “human” terrain.¹⁴ This can mean wearing civilian clothes or driving civilian-pattern vehicles without emblems or insignia so that the belligerents and their operatives are indistinguishable from the civilians inhabiting the area.¹⁵ However, it can also involve wearing the uniform of an opponent or operating equipment, be it vehicles, planes, or warships, identified as belonging to the enemy.¹⁶ This attempt to mask operations might extend to wearing the uniforms or displaying the emblems and insignia of armed forces that are not engaged as a party to the hostilities, such as the United Nations and neutral states.¹⁷ Improper use may also be made of internationally protected emblems such as the Red Cross and Red Crescent.¹⁸

The surreptitious use of civilian attire and status, the misuse of internationally protected emblems, and the passing military forces off as belonging to an armed force that is not one’s own inevitably raises questions regarding treacherous or perfidious conduct. A dictionary definition of treachery is “behaviour that deceives or is not loyal to someone who trusts you,”¹⁹ while perfidy is “behaviour that is not loyal.”²⁰ In legal terms,

10. Thomas Gibbons-Neff & Yurii Shyvala, *In Small Victory, Signs of Grueling Combat Ahead in Ukrainian Counteroffensive*, N.Y. TIMES (July 2, 2023), <https://www.nytimes.com/2023/07/02/world/europe/ukraine-russia-counteroffensive.html>.

11. See *infra* Section II.C (giving insight on how the Russian and Ukrainian conflict includes clandestine and covert operations).

12. Malu Cursino, *Kramatorsk: Alleged Russian Spy to Be Charged over Deadly Strike*, BBC NEWS (June 29, 2023), <https://www.bbc.com/news/world-europe-66045197>.

13. *Shadow*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/shadow> (last visited Sept. 19, 2023); see *Special Forces*, *supra* note 3.

14. See Watkin, *supra* note 2.

15. *Id.*; see *infra* Part III (providing detail on the international humanitarian laws relating to uniforms and symbols).

16. See *infra* Part IV (explaining how treachery and perfidy have been used in a legal analysis).

17. See *infra* Part IV (supporting the concept that the misuse of uniforms can be seen as treacherous).

18. See *infra* Section IV.B.3 (providing history and background of the misuse of symbols and emblems in correlation to the Red Cross, Red Chrystal, and Red Crescent).

19. *Treachery*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/treachery> (last visited Sept. 19, 2023).

20. *Perfidy*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/perfidy> (last visited Sept. 19, 2023).

treachery and perfidy are widely viewed as interchangeable, with such action long having been prohibited under international humanitarian law.²¹ This can be seen in Francis Lieber's 1863 *Instructions for the Government of Armies of the United States in the Field* (Lieber Code),²² which broadly states military necessity "admits of deception, but disclaims acts of perfidy."²³ The Lieber Code also indicates that while deception is permitted, "the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy."²⁴ Further, "[t]he use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war."²⁵ However, this very strict nineteenth-century approach towards perfidy narrowed considerably as state practice was addressed in international humanitarian law in the years that followed.²⁶ The early broad proscription did not necessarily match how states conducted operations.²⁷

A unique aspect of the Russia-Ukraine conflict is that both protagonists are parties to the 1977 Additional Protocol I,²⁸ which notably incorporates specific provisions relating to resistance movements and others carrying out irregular operations in occupied territory.²⁹ In contemporary discussion, much of the debate about treacherous conduct has focused on the wearing of civilian clothes while engaging in such hostilities.³⁰ Less frequently explored is the misuse of enemy uniforms, emblems, and insignia; those of other armed forces that are not a party to the conflict (e.g., the United Nations, neutral states); or the emblems and insignia of internationally protected organizations.³¹ It is these issues that this Article explores.

21. JAMES MOLONY SPAIGHT & FRANCIS D. ACLAND, WAR RIGHTS ON LAND 86 (photo. rpt. 1975) (1911). During the development of the 1907 Hague Land Warfare Regulations there was discussion as to whether perfidy or treachery should be used. *Id.* Treachery was adopted since it was "the equivalent of the German *Meuchelmord* ('murder by treachery')." *Id.*

22. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (Apr. 24, 1863), reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3 (Dietrich et al. eds., 3d ed. rev. 1988) [hereinafter *Lieber Code*].

23. *Id.* art. 16.

24. *Id.* art. 101.

25. *Id.* art. 65.

26. See *infra* Part II (discussing how the use and misuse of military uniforms has evolved over the years).

27. See *infra* Part II (providing support on how Russia's use of uniforms and emblems are different from how other countries have done in the past).

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

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

30. See *infra* Part III (providing background on how military personnel would wear civilian clothing during a time of war).

31. Additional Protocol I, *supra* note 28, art. 37 ¶ 1.

While not involving enemy attire, emblems, or insignia, questions regarding uniforms first arose in the context of Russia's 2014 seizure of Crimea.³² In a demonstrative example of twenty-first century "hybrid warfare," Russian-speaking soldiers, who came to be anonymously known as the "little green men," wore non-identifiable camouflage but Russian-style uniforms during those operations.³³ During the initial stages of the 2022 Russian invasion, there were also reports of Russian special forces³⁴ and private "Wagner" militia wearing civilian clothes while infiltrating Kyiv in an effort to decapitate the Ukrainian leadership.³⁵ It is also alleged that Russian special forces personnel wore Ukrainian military uniforms and used Ukrainian and captured Organization for Security and Cooperation in Europe (OSCE) vehicles while operating behind Ukrainian lines.³⁶

As Ukraine rallied its population to oppose the 2022 Russian invasion, the practice was adopted of newly engaged personnel in civilian clothes applying coloured tape around their arms to distinguish them from the civilian population.³⁷ Those in uniform also applied coloured tape (e.g., yellow, green, and blue) to their camouflaged uniforms.³⁸ Given the

32. See, e.g., Steven Pifer, *Crimea: Six Years After Illegal Annexation*, BROOKINGS (Mar. 17, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation/> (providing background on the illegal annexation of Crimea and how it has affected the Russian-Ukrainian conflict).

33. JIM SCUITTO, *THE SHADOW WAR: INSIDE RUSSIA'S AND CHINA'S SECRET OPERATIONS TO DEFEAT AMERICA* 66 (2019); Pifer, *supra* note 32; Vitaly Shevchenko, "Little Green Men" or "Russian Invaders?," BBC NEWS (Mar. 11, 2014), <https://www.bbc.com/news/world-europe-26532154>.

34. This Article will use the generic and more globally applied term "special forces," which includes United States Special Operations Forces (SOF) as well as the U.S. Army "Special Forces."

35. Manveen Rana, *Volodymyr Zelensky: Russian Mercenaries Ordered to Kill Ukraine's President*, TIMES (Feb. 28, 2022, 12:01 AM), <https://www.thetimes.co.uk/article/volodymyr-zelensky-russian-mercenaries-ordered-to-kill-ukraine-president-cvcksh79d>.

36. Mia Jankowicz, *Ukraine Accuses Russian Soldiers of Stealing Uniforms and Vehicles to Enter Kyiv*, BUS. INSIDER (Feb. 25, 2022, 5:21 AM CST), <https://www.businessinsider.com/ukraine-says-russia-soldiers-stole-uniforms-trucks-to-reach-kyiv-2022-2>; Louise Callahan, *Fear Stalks Streets of Kyiv in the Hunt for Kremlin Spies*, TIMES (Feb. 22, 2022, 2:50 PM GMT), <https://www.thetimes.co.uk/article/volunteers-hunt-traitors-and-kremlin-spies-as-fear-grips-kyiv-snp5r2qjp>; Allison Quinn, *Putin Sent in Troops Disguised with White Peace Monitor Symbols and Ukrainian Uniforms, Says Kyiv*, DAILY BEAST, <https://www.thedailybeast.com/putin-sent-in-troops-disguised-with-ocse-white-peace-monitor-symbols-and-ukrainian-uniforms-says-kyiv> (last updated Feb. 24, 2022, 11:06 AM).

37. Maïa De La Baume, *French Volunteers Rally to Zelenskyy's Call to Join War in Ukraine*, POLITICO (Mar. 3, 2022, 5:17 PM CET), <https://www.politico.eu/article/france-volunteer-rally-zelensky-call-join-war-ukraine/> (providing a picture of volunteers in Kyiv wearing civilian clothes with yellow arm bands and carrying assault style rifles).

38. *Kyiv to Probe Clip Appearing to Show Surrendering Russian Troops Being Gunned Down*, TIMES OF ISRAEL (Nov. 22, 2022, 6:29 AM) [hereinafter *Kyiv to Probe*], <https://www.timesofisrael.com/kyiv-says-itll-probe-clip-seemingly-showing-surrendering-russian-troops-gunned-down/>; John Sparks, *Ukraine War: Ukrainian Soldier on His Way to Frontline for First Time—After What Russians Did in Bucha They Must Die*, SKY NEWS (Apr. 10, 2022, 3:39 PM), <https://news.sky.com/story/ukraine-war-ukrainian-soldier-on-his-way-to-frontline-for-first-time-after-what-russians-did-in-bucha-they-must-die-12585068> ("A battalion member called Vandal approached us and asked if we had any tape. Ukrainian soldiers wrap blue tape around their right arm as way of identifying themselves to each other. No one wants to be shot by their own side.").

similarities between Russian and Ukrainian equipment and uniforms, as well as a general adoption of camouflaged uniforms by most state armed forces,³⁹ the use of such coloured markings undoubtedly helped avoid incidents of “friendly fire.”⁴⁰ The Ukrainian forces were not alone in applying distinguishing coloured markings on uniforms as “[r]ed or white identifying marks are sometimes worn by Russian and Russia-aligned troops to identify them as members of the Kremlin’s invasion force.”⁴¹

A unique Russian symbol is the letter “Z,” which was first emblazoned on Russian military vehicles.⁴² It subsequently became part of an extensive Russian public relations campaign that extended far beyond Ukraine for those demonstrating support for its role in the conflict.⁴³ The “Z” is just one of “other letters, including O, X, A and V, that have appeared on Russian tanks, sometimes framed by squares, triangles and other painted shapes.”⁴⁴ Easily drawn, different meanings have been attributed to the “Z,” including for “Запобеду—pronounced ‘za pobedu’ (meaning ‘for the victory’), others say it is for ‘Zapad’ (West).”⁴⁵

With this background, the use of uniforms, emblems, and insignia during the Ukraine-Russia conflict is explored by first looking at their use generally during international armed conflict.⁴⁶ This includes discussing the development and use of camouflage as well as their connection to irregular warfare.⁴⁷ The analysis then turns to the use of uniforms, insignia, emblems and flags, and the development of international humanitarian law.⁴⁸ Having established a benchmark regarding these distinguishing features, the issue of treacherous conduct and war crimes will be explored.⁴⁹ Next, the relationship between the use of enemy uniforms and symbols will be discussed in the context of spying.⁵⁰ Attention is then focused on the misuse of internationally protected emblems, such as the Red Cross and Red Crescent.⁵¹ Finally, the

39. Wesley Morgan, *The Empire’s New Clothes (and Everyone Else’s Too)*, NEW LINES MAG. (May 15, 2023), <https://newlinesmag.com/reportage/the-empires-new-clothes/>.

40. Mohan, *supra* note 1; Sparks, *supra* note 38.

41. *Kyiv to Probe*, *supra* note 38.

42. Paulina Villegas & Sammy Westfall, *How ‘Z’ Became a Symbol for Supporting Russia’s Invasion of Ukraine*, WASH. POST, <https://www.washingtonpost.com/world/2022/03/09/letter-z-russia-symbol-pro-war/> (last updated Mar. 22, 2022, 1:52 PM EDT).

43. *Id.*

44. *Id.*

45. *Ukraine War: Why Is Russia Using the Letter ‘Z’ and What Does It Mean?*, SKY NEWS (Mar. 8, 2022, 8:28 AM), <https://news.sky.com/story/ukraine-war-what-does-the-z-symbol-on-russian-tanks-mean-and-where-does-it-come-from-12560183>.

46. *See infra* Part II (providing examples on how different countries have used their military uniforms in different capacities).

47. *See infra* Section II.B (giving context on how military uniforms began implementing camouflage and how camouflage was integrated into multiple aspects of the military).

48. *See infra* Part III (analyzing uniforms, symbols, and the law).

49. *See infra* Section IV.A (examining treacherous conduct).

50. *See infra* Section IV.B.2 (discussing misuse of enemy uniforms, emblems, and insignias).

51. *See infra* Section IV.B.3 (discussing the Red Cross, Red Crescent, and Red Chrystal specifically).

analysis will explore the prospect of war crime prosecutions being initiated for the misuse of uniforms, insignia, emblems, and flags in contemporary conflict.⁵²

II. UNIFORMS, EMBLEMS, INSIGNIA, AND THE STATE

A. Uniforms and State Warfare

Early evidence records military formations and the wearing of uniforms “more than five thousand years ago, and in ancient history uniformed soldiers were found in particular in militarized civilizations.”⁵³ For example, Mesopotamia, Babylonia, the Assyrians, and particularly Rome maintained large standing armies.⁵⁴ The Roman army included “a hard core of professional soldiers wearing clothing and equipment clearly identifying them as belonging to it.”⁵⁵ However, it was seventeenth century Europe that was the birthplace of the modern concept of uniformed armed forces.⁵⁶ The previous one hundred years had included significant civil wars “fuelled by religious and cultural hatred” and a destruction of the medieval sense of order.⁵⁷ During this period “the precursors of military uniforms largely disappeared.”⁵⁸ However, a desire to attain greater order within society led to the development of centralized control over armed forces by kings, governments, and uniformed armed forces.⁵⁹

The growth of the nation-state saw the development of an economic structure that enabled governments “to clothe their soldiers in uniforms at a reasonable cost.”⁶⁰ In addition, the recognition that disciplined military forces were more effective also contributed to the desire for greater control which “had its visual expression in a progressive tightening of the rules and orders regarding uniforms.”⁶¹ There was a synergy between the state and its armed forces as “modern means of death and destruction would never have been possible without the state, its ministry of defense . . . and its regular, uniformed, bureaucratically managed armed forces.”⁶² States with large armies could expand their territorial base but required a large, powerful, centralized state apparatus to do so.⁶³

52. See *infra* Part V (discussing the *tu quoque* effect).

53. Toni Pfanner, *Military Uniforms and the Law of War*, 86 INT’L REV. RED CROSS 93, 95 (2004).

54. *Id.*

55. *Id.* at 96.

56. *Id.*

57. TIM NEWARK, BRASSEY’S BOOK OF UNIFORMS 10 (1998).

58. Pfanner, *supra* note 53, at 96.

59. NEWARK, *supra* note 57, at 10.

60. *Id.* at 13.

61. *Id.* at 15.

62. MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE 249 (1999).

63. WARD THOMAS, THE ETHICS OF DESTRUCTION 62 (2001).

The development of the state and large armies also had a significant impact on perspectives regarding the proper way to conduct hostilities.⁶⁴ In this regard “the ideational structure of sovereign statehood interacted synergistically with mass armies: it reinforced the normative idea that clashes between large masses of men—rather than intrigue—was the proper way for conflicts to be settled.”⁶⁵ This connection between states, large armies, and a preference for open warfare was to heavily influence the early development of international humanitarian law and its approach towards lawful combatancy and prisoner of war status.⁶⁶ However, there remained controversy over what constituted a proper uniform to be considered a lawful participant in hostilities.⁶⁷ Not all states relied on large standing armies, but rather the mobilization of militias, volunteer corps, and ordinary citizens whose connection to the state might be marked by “only a distinctive sign on the cap or sleeve.”⁶⁸ In addition, reliance on the *levée en masse*, a concept involving the spontaneous mobilization of the population to repel an invader, highlights that not all fighters acting for states will be wearing uniforms.⁶⁹

There are two additional aspects about uniforms that bear mentioning. First, with the development of the state and a desire for centralized internal control, there was a move to extend law and order within national borders and the creation of centrally controlled and uniformed police forces.⁷⁰ There was a migration of the internal security role away from militia and other military units⁷¹ to police and gendarmes “who[] were paid and maintained exclusively by the state.”⁷² Domestic policing developed with an acceptance by state authorities for the wearing of civilian clothes in a law enforcement context.⁷³ This was not replicated in inter-state armed conflict.⁷⁴ Secondly, while uniforms were used by various groups elsewhere in the world, as “European imperial power spread around the globe in the 18th and 19th centuries, other cultures began to adopt this Western attribute [uniformly attired soldiers] in an attempt to mimic other aspects of Western military success such as discipline and cohesion.”⁷⁵ This meant that the European concept of a uniform and its “legality” increasingly became the norm.⁷⁶

64. *Id.* at 63.

65. *Id.*

66. *Id.* at 64.

67. NEWARK, *supra* note 57, at 10.

68. SPAIGHT & ACLAND, *supra* note 21, at 57.

69. *Id.* at 41.

70. VAN CREVELD, *supra* note 62, at 165–67, 208.

71. *Id.* at 165–67; *see also* LEO BRAUDY, FROM CHIVALRY TO TERRORISM: WAR AND THE CHANGING NATURE OF MASCULINITY 282 (2003) (noting that the military continued to have some involvement in maintaining internal order).

72. VAN CREVELD, *supra* note 62, at 208.

73. *Id.* at 210.

74. *Id.*

75. NEWARK, *supra* note 57, at 65.

76. *See id.*

B. Camouflage

As noted, the development of the state resulted in more uniformly dressed soldiers and a preference for open warfare.⁷⁷ However, there were other counterbalancing forces at work, which were soon to entice military forces to adopt camouflage and seek to withdraw from ready observation.⁷⁸ The pressure to do so resulted from a number of factors, including state armed forces fighting against irregular opponents hiding in difficult terrain (e.g., mountains, jungles, forests) in a colonial context, rather than on European battlefields where tightly formed troops stood in the open.⁷⁹ There were also the technological advances, such as development of long-range rifled weapons, machine guns, artillery, and air power, which extended the battlefield beyond the clash of arms directly involving formed bodies of troops and increased the lethality of inter-state warfare.⁸⁰ Even regular armed forces sought to avoid observation from their opponents.⁸¹

Hiding from view was not necessarily a new concept.⁸² There had long been select military forces, such as the German Jäger troops created in the seventeenth and eighteenth centuries, Roger's Rangers during the American Revolutionary War, and the British Rifle regiments during the Napoleonic Wars, that used uniform colors (e.g., "rifle green") better suited for irregular warfare and skirmishing.⁸³ However, by the late nineteenth century there was a broader move across state armed forces to adopt more practical uniforms and use colours that did not make their wearers easy targets.⁸⁴ In a British context, this was seen in the adoption of a "Khaki" colored uniform,⁸⁵ while the German forces shifted to a "Feldgrau" (field grey) color in 1910 just prior to the first world war.⁸⁶ That conflict also saw the French adopt a "Horizon Blue" colored uniform named "for a shade of blue alludes to the intangible color that divides the sky from the earth."⁸⁷ During World War I, camouflage

77. THOMAS, *supra* note 63, at 63.

78. SPAIGHT & ACLAND, *supra* note 21, at 57.

79. *Id.*

80. MARTIN VAN CREVELD, *THE CULTURE OF WAR* 21 (2008); *see also* KENNETH C. DAVIS, *THE HIDDEN HISTORY OF AMERICA AT WAR: UNTOLD TALES FROM YORKTOWN TO FALLUJAH* 132–33 (2015) (outlining the technological impact of the U.S. Civil War, including the rapid transformation in weaponry that led to repeating rifles and the Gatling gun, the forerunner of the machine gun).

81. VAN CREVELD, *supra* note 80, at 21.

82. TIM NEWARK ET AL., *BRASSEY'S BOOK OF CAMOUFLAGE* 10–11 (1996).

83. *Id.*

84. NEWARK, *supra* note 57, at 73 (explaining that, while the British military continued to hang on to traditional uniforms, "a new style of guerrilla warfare had evolved in which individual skirmishers armed with rifles ranged across a battlefield, pricking off brightly clothed soldiers").

85. NEWARK ET AL., *supra* note 82, at 12–14.

86. Ralph Reiley, *Wartime Changes to the German Field Uniform 1914-1916*, [WORLDWAR1.COM](http://www.worldwar1.com/sfgeruni.htm), <http://www.worldwar1.com/sfgeruni.htm> (last visited Sept. 19, 2023).

87. Avishkek Satyal, *French Army Uniforms of WWI*, [HISTORYTEN](https://historyten.com/world-war-1/french-army-uniforms-ww1/) (Oct. 9, 2022), <https://historyten.com/world-war-1/french-army-uniforms-ww1/>.

coloring was first applied to German helmets.⁸⁸ This marked the beginning of a wider move to use disruptive patterns to mask the existence of artillery positions, tanks, naval vessels, and aircraft,⁸⁹ although, following World War II, as radar and other advanced means of technological observation were developed, camouflaging naval vessels and aircraft with painted designs became less common.⁹⁰

First developed in 1918, World War II witnessed the selective adoption of patterned camouflaged uniforms.⁹¹ However, it was in the context of colonial wars of the 1960s and 1970s that military forces broadly embraced the use of such uniforms.⁹² This is a practice that has not only become widespread but has also created new challenges.⁹³ With the development of technologically advanced “multi-cam” patterned uniforms and their widespread adoption by many armed forces, opposing belligerents have become increasingly difficult to differentiate on the battlefield.⁹⁴ In the Russia-Ukraine conflict, this apparently helped prompt the practice of wearing colored tape wrapped around helmets and arms so that “friendly fire” incidents could be avoided.⁹⁵

There have also been significant efforts in recent years to adopt technological solutions for hiding soldiers and equipment.⁹⁶ It is reported that in Ukraine “Russian forces are employing a camouflage that decreases the visibility of combat vehicles in the infrared and radar spectra.”⁹⁷ Israel has developed “an innovative camouflage sheet made out of a material that provides multispectral concealment.”⁹⁸ United Kingdom special forces

88. NEWARK ET AL., *supra* note 82, at 15.

89. *Id.*

90. Joseph Frantiska Jr., *The Rise and Fall of Dazzle Camouflage*, WARFARE HIST. NETWORK (Fall 2017), <https://warfarehistorynetwork.com/article/the-rise-and-fall-of-dazzle-camouflage/>.

91. NEWARK ET AL., *supra* note 82, at 23–27.

92. *Id.* at 28–36.

93. Morgan, *supra* note 39.

94. *Id.*

95. *Id.* (noting that “[s]ome Ukrainian paramilitary units have been wearing MultiCam knockoffs since Russia’s invasion in 2014, with members of the controversial Azov Brigade—whose ranks include neo-Nazis and other far-right ultranationalists—even celebrating it with a band called My Skin Is MultiCam. The pattern has spread to regular Ukrainian army units since Russia’s latest invasion in 2022, thanks to an influx of U.S.-supplied gear. At the same time, MultiCam has become the de facto uniform of the Wagner Group, which has an estimated 50,000 troops fighting on the Russian side. The similarities in uniforms and equipment have led the opposing armies to add colored armbands to their uniforms”); *see also* Mohan, *supra* note 1 (discussing Ukrainian soldiers switch from distinct yellow bands to blue to prevent Russian infiltration).

96. *See, e.g.*, Sakshi Tiwara, *Stung by Losses, Russia Claims Using Latest, Hi-Tech Camouflage to Defend Its Tanks from Spy Drones*, EURASIAN TIMES (Apr. 27, 2022), <https://eurasianimes.com/russias-gives-up-its-highly-comical-ways-to-shield-its-tanks/> (noting that Russian missile launchers now use devices that minimize their radar signature).

97. *Id.*

98. Maya Margit, *Israeli Camouflage Tech Makes Soldiers ‘Invisible’*, JERUSALEM POST, <https://www.jpost.com/jpost-tech/israeli-camouflage-tech-makes-soldiers-invisible-671096> (last updated June 15, 2021, 5:26 PM).

operating in Syria have worn “stealth” suits, dubbed the “combat burqa,” which are designed to hide soldiers from sophisticated surveillance systems.⁹⁹

C. Irregular Warfare

The wearing of uniforms is also impacted by the way hostilities are conducted.¹⁰⁰ The Russia-Ukraine conflict stands out as an inter-state conflict involving conventional warfare.¹⁰¹ However, like almost all such conflicts, it also involves conduct of irregular warfare including clandestine and covert operations.¹⁰² Much of this irregular warfare is carried out by specialized forces, whether military or paramilitary, employed by military and intelligence organizations.¹⁰³ They can carry out a wide range of missions including raids, infiltration of enemy lines, attacks from the sea, parachute and other airborne insertion, reconnaissance and other intelligence gathering, sabotage, and providing support to partisan and guerrilla units.¹⁰⁴

It has been reported “the Security Service of Ukraine, the Main Directorate of Intelligence and the Ukrainian military each field their own special forces units.”¹⁰⁵ Such units have been implicated in strikes against Russian forces in Ukraine on the frontlines,¹⁰⁶ in support of surrounded units,¹⁰⁷ in occupied territory,¹⁰⁸ and further afield in Russia.¹⁰⁹ Under Ukrainian law, its special forces are responsible for organizing, preparing,

99. *British Forces Hunt for Jihadi John in ‘Combat Burqas’*, NDTV, <https://www.ndtv.com/world-news/british-forces-hunt-for-jihadi-john-in-combat-burqas-1212522> (last updated Aug. 30, 2015, 7:35 PM IST).

100. STEPHEN BIDDLE, *NONSTATE WARFARE: THE MILITARY METHODS OF GUERRILLAS, WARLORDS, AND MILITIAS* xvi (2021) (“[S]ince at least 1900, all sound war-fighting systems, whoever adopts them, have had to combine features commonly associated with both ‘conventional’ and ‘irregular’ warfare.”).

101. *Id.* at xv.

102. *Id.*

103. *Special Forces*, *supra* note 3.

104. *See id.*

105. Julian E. Barnes et al., *Ukrainians Were Likely Behind Kremlin Drone Attack, U.S. Officials Say*, N.Y. TIMES (May 24, 2023), <https://www.nytimes.com/2023/05/24/us/politics/ukraine-kremlin-drone-attack.html>.

106. Maxim Tucker, *Ukraine’s Secret Attempt to Retake the Zaporizhzhia Nuclear Plant*, TIMES (Apr. 7, 2023, 5:00 PM BST), <https://www.thetimes.co.uk/article/ukrainian-zaporizhzhia-nuclear-power-plant-russia-putin-war-2023-fx82xz3xz>; Carlotta Gall, *On the River at Night, Ambushing Russians*, N.Y. TIMES (Nov. 21, 2022), <https://www.nytimes.com/2022/11/21/world/europe/ukraine-russia-war-river.html>.

107. Maxim Tucker, *Inside Ukraine’s ‘Impossible’ Military Intelligence Raid on Azovstal*, TIMES (Mar. 15, 2023, 4:40 PM GMT), <https://www.thetimes.co.uk/article/ukraine-russia-war-azovstal-steel-works-military-intelligence-raid-hqd668pwb>.

108. Marcus Parekh et al., *Ukrainian Special Forces ‘Could Launch More Attacks in Coming Days’ on Occupied Crimea*, TEL. (Aug. 10, 2022, 6:51 PM), <https://www.telegraph.co.uk/world-news/2022/08/10/ukraine-russia-news-latest-updates-nuclear-plant-oil-crimea/>.

109. Maxim Tucker, *‘Shaman’ Special Forces Take the Fight Across the Border into Russia*, TIMES (June 26, 2022, 6:00 PM BST), <https://www.thetimes.co.uk/article/shaman-special-forces-take-the-fight-across-the-border-into-russia-0l6srllwk>; Barnes et al., *supra* note 105.

supporting, and leading the resistance in occupied territory.¹¹⁰ Russia also fields a variety of military and paramilitary special forces.¹¹¹ They have carried out a broad range of “behind the lines” operations.¹¹² It is reported such units parachuted into Kyiv to seek to capture and kill President Zelensky at the beginning of the conflict.¹¹³ Airborne units attempted to seize a strategic airfield in the opening stages of the conflict.¹¹⁴ There was the previously noted infiltration of the Ukrainian capital,¹¹⁵ and watercraft has been used on rivers to slip behind the frontlines on reconnaissance missions to locate targets.¹¹⁶

Historically, the use of enemy uniforms, emblems, and symbols occurs most often in the context of irregular activities, such as infiltration of an enemy position, operating in enemy rear areas, and while conducting reconnaissance and other intelligence gathering missions.¹¹⁷ It happened during World War II,¹¹⁸ and enemy uniforms have been worn by both members of regular armed forces¹¹⁹ and by non-state actors fighting against

110. *Law on Foundations of National Resistance Enters into Force in Ukraine*, FREEDOM (Jan. 1, 2022), <https://uatv.ua/en/law-on-foundations-of-national-resistance-enters-into-force-in-ukraine/>.

111. Jack Watling & Nick Reynolds, *Plot to Destroy Ukraine*, ROYAL UNITED SERVS. INST. FOR DEF. & SEC. STUD. 8 (Feb. 15, 2022), <https://static.rusi.org/special-report-202202-ukraine-web.pdf>.

112. Foreign Staff, *Zelensky: I Was Minutes from Being Captured*, TIMES (Apr. 30, 2022, 12:01 AM BST), <https://www.thetimes.co.uk/article/zelensky-i-was-minutes-from-being-captured-dbf5qz2hm>.

113. *Id.*

114. Stijn Mitzer & Joost Oliemans, *Destination Disaster: Russia's Failure at Hostomel Airport*, ORYX (Apr. 13, 2022), <https://www.oryxspioenkop.com/2022/04/destination-disaster-russias-failure-at.html>.

115. Brendan Cole, *Russians Wearing Ukrainian Soldiers' Uniforms Driving Toward Kyiv*, NEWSWEEK (Feb. 25, 2022, 3:34 AM), <https://www.newsweek.com/russia-ukraine-kyiv-putin-forces-military-vehicles-1682568>.

116. George Grylls, *Russia Uses Attack Patrol Boats to Slip Behind Enemy Lines*, TIMES (Apr. 26, 2022, 5:50 PM BST), <https://www.thetimes.co.uk/article/russia-uses-attack-patrol-boats-from-kherson-to-slip-behind-enemy-lines-vzhsnkgs>.

117. See *infra* Section IV.B.2 (discussing the *Skorzeny* trial and the Vietnam conflict where enemy uniforms were used).

118. See *The Trial of Otto Skorzeny and Others in 9 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS* 90–94 (1949); JAMES LUCAS, *KOMMANDO: GERMAN SPECIAL FORCES OF WORLD WAR TWO* 43–46 (1985); DAVID R. HIGGINS, *BEHIND SOVIET LINES: HITLERS BRANDENBURGERS CAPTURE THE MAIKOP OILFIELDS* (2014); DAMIEN LEWIS, *SAS GHOST PATROL: THE ULTRA-SECRET UNIT THAT POSED AS NAZI STORMTROOPERS*, at xx–xxi (2017); PAUL MOORCRAFT, *CHURCHILL'S GERMAN SPECIAL FORCES: THE ELITE REFUGEE TROOPS WHO TOOK THE WAR TO HITLER* 16–47 (2023).

119. JOHN L. PLASTER, *SECRET COMMANDOS: BEHIND ENEMY LINES WITH THE ELITE WARRIORS OF SOG 36* (2004) (describing an eight-person reconnaissance team during the Vietnam conflict that consisted of three Americans and five Montagnard tribe members, and were led “by a Montagnard, or Yard, as they were known, in NVA uniform carrying an AK”); *id.* at 182 (outlining the use of a point man on patrol “disguised as an NVA, complete with AK and chest web gear”); YAAKOV KATZ, *SHADOW STRIKE: INSIDE ISRAEL'S SECRET MISSION TO ELIMINATE SYRIAN NUCLEAR POWER* 159–63 (2019) (indicating that during the 2007 collection of evidence from a Syrian nuclear facility, members of the Israeli Sayert Matkal wore Syrian uniforms and drove camouflaged Syrian-model military jeeps).

state opponents since then.¹²⁰ The reports that Russian military personnel have operated in Ukrainian uniforms and vehicles, and used OSCE marked vehicles, highlights that such activity continues to be an issue that will attract questions regarding its legality.¹²¹ It is not clear if Ukrainian forces have similarly used Russian uniforms and vehicles during the extensive intelligence and special-forces-led operations behind Russian lines and in Russia itself.¹²² In any event, as will be discussed, not all use of enemy uniforms, emblems, and insignia is contrary to international humanitarian law, or would be dealt with as a war crime.¹²³ The misuse of internationally protected symbols, emblems of international organizations, uniforms, etc., of the United Nations personnel and neutral states generally attracts more criticism and liability.¹²⁴

III. UNIFORMS, SYMBOLS, AND THE LAW

A. Visibility and Fixture

The use of uniforms, military insignia, national flags, and the idea of distinguishing members of a state's armed forces from both the civilian population and enemy forces was a prominent feature of late nineteenth and early twentieth century efforts to codify international humanitarian law.¹²⁵ The question of uniforms arose in two areas: first, lawful combatant and prisoner of war status, and secondly the treacherous use of uniforms and distinguishing signs.¹²⁶ Status is closely tied to the principle of distinction, with the separation of armies from the civilian population being called at the time perhaps the greatest triumph of international law with its mitigating effects on the evils of war being incalculable.¹²⁷ Discussions during the

120. MICHAEL DEWAR, *THE ART OF DECEPTION IN WARFARE* 183 (1989) (indicating that the Irgun terrorist group raided a British Army camp near Latrun in February 1948 while wearing British uniforms and driving army vehicles); *see also* SEAN NAYLOR, *RELENTLESS STRIKE: THE SECRET HISTORY OF JOINT SPECIAL OPERATIONS COMMAND* 298 (2015) (outlining a January 2007 operation where Iraqi insurgents in U.S. uniforms gained access to a compound, which resulted in the death of five American personnel); Riaz Khan, *Militant Who Killed 101 at Pakistan Mosque Wore Uniform*, AP NEWS (Feb. 2, 2023, 12:52 PM), <https://apnews.com/article/afghanistan-crime-pakistan-government-peshawar-bf0181a7dd63973a15537c4da47ff9d3> (reporting on a case where a militant wore a police uniform).

121. *See* Quinn, *supra* note 36; Jankowicz, *supra* note 36.

122. Maxim Tucker, *Ukraine Assassinated Russian Propagandists, Admits Intelligence Chief*, TIMES (May 17, 2023, 9:50 PM BST), <https://www.thetimes.co.uk/article/ukraine-assassinated-russian-propagandists-admits-intelligence-chief-fl33rn5vc>; Frederico Borsari, *Ukrainian Special Forces—Preparing the Battlefield*, CEPA (May 22, 2023), <https://cepa.org/article/ukrainian-special-forces-preparing-the-battlefield/>.

123. *See infra* Section IV.A (highlighting the thin line between ruses and perfidy).

124. *See* Section IV.B.2 (explaining the historical confusion of what actually constitutes a misuse).

125. SPAIGHT & ACLAND, *supra* note 21, at 37.

126. *Id.* at 104–10, 204–09, 304–05.

127. *Id.* at 37.

negotiations of the 1907 Hague Land Warfare Regulations¹²⁸ exposed a fundamental disagreement amongst militarily powerful and less powerful states as to whether the civilian population could repel an invader, and, even more controversially, continue to fight once territory was occupied.¹²⁹ A *levée en masse* fighting in civilian clothes and carrying arms openly to repel an invader was ultimately provided for in the Regulations.¹³⁰ However, the status of organized resistance movements in occupied territory remained divisive at the end of the second world war and during the development of Additional Protocol I.¹³¹ The status of non-state actors as lawful combatants remains one of the key reasons why the United States has not adopted that Protocol.¹³²

In analyzing treachery, the international humanitarian law provisions relating to uniforms are notable in two respects. First, is the lack of any set definition regarding what constitutes a uniform.¹³³ Second, there is a requirement for the wearing of fixed distinctive signs to be recognizable at a distance, which runs counter to what was occurring with most to state military forces at the time.¹³⁴ As has been noted, by the turn of the twentieth century states were adopting uniform coloring (e.g., khaki, feldgrau, horizon blue) that made soldiers less visible.¹³⁵ This set up a situation where the law appears to be anchored to mid to late nineteenth century concepts of war fighting while state practice was in a period of transition.¹³⁶

In terms of what standard might be required for a uniform, the 1907 Hague Land Warfare Regulations, article 1, only refers to the armies of a state as lawful belligerents without indicating how they are to be clothed.¹³⁷ With respect to militia and volunteer corps, the Regulations require, amongst other criteria, that they “have a fixed distinctive emblem recognizable at a distance.”¹³⁸ The Third Geneva Convention,¹³⁹ article 4A(1), adopts a similar

128. Regulations Respecting the Laws and Customs of War on Land Annex to the Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Land Warfare Regulations].

129. SPAIGHT & ACLAND, *supra* note 21, at 48–56.

130. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 2.

131. *Id.*

132. Ronald Reagan, *Letter of Transmittal*, 81 AM. J. INT'L L. 910, 912 (1987).

133. *See generally* 1907 Hague Land Warfare Regulations, *supra* note 128 (prohibiting the improper use of enemy uniforms but never defining the term with any kind of specificity).

134. *See id.* art 1(2).

135. *See supra* notes 85–87 and accompanying text (describing the trend toward camouflaged uniforms and its progression during the latter parts of the nineteenth century).

136. *Compare* 1907 Hague Land Warfare Regulations, *supra* note 128, art. 1(2) (requiring fixed distinctive signs to be recognizable from a distance), *with supra* notes 85–87 and accompanying text (examining the progression towards less visually recognizable uniforms in the latter part of the nineteenth century).

137. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 1.

138. *Id.*

139. Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4A(1)–(6), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention or GC III].

approach with no reference made to uniforms being worn by the armed forces of the party to the conflict.¹⁴⁰ Further, this provision also recognizes that some members of militia and volunteer corps form part of those forces.¹⁴¹ A separate subsection, article 4A(2), deals with “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements.”¹⁴² It is this provision that includes the requirement for the wearing of a fixed distinctive sign.¹⁴³

There have been limited suggestions that regular state armed forces would not have to meet the enumerated criteria set out for militia, volunteer groups, or resistance movements, including the wearing of a fixed distinctive sign recognizable at a distance.¹⁴⁴ This would provide combatant and prisoner-of-war status to regular state armed forces regardless of how they are dressed and presumably, how they act.¹⁴⁵ However, it is clear from history, state practice, and judicial decisions that all armed forces, at a minimum, must meet such criteria.¹⁴⁶ Notably for Russia and Ukraine, Additional Protocol I, article 43(1), removes any distinction between regular and irregular armed forces in terms of status criteria.¹⁴⁷ Further, the practice of wearing uniforms is directly referred to in article 44(7), which states that provisions in that article that provide lawful combatant status to members of resistance organizations and state armed forces that might be assisting them in circumstances where they cannot distinguish themselves “[are] not intended to change the generally accepted practice of states with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.”¹⁴⁸ That said, the wearing of a fixed distinctive sign recognizable at a distance appears to be the minimum standard at law for a “uniform.”¹⁴⁹

The question remains as to what the fixed distinctive sign standard entails in terms of visibility and permanence. In the Ukraine conflict, the impact of using brightly coloured tape to distinguish fighters is particularly relevant.¹⁵⁰ Overall, the law lacks clarity.¹⁵¹ At the time of the development of the 1907 Hague Land Warfare Regulations, it was noted that “the sign

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

141. *Id.*

142. *Id.* art. 4A(2).

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

144. See GEOFFREY S. CORN ET AL., *THE LAW IN WAR: A CONCISE OVERVIEW* 112–24 (2d ed. 2023) (discussing the applicability of the enumerated criteria for combatancy to regular armed forces).

145. *See id.*

146. *See id.*

147. Additional Protocol I, *supra* note 28, art. 43(1).

148. *Id.* art. 44(7)

149. GC III, *supra* note 139, art. 4(A)(2)(b).

150. *See supra* notes 38–41 and accompanying text (providing an example of how colored markings have proven helpful to those fighting in Ukraine).

151. *See* GC III, *supra* note 139, art. 4(A)(2).

must be fixed—externally, so as not to be assumed or concealed at will.”¹⁵² A proposal for notification of the emblem was rejected and a suggestion that it be recognizable at rifle range (e.g., 2,000 yards) was viewed as unreasonable.¹⁵³ During the Russo-Japanese War, the Japanese government took the view that Russian “free corps” must be “*distinguishable by the naked eye from the ordinary people.*”¹⁵⁴

During World War II, Allied Jedburgh teams operating behind the lines were provided tri-color arm bands “in all supply drops as a minimum fulfillment of the 1907 Hague Convention requirement that partisans wear a distinctive emblem or uniform.”¹⁵⁵ That said, in *The Hostages Case*, a post-World War II war crimes trial, the court determined as following regarding the status of Yugoslav resistance forces:

The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian, and Serbian uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance.¹⁵⁶

In contrast, the 1960 Commentary on Geneva Convention III dealing with prisoner war status indicated that “a sign need not necessarily be an armband. It may be a cap (although this may frequently be taken off and does not seem fully adequate), a coat, a shirt, an emblem or a coloured sign worn on the chest.”¹⁵⁷ The 2020 ICRC Commentary¹⁵⁸ does not make direct reference to armbands. Rather, reference is made to the distinctive sign being fixed in that “it is not easily removed or disposed of ‘at the first sign of danger.’”¹⁵⁹ However, this statement is underpinned by a footnote where reliance is placed on Howard Levie’s 1978 work, *Prisoners of War in International Armed Conflict*.¹⁶⁰ He states that an armband sewed to a sleeve, a “logotype” displayed on clothing and a unique type of jacket would constitute a fixed

152. SPAIGHT & ACLAND, *supra* note 21, at 57.

153. *Id.*

154. *Id.*

155. MICHAEL F. DILLEY, BEHIND THE LINES: A CRITICAL SURVEY OF SPECIAL OPERATIONS IN WORLD WAR II 170–71 (2013).

156. INT’L MIL. TRIB., TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUREMBERG, OCTOBER 1946–APRIL 1949, 1107 (1949).

157. INT’L COMM. RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 60 (Jean S. Pictet et al. eds., 1960).

158. I COMMENTARY ON THE THIRD GENEVA CONVENTION, ICRC (2020) [hereinafter 2020 ICRC GENEVA CONVENTION III COMMENTARY].

159. *Id.* ¶ 1016.

160. *Id.* ¶ 1016 n.133 (citing Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INT’L L. STUD. 48 (1978)).

and distinctive sign. In his view, an armband slipped on or pinned to the sleeve would not be sufficient.¹⁶¹

The United States 2016 *Department of Defense's Law of War Manual (U.S. Law of War Manual)* notes that “a partial uniform (such as a uniform jacket or trousers), load bearing vest, armband, or other device could suffice, so long as it served to distinguish the members from the civilian population.”¹⁶² As with the ICRC Commentary reliance is placed on Howard Levie’s work regarding the degree of fixture required.¹⁶³ Other references to sewing on distinctive signs are found in the Manual as well.¹⁶⁴ So the question remains how “fixed” the sign must be to the soldier. In this regard, the fixed nature of an emblem should also reflect the reality that uniforms may also be removed and donned relatively easily.¹⁶⁵ However, practically it is much easier to remove just an armband than a uniform and then blend within the civilian population.¹⁶⁶

In the Ukraine-Russia conflict, the potential removal of coloured tape wrapped around an arm or helmet presents a similar challenge. That said, Geneva Convention I only requires medical personnel to wear “affixed to the left arm, a water-resistant . . . emblem” even though such an armband might also be easily removed.¹⁶⁷ The issue of fixture becomes a question of degree and how practically it is being used in the conflict.¹⁶⁸ Tape is not as easily removed as an armband slipped over the arm. A sewn-on patch could also be cut off. The *U.S. Law of War Manual* provides useful guidance in noting that “[i]n practice . . . it would be important to assess whether members of the armed group are functionally distinguishable from the civilian population, even if the distinctive sign that they wear is not permanent and could be removed.”¹⁶⁹ This functional assessment makes good practical sense, and the sewing on of an armband, as is suggested in the Levie analysis, appears not to be an absolute requirement for the legal test.¹⁷⁰

Notably, 1977 Additional Protocol I places considerably less emphasis on uniforms.¹⁷¹ Article 43, dealing with combatant status, does not refer to

161. Levie, *supra* note 160, at 48.

162. U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 4.6.4.1., at 122 (2016) [hereinafter LAW OF WAR MANUAL], <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf> (last updated May 2016).

163. *Id.* ¶ 4.6.4.2 n.168.

164. *Id.*; see also MORRIS GREENSPAN, MODERN LAW OF LAND WARFARE 59 (1959) (discussing distinctive signs); MINISTRY OF DEFENCE, MANUAL OF MILITARY LAW ¶ 92 (1958).

165. See LAW OF WAR MANUAL, *supra* note 162.

166. See *id.*

167. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 40, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter the First Geneva Convention or GC I].

168. See LAW OF WAR MANUAL, *supra* note 162, ¶ 4.6.4.2.

169. *Id.*

170. See *id.*; Levie, *supra* note 160, at 48.

171. Additional Protocol I, *supra* note 28, art. 43.

the fixed distinctive sign criterion, although the Protocol only supplements, and does not amend, Geneva Convention III.¹⁷² Therefore, a fixed distinctive sign remains a relevant issue. The Additional Protocols Commentary notes that “a cap or an armlet etc. worn in a standard way is actually equivalent to a uniform.”¹⁷³ The use of coloured tape by both sides in the Ukraine conflict indicates not only its acceptance but also its effectiveness.¹⁷⁴ It appears the suggested functionality requirement regarding the degree of fixture for a distinctive sign is met with the use of such tape.

Finally, another factor to be considered is that the notion of a fixed distinctive sign recognizable at a distance must be assessed in the context of the degree to which camouflaged uniforms are the norm for state military forces. Adopting too stringent a recognizability standard is inconsistent with the normal practice for regular armed forces that seek to blend into the surrounding environment.¹⁷⁵ While the standard for what constitutes a fixed distinctive sign is open to interpretation, it appears that a colored armband recognizable by the naked eye as adopted by Ukraine and Russia would constitute a fixed distinctive sign.¹⁷⁶

B. Other Distinctive Signs and Emblems

International humanitarian law provides for the use of distinctive protective signs and emblems such as the Red Cross or Red Crescent, signs for works and installations containing dangerous forces, and distinctive signs for self-defence.¹⁷⁷ Other signs, signals, and emblems relate to flags of truce, protective emblems for cultural property, and “other internationally recognized protective emblems, signs or signals.”¹⁷⁸ There is also recognition for the United Nations emblem, which may be used on civilian or military vehicles.¹⁷⁹ The uniforms of United Nations authorized military personnel may also include blue berets or helmets.¹⁸⁰ It should be noted that

172. *Id.*

173. INT’L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1577 (Yves Sandoz et al. eds., 1987) [hereinafter ADDITIONAL PROTOCOLS COMMENTARY].

174. *See id.*

175. Levie, *supra* note 160, at 48; *see also* 2020 ICRC GENEVA CONVENTION III COMMENTARY, *supra* note 158, ¶ 1018 (“The core criterion is not that they can be seen by the opposing forces, but that in the event they are seen, they are not mistaken for civilians, nor for members of the enemy army. For example, the wearing of camouflage uniforms with a patch indicating nationality has long been accepted as fulfilling the requirement of the armed forces to distinguish themselves, notwithstanding that camouflage by nature is intended to blend into the surrounding environment. It would likewise be acceptable for other militias and volunteer groups under [a]rticle 4A(2) to be so attired.”).

176. *See* 2020 ICR GENEVA CONVENTION III COMMENTARY, *supra* note 158, ¶ 1015.

177. *See* Additional Protocol I, *supra* note 28, art. 38.

178. *Id.* art. 38(1).

179. *Id.* art. 38(2).

180. *About Us*, U.N., DEP’T OF OPERATIONAL SUPPORT, <https://operationalsupport.un.org/en/uncap/about-us> (last visited Sept. 27, 2023).

protagonists in a conflict may have permanent or temporarily employed medical personnel who display a Red Cross or Red Crescent, and vehicles and facilities employed in such humanitarian service can be similarly marked.¹⁸¹ This means that displaying an emblem can be a common occurrence by all Parties to a conflict, and it is the improper use of the emblem that constitutes a war crime.¹⁸²

C. Marking of Vehicles

The requirement to distinguish opponents in conflict is not limited to wearing uniforms, as is reflected in the use of the “Z” on Russian vehicles.¹⁸³ This issue arises primarily in the context of belligerents using civilian pattern vehicles, which has occurred in the Ukraine conflict.¹⁸⁴ As the *2020 ICRC Geneva Convention III Commentary* suggests “[i]f members of militias or volunteer corps are in vehicles that otherwise have the appearance of civilian vehicles, they must also ensure that these bear a distinctive sign.”¹⁸⁵ In some instances Ukraine has taken steps to paint donated civilian pattern vehicles in camouflaged colors, marking them as military in nature.¹⁸⁶ However, there have also been instances in which unmarked civilian vehicles have been targeted by Russian forces while collecting wounded civilians from the battlefield, raising questions as to whether their humanitarian use was known at the time of the attack.¹⁸⁷ As with wearing uniforms, the reality is that many armed forces use the same types of artillery, tanks, and aircraft.¹⁸⁸ This is certainly the case in the conflict between Russia and Ukraine, which makes the application of national insignia an important practical method of distinguishing enemy forces, although it too is a practice impacted by using camouflage.¹⁸⁹

181. See, e.g., GC I, *supra* note 167, arts. 39–42 (requiring distinctive emblems to be worn by medical personnel).

182. See *id.*

183. See Villegas & Westfall, *supra* note 42.

184. Thomas Gibbons-Neff & Malachy Browne, *Guided Missile Killed U.S. Aid Worker in Ukraine, Video Shows*, N.Y. TIMES (Feb. 14, 2023), <https://www.nytimes.com/2023/02/14/world/europe/russian-attack-aid-worker-video.html> (“Ukrainian forces traverse the battlefield in all types of civilian vehicles, including privately owned sedans and school buses.”).

185. 2020 ICRC GENEVA CONVENTION III COMMENTARY, *supra* note 158, ¶ 1020.

186. Bethany Dawson, *Meet the International Team of Volunteers Who Are Retrofitting Civilian Fords and Toyotas into Battle Trucks for the Ukrainian Forces*, BUS. INSIDER (June 12, 2022, 9:43 AM), <https://www.businessinsider.com/civilian-fords-and-toyotas-turned-into-battle-trucks-for-ukraines-force-s-2022-6>; *How Ukrainian Forces Are Weaponising Civilian Vehicles like Scenes from Mad Max*, FORCES NET (June 23, 2022, 12:33 PM), <https://www.forces.net/ukraine/how-ukrainian-forces-are-weaponising-civilian-vehicles-scenes-mad-max>.

187. See Gibbons-Neff & Browne, *supra* note 184.

188. See ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 173, ¶ 1572.

189. *Id.*

IV. TREACHEROUS CONDUCT

A. Treachery and Perfidy

With a focus on deceit, treachery is theoretically and has been traditionally viewed as a very broad concept.¹⁹⁰ From a legal perspective it has included assassination as well as treacherous killing and wounding,¹⁹¹ poisoning an opponent,¹⁹² denial of quarter,¹⁹³ misusing uniforms and insignia,¹⁹⁴ and abusing a flag of truce.¹⁹⁵ International humanitarian law refers both to treachery and perfidy, which are historically considered to be interchangeable terms.¹⁹⁶ A unique aspect of treachery is the degree to which prohibitions are linked to honor and the manner in which hostilities are conducted.¹⁹⁷ A fundamental characteristic of treachery and perfidy is described in Additional Protocol I article 37 as “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection in the rules of international law applicable in armed conflict, with intent to betray that confidence.”¹⁹⁸ Article 37(1)(d) also provides a nonexhaustive list of perfidious acts, which includes “the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.”¹⁹⁹

However, as codified, treacherous acts are presented not only as being relatively narrow in scope but also in an unfortunately disjointed fashion.²⁰⁰ The fragmentation of perfidy is centered around a focus on acts relating to the killing, wounding, or capturing of an adversary in Additional Protocol I article 37(1), while also more broadly prohibiting acts relating to emblems,

190. See Michael Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. OF INT'L L. 609, 617 (1992).

191. SPAIGHT & ACLAND, *supra* note 21, at 86–89; see also *Lieber Code*, *supra* note 22, arts. 148; 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(b); Schmitt, *supra* note 190, at 630 (discussing killing and wounding as treachery).

192. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(a); Additional Protocol I, *supra* note 28, art. 37.

193. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(d); Additional Protocol I, *supra* note 28, art. 40.

194. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(f); Additional Protocol I, *supra* note 28, art. 37(d).

195. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(f); Richard B. Jackson, *Perfidy in Non-International Armed Conflicts*, 88 INT'L L. STUD. 237, 241–42 (2012); see LESLIE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 93 (3d ed. 2008).

196. Jackson, *supra* note 195, at 257 n.65 (citing 10 U.S.C. § 950t(17) (2006)).

197. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 173, ¶ 1486 (“The rules regarding honour are basically concentrated in [a]rticles 37, 38 (*Recognized emblems*) and 39 (*Emblems of nationality*). However, various other provisions—[a]rticles 44 (*Combatants and prisoners of war*), paragraph 3 (open carrying of arms), and 46 (*Spies*), paragraph 3 (the clandestine gathering of information)—are directly related to the same principle.”).

198. AP I, *supra* note 28, art. 37(1).

199. *Id.* art. 37(1)(d).

200. See *id.* art. 37(1).

insignia, flags, etc. (articles 38 and 39).²⁰¹ It is noted that “it was not the prohibition of perfidy *per se* which was the prime consideration of article 37, but only the prohibition of a particular category of acts of perfidy.”²⁰² The Protocol continued the practice in the 1907 Hague Land Warfare Regulations in which the term “treacherous” was incorporated into the prohibition of killing or wounding an adversary in article 23(b) while the misuse of emblems was separately prohibited without a specific reference to treachery.²⁰³ The provisions of articles 37, 38, and 39 of Additional Protocol I are linked in prohibiting treacherous conduct, which is evident in the Additional Protocols Commentary where it is noted “[a]rticle 38 (*Recognized emblems*) and [a]rticle 39 (*Emblems of nationality*) make a by no means insignificant contribution to reinforcing [a]rticle 37, particularly by the absolute quality of the prohibitions formulated in them.”²⁰⁴

The types of perfidious acts captured by article 37 are broader than the specific examples in article 85(3) of the Protocol, which lists as a grave breach “the perfidious use, in violation of [a]rticle 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.”²⁰⁵ Those emblems are not listed specifically in article 37 and are the subject of a more specific prohibition found in article 38.²⁰⁶ The overlap between “perfidy” as codified in Additional Protocol I and a broader concept of treachery and perfidy is also evident in article 37(d) because reference to the use of signs, emblems, and uniforms regarding the United Nations, neutral, or other states is also found in articles 38(2) and 39(1).²⁰⁷ Further, article 39(3) specifically provides that neither article 39 nor article 37(d) “shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.”²⁰⁸ The unique way in which “perfidy” is codified in Additional Protocol I has led to the observation that “it seems the best understanding of the codified, law-of-war perfidy prohibition of AP I appreciates three varieties of perfidy: simple perfidy [all acts]; prohibited perfidy [killing wounding or capture]; and grave perfidy [emblems of the Red Cross, etc.]”²⁰⁹

Another area of potential confusion relates to the scope of article 37 in terms of it applying to the capture of an adversary as well as killing or injuring that person. Article 23(b) of the 1907 Hague Land Warfare Regulations was limited to the treacherous killing or wounding of “individuals belonging to

201. *Id.* arts. 37(1), 38–39.

202. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 173, ¶ 1490.

203. 1907 Hague Land Warfare, *supra* note 128, arts. 23(b), (f).

204. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 173, ¶ 1494.

205. AP I, *supra* note 28, art. 85(3)(f).

206. *See id.* art. 38.

207. *See id.* arts. 37(d), 38(2), 39(1).

208. *Id.* art. 39(3).

209. Sean Watts, *Law-of-War Perfidy*, 219 MIL. L. REV. 106, 154 (2014).

the hostile nation or army.”²¹⁰ In a similar fashion, article 8(2)(b)(xi) the 1998 Rome Statute of the International Criminal Court²¹¹ sets out the war crime of “[k]illing or wounding treacherously individuals belonging to the hostile nation or army” during international armed conflict, while article 8(2)(e)(ix) indicates that the “[k]illing or wounding treacherously a combatant adversary” is a serious violation of the laws and customs applicable to conflicts not of an international character.²¹² These Rome Statute provisions directly reflect the 1907 Hague Land Warfare Regulations and as such do not embrace the expanded notion of perfidy incorporating capture found in Additional Protocol I.²¹³ This suggests that, notwithstanding the embrace of capture as a perfidious act in 1977, it had still not received broader acceptance by 1998.²¹⁴

Yet another example of the potentially narrow legal scope of treachery can be seen in article 23(f), which deals with the “*improper* use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention.”²¹⁵ This raises the issue of whether the term “improper” means there is also an accepted use of such uniforms and insignia. Additional Protocol I, article 39 was developed to update and clarify the prohibition of wearing enemy uniforms.²¹⁶ That article refers to a prohibition “to make use” rather than a misuse of “flags or military emblems, insignia or uniforms of adverse [p]arties.”²¹⁷ The prohibition specifically prohibited the use of enemy uniforms while engaging in attacks and expanded the delict to include a ban on their being used to shield, favour or protect military operations.²¹⁸ The Additional Protocols Commentary notes this wording was intended to put an end to the uncertainty arising from the text of Hague Regulations, unclear customary international law and a post-World War II war crimes trial, the *Skorzeny Case*.²¹⁹

Notwithstanding that goal, there are a number of factors that suggest that intent was not fully realized. First, even with the new wording being incorporated the Additional Protocol Commentary notes that not all delegations were of the view the prohibition should go beyond then existing law.²²⁰ This is perhaps best represented in the Reservation made by Canada

210. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(b).

211. Rome Statute of the Int’l Crim. Ct., July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

212. *Id.* arts.8(2)(b)(xi), 8(2)(e)(ix).

213. *Id.* arts. 8(2)(b)(xi), 8(2)(e)(ix); 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(b).

214. Rome Statute, *supra* note 211, arts. 8(2)(b)(xi), 8(2)(e)(ix).

215. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(f) (emphasis added).

216. *See* AP I, *supra* note 28, art. 39(2).

217. *Id.*

218. *Id.*

219. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 173, ¶ 1494; *The Trial of Otto Skorzeny and Others*, *supra* note 118, at 90–91.

220. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 173, ¶ 1574.

in 1990 that it “does not intend to be bound by the prohibitions contained in paragraph 2 of article 39 to make use of military emblems, insignia or uniforms of adverse parties in order to shield, favour, protect or impede military operations.”²²¹ Secondly, in dealing with the use of enemy uniforms, the 1998 Rome Statute retained the “misuse” wording and made no attempt to outline the conditions under which the prohibition applied.²²² It limits the war crime to situations “resulting in death or serious personal injury,” aligning that section with the more general treachery provision found in article 8(2)(b)(xi), as well as suggesting a closer affinity to it occurring during an attack.²²³

Another indication of a continuing ability to wear enemy uniforms and insignia in some circumstances is the ICRC view that captured escaping prisoners of war who wear an enemy uniform and do engage in violence against life or limb should only be subjected to a disciplinary process.²²⁴ Further, it is not suggested that all passing off as an enemy force appears to be prohibited under international humanitarian law.²²⁵ In this respect the *Additional Protocols Commentary* lists “using the enemy wavelengths, passwords” as an example of a permissible ruse, although this is said to be sometimes contested.²²⁶ This suggestion highlights the very thin line that can exist between a ruse and perfidious conduct.

Notably, notwithstanding the variety of acts falling within the legal prohibitions on treacherous acts, not all perfidy by belligerents during hostilities is prohibited.²²⁷ The application of the prohibition is also complicated by issues such as its historical connection to espionage. To the extent treacherous and perfidious conduct is premised upon an overt engagement in hostilities, the widespread use of camouflage and a frequent state reliance on covert and clandestine operations can further complicate the legal assessment. The *Additional Protocols Commentary* outlines considerable scope remains for treacherous acts to take place that are not aimed at killing, injuring, or capturing an adversary.²²⁸ Questions remain as to whether the law encompasses attempts at perfidy.²²⁹ It also appears that treacherous acts resulting the destruction of property (e.g., sabotage)

221. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Can., June 8, 1977, 1125 U.N.T.S. 3 (Canada Reservation), <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/ca?activeTab=default>.

222. Rome Statute, *supra* note 211, art. 8(2)(a)(vii).

223. *Id.* arts. 8(2)(b)(vii), 8(2)(b)(xi)

224. See GC III, *supra* note 139, art. 93(2); ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 173, ¶ 1576.

225. See ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 173, ¶1521 n.54.

226. *Id.*

227. *Id.* ¶ 1492.

228. *Id.*

229. *Id.*; see also Geoffrey Corn, *The Case for Attempted Perfidy: A “Attempt” to Enhance the Deterrent Value*, 13 J. NAT’L SEC. L. & POL’Y 401, 433–34 (2023) (highlighting the grey areas in the law regarding perfidy).

constituting a military objective, but no killing, wounding, or capture are not included in the narrow definition for perfidy under article 37(1).²³⁰ In addition, there are issues surrounding how proximate the carrying out of a perfidious act must be to the killing, wounding, or capture of an opponent.²³¹

B. The Misuse of Uniforms, Emblems, and Insignia

1. No Insignia and the “Little Green Men”

Having addressed the international humanitarian law application to treacherous activity, the analysis turns to the situation in Ukraine. Questions regarding compliance with humanitarian law captured global attention in 2014 when Russian forces entered Crimea wearing uniforms with no external markings identifying their state affiliation.²³² This covert insertion of state armed forces into another country came to personify the concept of twenty-first-century hybrid warfare.²³³ It also raised questions regarding the legality of that action.²³⁴ However, subsequent analysis has concluded such action is not perfidious.²³⁵ It has been suggested that the deceptive action was more in the nature of a lawful ruse, as there was no attempt to deceive Ukraine “on a point of law (the protection under IHL),” such as the misuse of a white flag.²³⁶ Another review highlights that, while not wearing a distinguishable uniform or sign would affect combatant status, there was no requirement to wear insignia of nationality in order to comply with the principle of distinction.²³⁷ In this regard it was suggested “*Spetsnaz* commandos, carrying Russian manufactured arms openly, wearing unmarked-Russian type uniforms and speaking Russian, are clearly not impersonating the Ukrainian military nor are they attempting to blend into the civilian population.”²³⁸ The lack of a requirement to wear insignia of nationality is supported by the *Additional Protocols Commentary*, which

230. Watts, *supra* note 209, at 145.

231. *Id.* at 146.

232. See Ines Gillich, *Illegally Evading Attribution? Russia’s Use of Unmarked Troops in Crimea and International Humanitarian Law*, 48 VAND. J. TRANS. L. 1191, 1192–93 (2015).

233. COLIN S. GRAY, *EXPLORATIONS IN STRATEGY* 146 (1996) (“A clandestine operation is one which attempts to conceal its very existence. A covert operation is one which attempts to conceal its true authorship.”).

234. Gillich, *supra* note 232, at 1192.

235. *Id.* at 1219.

236. *Id.*

237. Shane R. Reeves & David Wallace, *The Combatant Status of the “Little Green Men” and Other Participants in the Ukraine Conflict*, 91 INT’L L. STUD. 361, 394–95 (2015).

238. *Id.* at 395.

suggests that “removing the signs indicating rank, unit, nationality or special function from uniforms” is a lawful ruse,²³⁹ and by state practice.²⁴⁰

What the “little green men” incident highlights is the apparent different emphasis placed on distinguishing armed forces personnel from civilians in comparison to enemy soldiers, the hallmark of the principle of distinction.²⁴¹ However, there is a fine line between fighting with no insignia of nationality, which could cause an enemy to hesitate to react, and the wearing of enemy insignia for purposes that would have a similar tactical effect. It seems it is a difference the law accepts thereby pointing to a subtle and somewhat amorphous standard. There appears to be no reason why a similar approach would not also apply to the marking of armoured and other military vehicles so that a “Z” or other insignia associated with nationality would not be required of Russia.

2. *The (Mis)use of Enemy Uniforms, Emblems, and Insignia*

Questions regarding the propriety of wearing enemy uniforms, emblems, and insignia in order to deceive an opponent have been an issue since the early days of international humanitarian law codification.²⁴² Characteristically, the Lieber Code took a strict stand indicating that using an enemy national standard, flag, or other emblem to deceive the enemy is an act of perfidy,²⁴³ and those fighting in an enemy uniform “can expect no quarter.”²⁴⁴ James Spaight and Francis Acland, writing in 1911, argued against permitting soldiers to wear enemy uniforms without a distinguishing mark up to the point of attack.²⁴⁵ However, the use of enemy uniforms has long been a part of warfare. The 1907 Hague Land Warfare Regulations ultimately reflected that reality by prohibiting the “improper use of . . . the national flag or of the military insignia and uniform of the enemy.”²⁴⁶ As the 1914 United Kingdom Manual of Military Law indicated, “The employment of a national flag, military insignia, and uniform of the enemy for the purpose of ruse is not forbidden,” although “[t]heory and practice are unanimous in forbidding their employment during a combat, that is, the opening of fire

239. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 173, ¶ 1521.

240. Gillich, *supra* note 232, at 1218–19 (referencing U.S. pilots removing identifying badges from their uniforms while flying missions during Operation Southern Watch (1992–2003) over Iraq); *see also* DILLEY, *supra* note 155, at 160 (noting that two United States Army Alamo Scouts teams wore uniforms consisting of fatigues and soft hats with no rank or unit insignia); PLASTER, *supra* note 119, at 46 (referencing a United States special forces operation where the soldiers removed all identifying insignia and information before an operation in Laos during the Vietnam conflict).

241. Gillich, *supra* note 232, at 1193.

242. *See Lieber Code*, *supra* note 22, arts. 63, 65.

243. *Id.* art. 65.

244. *Id.* art. 63.

245. SPAIGHT & ACLAND, *supra* note 21, at 105 (“The quiddity of the rule is difficult to follow.”).

246. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(f).

whilst in the guise of the enemy.”²⁴⁷ There was no unanimity regarding the use of such a uniform or flag “for the purpose of effecting approach or retirement.”²⁴⁸ The 1914 United States Rules of Land Warfare agreed that enemy uniforms, flags, and insignia had to be discarded before engaging in combat, but that their use otherwise was not settled.²⁴⁹

The question of operating in an enemy uniform being a potential war crime came to a head during the World War II trial of German Special Forces Commander Colonel Otto Skorzeny.²⁵⁰ He and nine others were acquitted of all charges relating to operating against and firing on United States soldiers while wearing American uniforms.²⁵¹ The operation involved a specially created unit of English speaking German soldiers tasked with infiltrating the front lines to seize bridges, destroy communications, and create confusion during the 1944 Battle of the Bulge in the Ardennes forest.²⁵² The rather sparse trial note indicates there was a lack of evidence concerning one accused, and there appeared to be a failure to prove an American soldier was killed or wounded during the operation.²⁵³ That said, there is no clear indication of the reasons for acquittal.²⁵⁴

During the trial, the defense presented a *tu quoque*²⁵⁵ plea that the allied forces had also engaged in such activity,²⁵⁶ and that the German troops were carrying out reconnaissance and therefore like spies were protected from prosecution when they successfully returned to their own lines.²⁵⁷ The *Skorzeny* trial had followed the war crimes trial of Admiral Dönitz,²⁵⁸ the commander of German submarine forces, during which he was found guilty

247. WAR OFF., MANUAL OF MILITARY LAW ¶ 152, at 257 (Hugh Godley et al. eds., 6th ed.1914) [hereinafter 1914 UK MANUAL OF MILITARY LAW].

248. *Id.*

249. WAR DEP’T, RULES OF LAND WARFARE ¶ 196, at 61–62 (1914) (indicating that “the Germans take the view The Hague Rules forbid absolutely the use of the enemy’s flag and uniforms”); *see id.* at 62 n.1.

250. *The Trial of Otto Skorzeny and Others*, *supra* note 118, at 90–91.

251. *Id.*

252. CHARLES WHITING, ARDENNES: THE SECRET WAR 28 (1985); *see also* OTTO SKORZENY, SKORZENY’S SECRET MISSIONS: THE INCREDIBLE EXPLOITS OF HITLER’S COMMANDO 161 (2018) (1957) (indicating that, in addition to creating confusion behind Allied lines, the focus of these battlegroups was to go ahead of attacking columns and concentrate in the vicinity of the bridges to report on them).

253. *The Trial of Otto Skorzeny and Others*, *supra* note 118, at 93; *see also* 1907 Hague Land Warfare Regulations, *supra* note 128, art. 31 (providing that “[a] spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage”).

254. *The Trial of Otto Skorzeny and Others*, *supra* note 118, at 93.

255. *Tu Quoque*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/tu%20quoque> (last visited Sept. 19, 2023) (“[A] retort charging an adversary with being or doing what the adversary criticizes in others.”).

256. Maximilian Koessler, *International Law on Use of Enemy Uniforms as a Stratagem and the Acquittal in the Skorzeny Case*, 24 MISS. L. REV. 35, 35 (1959).

257. *Id.* at 42.

258. 22 INT’L MIL. TRIBUNAL, THE TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL TRIBUNAL 556 (1948).

of breaching the 1936 London submarine Protocol.²⁵⁹ However, he was not sentenced by the Tribunal due to evidence that British Admiralty had issued sink on sight orders and the United States carried out unrestricted warfare.²⁶⁰ Taken together, the *Skorzeny* and *Dönitz* cases demonstrated a distinct, if somewhat uncomfortable, reluctance to punish members of the armed forces for acts of perfidy when similar activity was undertaken by the opposing party.²⁶¹

The use of enemy uniforms continued in the post-war period. This included during the Vietnam conflict where United States Special Forces patrols operating in the Military Assistance Command Vietnam-Studies and Observations Group (MACV-SOG) deployed indigenous soldiers in North Vietnamese uniforms as the “point and tail men” on patrols.²⁶² Demonstrating this scenario was fraught with its own identification challenges as the concern expressed for one patrol that a point man’s “disguise might not match NVA uniform markings, such as a distinctive armband.”²⁶³ This uniquely highlights that from a practical perspective the style and color of a uniform alone may be insufficient to ensure identification. During the 1976 Entebbe hostage rescue operation the Israeli assault unit was deceptively dressed in camouflage fatigues resembling Ugandan uniforms.²⁶⁴ Notably, they were also issued white caps to help avoid friendly fire incidents.²⁶⁵ As can be seen in the Ukraine conflict, it is not uncommon for opposing armies to be wearing the same pattern of uniform (e.g., multi-cam). Historically, the use of enemy uniforms has often resulted from the seizure from captured enemy stocks prompting the suggestion that identifying badges and insignia be removed.²⁶⁶ Ultimately, the wearing of what might be interpreted to be enemy uniforms means that a determination of perfidy is likely to hinge the intent of the wearer.²⁶⁷

259. *Id.* at 557, 561; Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April, 1930, Nov. 6, 1936, 173 L.N.T.S. 353, <https://ihl-databases.icrc.org/en/ihl-treaties/submarine-warfare-rules-pv-1936/proces-verbal>.

260. 22 INT’L MIL. TRIBUNAL, *supra* note 258, at 559.

261. *See id.*

262. PLASTER, *supra* note 119, at 214; *see also* RICHARD SCHULTZ, THE SECRET WAR AGAINST HANOI 64 (1999) (indicating that “duplicated NVA uniforms for recon teams” were provided to MACV-SOG).

263. PLASTER, *supra* note 119, at 204, 216.

264. *See, e.g.*, Shlomi Reisman, *Operation Yonatan: My 45-Year-Old Notes Come to Light*, in ENTEBBE DECLASSIFIED: THE UNTOLD FIRST HAND STORIES OF THE LEGENDARY RESCUE OPERATION 139, 144 (2021) (“[A]fter being fitted for and issued camo-striped uniforms and green berets of the sort the Ugandans wore (though we still hardly looked like Ugandan army regulars), and after we’d grabbed white, kibbutz-style workers hats so that we could easily identify one another as soon as we opened fire . . .”).

265. *Id.*

266. *See* 1914 UK MANUAL OF MILITARY LAW, *supra* note 247, ¶ 154 (stating: “If, owing to want of clothing, it becomes necessary to utilize apparel captured from the enemy, his badges should be removed before the articles are worn”).

267. SPAIGHT & ACLAND, *supra* note 21, at 109–10 (discussing intent and perfidy regarding the wearing of enemy uniforms during the Boer War).

Perhaps the most significant indication that the prohibition on wearing enemy uniforms, insignia, etc. is not absolute is found in Additional Protocol I, article 39(3), where it is acknowledged nothing affects “the existing generally recognized rules of international law applicable to espionage”²⁶⁸ Regarding spying, article 24 of the 1907 Hague Land Warfare Regulations states that, “Ruses . . . and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.”²⁶⁹ Ruses are permissible deception and this reference to “obtaining information” reflects the long standing view that espionage is not prohibited under international law.²⁷⁰ An acknowledgement that spying is not prohibited under international law is also reflected in the 1907 Hague Land Warfare Regulations, articles 29–30 and Additional Protocol I, article 46.²⁷¹ Fundamentally, a member of the armed forces who after clandestinely or on false pretences collects information about the enemy rejoins their forces, or as a member of a resistance movement is not captured while engaged in spying, does not lose their combatant or prisoner of war status.²⁷²

As far back as 1911 it was noted that “[t]he spy in modern war is usually the soldier who dons civilian dress, or the uniform of the enemy, or of a neutral country.”²⁷³ If members of the armed forces are captured engaging in espionage they are not entitled to combatant or prisoner of war status.²⁷⁴ While espionage is not prohibited under international law, it is universally recognized as punishable under state domestic law.²⁷⁵ This likely means a criminal trial and detention, and possibly, where available, the death penalty.²⁷⁶ In this regard, spies share a similar status to other persons engaging in hostilities without having the status of lawful belligerents (i.e., operating in civilian clothes).²⁷⁷ Therefore, while wearing an enemy uniform to engage in an attack, shielding, favouring, or protecting military operations is prohibited, there can be persons so attired operating on the battlefield and beyond for which there is no international legal sanction.²⁷⁸

268. AP I, *supra* note 28, art. 39(3).

269. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 24.

270. *Id.*

271. *Id.* arts. 29–30.

272. *Id.*

273. SPAIGHT & ACLAND, *supra* note 21, at 203–04; *see also* 1914 UK MANUAL OF MILITARY LAW, *supra* note 247, ¶ 155 (“The employment of measures necessary for obtaining intelligence with regard to the enemy and the theatre of war is formally sanctioned by the Hague Rules.”).

274. AP I, *supra* note 28, art. 46.

275. *Id.* art. 39(3).

276. *See id.*

277. Richard Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 323–45 (1951), *reprinted in* HUMANIZING THE LAWS OF WAR: SELECTED WRITINGS OF RICHARD BAXTER (Detlev F. Vagts et al. eds., 2013).

278. AP I, *supra* note 28, art. 39.

There also remains an unclear interface, and perhaps more accurately, an overlap between espionage and direct engagement in hostilities.²⁷⁹ A belligerent may infiltrate soldiers behind an opponent's lines in enemy uniform to report on the location of military objectives for reconnaissance purposes.²⁸⁰ This can directly lead to targeting and enhance the conduct of operations.²⁸¹ In the Skorenzy operation one of the infiltrating jeep teams did just that in reporting that a bridge was being defended.²⁸² Such tactical-level information gathering was recognized in the 2009 Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law as an indication of armed group membership, and by extension the taking of a direct part in hostilities.²⁸³ Those disguised soldiers would be subject to being killed or captured.²⁸⁴ Their activity might also be viewed as a prohibited use of an enemy uniform to extent the information forms the basis for an attack on the military objective, or (for Additional Protocol I states) the shielding, favouring, or protecting of a military operation.²⁸⁵ Much would depend upon the link between and proximity of such intelligence gathering and an attack or other military operation.²⁸⁶ It also raises questions concerning how broadly article 39 is to be interpreted.²⁸⁷

With both Ukraine and Russia being parties to Additional Protocol I, they are subject to the provisions of article 39, as well as article 23(f) of the 1907 Hague Land Warfare Regulations.²⁸⁸ Those Russian personnel operating in captured Ukrainian uniforms and vehicles, or wearing coloured tape associated with Ukrainian forces on their otherwise indistinguishable uniforms stand at risk of being charged with acting perfidiously. They may try to claim that their use of the enemy uniform and insignia was for espionage purposes. If that is the case, and if captured, they could be denied prisoner of war status and be subjected to prosecution under Ukrainian domestic law for spying.²⁸⁹ However, the facts may also support a war crimes prosecution if the information gathering is part of an engagement in an attack, or otherwise favouring a military operation.²⁹⁰ Further, even if involved in espionage, any exchange of gunfire between the Russian and Ukrainian forces could lead to allegations that the enemy uniform was used during an

279. *Id.* art. 46.

280. *Id.*

281. *Id.*

282. WHITING, *supra* note 252, at 123–26.

283. NILS MELZER, INT'L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 35, 81 (2009).

284. *See id.*

285. *See* AP I, *supra* note 28, art. 39.

286. *See id.*

287. *See id.*

288. *Id.*

289. *Id.* art. 46.

290. *Id.*

attack.²⁹¹ While perhaps the soldiers might see themselves as acting defensively, Additional Protocol I, article 49(1) states “[a]ttacks’ means acts of violence against the adversary, whether in offence or in defence.”²⁹² Simply surrendering without engaging in hostilities might be the only way to avoid allegations of treacherous conduct.

3. *The Red Cross, Red Crescent, Red Chrystal*

The prohibition found in the 1907 Hague Land Warfare Regulations, article 23(f) regarding the misuse of the “distinctive badges of the Geneva Convention,” and Additional Protocol I, article 38, which prohibits the misuse of “the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol” highlights the international concern over perfidious use of those emblems.²⁹³ The red lion and sun emblem used by Iran was renounced by that country following the 1979 Revolution in favour of the Red Crescent.²⁹⁴ In 2007, the Red Chrystal was adopted in Additional Protocol III to the 1949 Geneva Conventions to offer an option for the emblem that could not be perceived as having a religious or political connotation.²⁹⁵ Any doubt regarding the seriousness of the misuse of these emblems is reinforced by it being identified in Additional Protocol I, article 85(3)(f) as a grave breach of the Protocol.²⁹⁶ The most significant allegation regarding medical facilities is that they have been purposely targeted by Russia.²⁹⁷

However, an April 2022 OSCE report on international humanitarian law and human rights violations in Ukraine noted there was a “well-documented case of a Russian military vehicle transporting munitions marked by a hardly visible red cross.”²⁹⁸ The report determined it was a breach of international humanitarian law, but was not perfidious under article 37(1) of Additional

291. *Id.* art. 39(2).

292. *Id.* art. 49(1).

293. Compare 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(f) (discussing how using distinctive badges of the Geneva Conventions is forbidden), with AP I, *supra* note 28, art. 38 (stating the prohibition of improper use of symbols provided for in the Conventions).

294. *Iran, Renouncing Use of the Red Lion and Sun Emblem Sept. 4, 1980*, in HOW DOES LAW PROTECT IN WAR?, <https://casebook.icrc.org/case-study/iran-renouncing-use-red-lion-and-sun-emblem> (last visited Sept. 19, 2023).

295. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), of 8 December 2005, International Humanitarian Law Databases, <https://ihl-databases.icrc.org/en/ihl-treaties/apiii-2005> (last visited Sept. 19, 2023).

296. AP I, *supra* note 28, art. 85(3)(f).

297. Diane Cole, *Russia’s 226 Attacks on Health-Care Targets in Ukraine Are Part of a Larger Pattern*, NPR (May 24, 2022, 5:09 PM EST), <https://www.npr.org/sections/goatsandsoda/2022/03/16/1086982186/russias-strike-on-ukraine-maternity-hospital-is-part-of-a-terrible-wartime-tradi>.

298. Wolfgang Benedek, *Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022*, OSCE 44 (Apr. 13, 2022) [hereinafter OSCE Report], <https://www.osce.org/files/f/documents/f/a/515868.pdf>.

Protocol I since there was no indication that the emblems were used to kill, injure, or capture an adversary.²⁹⁹ This conclusion highlights how the codification of perfidy as a war crime has technically been narrowed in scope.³⁰⁰ Notwithstanding this conclusion, if established, the alleged misuse of the Red Cross remains a treacherous/perfidious act in its broader sense and would be contrary to international humanitarian law.³⁰¹

4. Other Internationally Recognized Emblems

Article 38(1) of Additional Protocol I also prohibits the deliberate misuse of “other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.”³⁰² As set out in article 38(2) the distinctive emblem of the United Nations is protected from any use “except as authorized by that Organization.”³⁰³ There is some indication in the OSCE Report that a flag of truce had been misused by the Russians, which is prohibited not only under the Protocol, but also under the 1907 Hague Land Warfare Regulations, article 23(f).³⁰⁴ Similarly, reference is made to the use of OSCE emblems and white-painted vehicles “that had ‘with something like red flags’ on the front.”³⁰⁵ Interestingly the OSCE Report only states that arguably the use of flags and insignia of that organization are prohibited.³⁰⁶ Notwithstanding the speculative language in the Report, it is likely that the misuse of the OSCE emblems falls within article 38(1) regarding “other internationally recognized protective emblems.”³⁰⁷ That term “refers to any other existing or future sign, whether it is universally accepted or not,”³⁰⁸ suggesting that the offending belligerent does not necessarily have to officially recognize the sign if there is international acceptance of it. The basis for including OSCE as an internationally protected emblem arises from the composition and role of the organization with fifty-seven participating states working “for stability, peace and democracy.”³⁰⁹

Even if the use of the OSCE insignia and emblems did not fall within Additional Protocol I, article 38(1), it remains that employing white-painted vehicles for purposes of infiltration or engagement of hostilities is problematic. It is suggested they represented “peacekeepers,” although the

299. *Id.*

300. *Id.*

301. AP I, *supra* note 28, art. 85(3)(f).

302. *Id.* art. 38(1).

303. *Id.* art. 38(2).

304. OSCE Report, *supra* note 298, at 43.

305. *Id.*; Quinn, *supra* note 36.

306. OSCE Report, *supra* note 298.

307. AP I, *supra* note 28, art. 38(1).

308. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 173, ¶ 1557.

309. *Who We Are*, OSCE, <https://www.osce.org/who-we-are> (last visited Sept. 19, 2023).

vehicles were not identified as belonging to the United Nations, the use of which is clearly prohibited under article 38(2).³¹⁰ White-painted vehicles could readily be mistaken for ones engaged in humanitarian activities.³¹¹ As an indication that such an approach is not limited to Russian forces, it has been reported that in 2001 British Special Boat Service personnel entering Afghanistan “had been ordered to paint their two WMIK Land Rovers white so they would look like humanitarian vehicles belonging to the UN or an aid group.”³¹² Even if white-painted vehicles do not fall directly within article 38, their use likely would attract scrutiny under article 37(1)(c) of the Protocol as potentially feigning civilian or non-combatant status.³¹³

V. THE *TU QUOQUE* EFFECT

One of the challenges in prosecuting states for their forces misusing uniforms, emblems, and insignia during armed conflict is that both parties may engage in such activity.³¹⁴ As has been noted, the plea of *tu quoque* was raised at war crimes trials at the end of World War II in both the *Dönitz* and *Skorzeny* cases.³¹⁵ The *tu quoque* plea was also raised and rejected by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kupreškić*³¹⁶ and *Martić*³¹⁷ cases. In the former case it was argued by the defence that the killing of civilians by the opposing party justified similar action,³¹⁸ and similarly in the latter case that crimes carried out against one ethnic group justified reciprocal action.³¹⁹ While the *Kupreškić* case stated that “the *tu quoque* defence has no place in contemporary international humanitarian law,”³²⁰ the judgement focused on the seriousness of the allegations (e.g., grave breaches) and “[t]he absolute nature of most obligations imposed by rules of international humanitarian law.”³²¹ In the *Martić* case, the court of appeals relied on the *Kupreškić* decision to hold that *tu quoque* is “no defence to serious violations of international humanitarian

310. AP I, *supra* note 28, art. 38(2).

311. Quinn, *supra* note 36.

312. TOBY HARNDEN, FIRST CASUALTY: THE UNTOLD STORY OF THE CIA MISSION TO AVENGE 9/11, at 209 (2022).

313. See AP I, *supra* note 28, art. 37(1)(c).

314. Koessler, *supra* note 256, at 30.

315. *Id.* at 35.

316. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <https://www.refworld.org/cases,ICTY,40276c634.html>; see also Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeals Chamber, ¶ 25 (Oct. 23, 2001), <https://www.refworld.org/cases,ICTY,40276b7e7.html> (referring to the *tu quoque* ruling at the trial level, but noted it had no bearing on the appeal).

317. Prosecutor v. Martić, Case No. IT-95-11-A8, Judgement (Int’l Crim. Trib. for the Former Yugoslavia, Appeal Chamber Oct. 8, 2008), <https://www.refworld.org/cases,ICTY,48f358752.html>.

318. *Kupreškić*, Case No. IT-95-16-T, Judgement, ¶ 511.

319. *Martić*, Case No. IT-95-11-A8, ¶¶ 109–10.

320. *Kupreškić*, Case No. IT-95-16-T, ¶ 511.

321. *Id.* ¶ 518.

law.”³²² However, neither decision addressed the *Dönitz* or *Skorzeny* judgements on this issue.³²³ Therefore, the *Kupreškić* tribunal appears to have wrongly stated that “although *tu quoque* was raised as a defence in war crimes trials following the second world war, it was universally rejected.”³²⁴ Rather, the Nuremberg treatment of this principle represented a partial acknowledgement, and it was far more nuanced than this statement suggests.³²⁵

Notwithstanding these ICTY decisions, the theory underlying the *tu quoque* principle will likely continue to have an impact on the laying of charges or successfully obtaining a conviction. This is particularly the case if both parties were engaged in the misuse of uniforms, emblems, and insignia. In this respect, while the misuse of the Red Cross or similar internationally recognized emblems should engage universal condemnation, the same might not be said for the use of enemy uniforms, which has a long and complicated history—particularly in the shadow conflicts of irregular warfare.³²⁶ There may be a difference in the conceptualization of honor-based perfidy when the deceit involves a means of warfare directed at other soldiers, rather than a justification for the large scale killing of civilians or the commission of serious humanitarian law breaches. The bowing by Otto Skorzeny and the other accused standing to attention at their trial to show respect for a British Secret Intelligence Service officer who had testified on their behalf about his use of German uniforms indicates that honour may take on a different meaning in shadow conflict than how it might otherwise be considered in a more conventional operational setting.³²⁷

Added to this is the accepted use of enemy uniforms, insignia, etc., for espionage; the impact of camouflage on visibility; and a waning and archaic reliance on “fixed distinctive signs,” while at the same time accepting soldiers may operate with no insignia or distinguishing emblems (e.g., “little green men”).³²⁸ Further, while fighting in civilian clothes was traditionally treated as a war crime (a linkage to spying), broad Allied support during World War II for resistance movements in occupied territory and a greater acceptance internationally for more relaxed standards for combatancy (e.g., articles 43 and 44 of Additional Protocol I) has changed perceptions about

322. *Martić*, Case No. IT-95-11-A8, ¶ 111 n.266.

323. See *Kupreškić*, Case No: IT-95-16-T, ¶ 675 n.942 (referencing the *Doenitz* decision, but regarding war crimes generally in the context of discussion of International Military Tribunal at Nuremberg convictions for both war crimes and crimes against humanity).

324. *Id.* ¶ 516.

325. *Id.*

326. Baxter, *supra* note 277, at 54 (“The use of the Red Cross insignia as a means of deception is, of course, absolutely forbidden by the law of war and is a form of ruse punishable as a war crime.”).

327. WHITING, *supra* note 252, at 210–13; see also SKORZENY, *supra* note 252, at 218 (referring to Wing-Commander F. Yeo Thomas’ supportive testimony).

328. SCUITTO, *supra* note 33.

belligerents fighting out of their own uniform.³²⁹ In this regard, soldiers fighting in an enemy uniform have frequently been lumped in with belligerents wearing civilian clothes and spies as “unprivileged belligerents.”³³⁰ A status that means trial under the domestic jurisdiction of a capturing state and a loss of POW status, rather than being dealt with as a war criminal.³³¹

Even with Additional Protocol I, article 39(2) adding the shielding, favouring, protecting, or impeding military operations as prohibited activities while wearing enemy emblems, insignia, or uniforms, the *tu quoque* principle is likely to continue to have considerable influence when assessing culpability.

VI. CONCLUSION

There are indications of Russian misuse of uniforms, insignia and emblems since the beginning of the 2022 invasion.³³² Perfidious and treacherous action has long been prohibited under international humanitarian law.³³³ Thought of frequently in terms of misusing civilian status, it extends more broadly to the use of enemy uniforms, insignia, and emblems, as well as those of neutral states and international organizations.³³⁴ One challenge in dealing with such treachery is that international humanitarian law has largely stove piped such acts into a narrower concept of perfidy focused on the killing and injuring (and capture) of an opponent, alongside a broader prohibition against the misuse of international recognized emblems such as the Red Cross and Red Crescent, the United Nations, and other international organizations.³³⁵

The misuse of the medical and other humanitarian emblems should and does attract international condemnation.³³⁶ However, assessing the misuse of enemy uniforms, emblems, and insignia presents a more complex situation.³³⁷ The practical application of the law banning treacherous activity such as wearing enemy uniforms is complicated by a lack of definition on what constitutes a uniform, the widespread use of camouflage, a long history of such use during espionage, and a tendency for many Parties to a conflict

329. Baxter, *supra* note 277, at 54.

330. *Id.* (“Although such conduct [assuming as disguise the uniform of the enemy] may not be a war crime, there is room for the view that individuals so disguising their true character are not to be entitled to be considered as prisoners of war and are to be treated as if they had been taken in civilian clothes.”).

331. *Id.*

332. OSCE Report, *supra* note 298, at 43.

333. 1907 Hague Land Warfare Regulations, *supra* note 128, art. 23(f).

334. *Id.*; AP I, *supra* note 28, art. 38.

335. Compare AP I, *supra* note 28, art. 38 (listing the numerous perfidious uses), with OSCE Report, *supra* note 298, at 44 (imposing a narrower view of perfidy).

336. AP I, *supra* note 28, art. 85(3)(f).

337. DEWAR, *supra* note 120, at 183.

to employ specialized forces in situations where they might pass themselves off as enemy soldiers or using enemy equipment.³³⁸

There is broad agreement that fighting opponents in their uniform is prohibited.³³⁹ However, acceptance that troops may fight in a uniform without any distinctive sign (e.g., “little green men”), or pass themselves off as an enemy force through use of enemy passwords highlights the artificiality of the law relying so heavily on visible distinctive signs.³⁴⁰ Ultimately, even with evidence of the misuse of an enemy uniform, there remains the potential impact of the *tu quoque* principle, particularly if one’s own forces have also been engaging in hostilities in a similar manner.³⁴¹ History suggests a successful prosecution is less likely, notwithstanding efforts in legal commentary and some caselaw to limit the application of that principle.³⁴²

338. *Id.*; AP I, *supra* note 28, art. 39(3) (acknowledging the generally recognized rules of espionage).

339. AP I, *supra* note 28, art. 39(3).

340. Baxter, *supra* note 277, at 54.

341. Harnden, *supra* note 312, at 209.

342. Prosecutor v. Kupieškić, Case No. IT-95-16-T, Judgement, ¶ 511 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000); Prosecutor v. Martić, Case No. IT-95-11-A8, Judgement, ¶ 111 n.266 (Int’l Crim. Trib. for the Former Yugoslavia, Appeal Chamber Oct. 8, 2008).