

IRREGULAR COMBATANTS AND PRISONER OF WAR STATUS

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INTRODUCTION

Since the latter part of the nineteenth century, the international community has sought at several diplomatic conferences to codify and update the laws of armed conflict in order to diminish the effects of hostilities and to provide greater protection to the victims of armed conflicts. Perhaps no issue has provoked more controversy at these gatherings than have proposals to revise the legal rules for giving privileged combatant status to irregular combatants.

This article traces, albeit not exhaustively, the historical development in modern treaty law of the rules applicable to combatant status and entitlement to prisoner of war status. It examines the important legal distinction between privileged and unprivileged combatants in customary and conventional international law and explains why the notion of privileged combatancy is strictly limited to international armed conflicts. It particularly focuses on and analyzes the new relaxed standards set forth in the 1977 First Protocol¹ Additional to the 1949 Geneva Conventions² under which irregular combatants both may qualify, as well as forfeit their rights, as combatants entitled to prisoner of war status.

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1 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), *opened for signature* December 12, 1977, U.N. Doc. A/32/144, Annex I, II (1977), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter cited as Protocol I].

2 The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3116, T.I.A.S. No. 3362, at 3, 75 U.N.T.S. 31, 32 [First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3220, T.I.A.S. No. 3363, at 4, 75 U.N.T.S. 85, 86 [Second Geneva Convention]; Geneva Convention Relative to the Treatment to Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364, at 3, 75 U.N.T.S. 135, 136

PRIVILEGED OR LAWFUL COMBATANTS

A combatant is a person who directly engages in hostilities, which means participating in an attack intended to cause physical harm to enemy personnel or objects. Historically, such belligerents have been classified as either “privileged”, i.e. “lawful” or “unprivileged”, i.e., “unlawful” combatants. The so-called “privileged” or “lawful” combatant is a person authorized by a party to an armed conflict to engage in hostilities and, as such, is entitled to the protections encompassed in the “combatant’s privilege.”³ This privilege is in essence a license to kill or wound enemy combatants, destroy other enemy military objectives and cause incidental civilian casualties.⁴ A lawful combatant possessing this privilege must be given prisoner of war status upon capture and immunity from criminal prosecution under the domestic law of his captor for his hostile acts that do not violate the laws and customs of war.

The concept and legal implications of privileged combatancy are deeply rooted in the customary law of armed conflict. They were reaffirmed, for example, in Articles 57 and 56 of The Lieber Instructions of 1863.⁵ Article 57 formulates the notion of the combatant’s privilege as follows: “[s]o soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent: his killing, wounding, or other warlike acts are not individual crimes or offenses.”⁶ The immunity of captured combatants from prosecution is expressly recognized in Article 56. It states that “[a] prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.”⁷

This concept was similarly recognized and applied by various war crimes tribunals convened after World War II. For instance, in *U.S. v. List*, the U.S. Military Tribunal stated: “[i]t cannot be questioned that acts done in times of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war.”⁸ Referring to privileged combatants,

[Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3518, T.I.A.S. No. 3365, at 3, 75 U.N.T.S. 287, 288 [Fourth Geneva Convention] [all four collectively hereinafter 1949 Geneva Conventions].

3 See Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 Am. U.L.Rev. 53,59 (1983) [hereinafter cited as Solf].

4 Such authorization is typically evidenced by inter alia, “commission, emolument, attestation, warrant, order, conscription or enlistment.” U.S. DEP’T OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, APF 110-31 para.3.2 at 3.1 (1976). [hereinafter cited as U.S. Air Force Pamphlet].

5 U.S. DEPARTMENT OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD, General Order No. 100 (1863) (Lieber Instructions), *reprinted in* The Laws of Armed Conflicts 3 (D.Schindler & J. Toman 2d rev.ed.1981) [hereinafter cited as Lieber Instructions].

6 *Id.*

7 *Id.*

8 *United States v. List (THE HOSTAGE CASE)*, *Reported in* TRIALS OF WAR CRIMINALS

the tribunal added: “[i]t is only this group that is entitled to treatment as prisoners of war and incurs no liability after capture or surrender.”⁹ Comparable statements can also be found in the municipal law of states.¹⁰

It should be noted that the 1949 Geneva Conventions and its two Additional Protocols¹¹ do not use the term “privileged” or “lawful” combatant and contain no provision that expressly recognizes the immunity of such combatants from prosecution for their legitimate acts performed in the line of duty. However, this immunity is inferentially recognized in Article 57 of the Third Geneva Convention which states, in pertinent part, that “[p]risoners of war may not be sentenced ... to any penalties except those provided for in respect of members of the armed forces of the said power *who have committed the same acts*.” (Emphasis supplied). Since the detaining power would not prosecute its own soldiers for their legitimate acts of war, it cannot try prisoners of war for comparable acts. Thus, prisoners of war can be tried only for violations of the laws and customs of war and other offenses for which the detaining power is obliged by the Conventions to punish its own personnel.

THE UNPRIVILEGED OR UNLAWFUL COMBATANT

An “unprivileged” or “unlawful” combatant refers to a person who does not have the combatant's privilege, but nevertheless directly participates in hostilities. Such unlawful belligerents would include, civilians,¹² noncombatant personnel in the armed forces,¹³ as well as noncombatant members of the armed forces¹⁴ who, in violation of their protected status, actively engage in hostilities. These persons temporarily forfeit their immunity from direct

BEFORE THE NUREMBERG MILITARY TRIBUNAL 1228, 1238 (1950).

⁹ *Id.*

¹⁰ Such a formulation is that “[a] homicide committed in the proper performance of a legal duty is justifiable. Thus ... killing in suppression of a mutiny or riot ... killing an enemy in a battle ... are cases of justifiable homicide.” UNITED STATES, MANUAL FOR COURTS-MARTIAL § 351 (1951).

¹¹ In addition to Protocol I, *supra* note 1, the Diplomatic Conference concluded the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I and II (1977), *reprinted in* 16 I.L.M. 1442 (1977).

¹² Civilians are not otherwise lawful or unlawful combatants. *But see* the reference, *infra* note 27, to the privileged combatant status of members of a *levée en masse*. For an authoritative discussion of unprivileged combatancy, see Baxter, *So Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs*, BRIT. Y.B.INT'L.L. (1952) [hereinafter cited as Baxter].

¹³ Such persons, who are not combatants, include civilian members of military aircraft crews, supply contractor personnel, technical representatives of government contractors, war correspondents, and members of labor units or civilian services responsible for the welfare of armed forces. Unlike other civilians, these persons are subject to capture and treatment as prisoners of war under Article 4(A)2(4) of the Third Geneva Convention.

¹⁴ Such persons include doctors, other medical personnel and chaplains. These members of the armed forces are classified as non-combatants because they enjoy special protections under the 1949 Geneva Conventions. Unlike civilians accompanying the armed forces, they may not be made prisoners of war.

individualized attack during such time as they assume the role of a combatant. Unlike privileged combatants, unlawful combatants upon capture can be tried and punished under municipal law for their unprivileged belligerency, even if their hostile acts complied with the laws of war.

The notion of unprivileged combatant also has been used to describe irregular or part-time combatants, such as guerrillas, partisans, and members of resistance movements, who either fail to distinguish themselves from the civilian population at all times while on active duty or otherwise do not fulfil the requirements for privileged combatant status. Others falling within this category are those privileged combatants who violate the requirements regarding mode of dress, such as regular military personnel who are caught spying while out of uniform.¹⁵

The term “unlawful” combatant is used only to denote the fact that the person lacks the combatant’s privilege and is not entitled to participate in hostilities. Mere combatancy by such persons is not tantamount to a violation of the laws of armed conflict, although their *specific* hostile acts may qualify as such.¹⁶

NON-APPLICABILITY OF PRIVILEGED COMBATANCY IN NON-INTERNATIONAL ARMED CONFLICTS

Since lawful combatant and prisoner of war status directly flow from the combatant’s privilege, recognition of this privilege is limited under customary and conventional international law to situations of interstate, or international armed conflict, as defined in common Article 2¹⁷ of the Geneva Conventions, and a limited class of struggles for self-determination, recognized in Article 1(4)¹⁸ of Protocol I as international armed conflicts.

15 See U.S. AIR FORCE PAMPHLET, *supra* note 4, at para.3.3a at 3.3.

16 See Article 82 of the Lieber Instructions, *supra* note 5, which includes among those not entitled to prisoner of war status, persons who fight “with intermittent return to their homes and avocations, or with occasional assumption of a semblance of peaceful pursuits.”

17 Common Article 2 of the Geneva Conventions, *supra* note 2, states: In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

18 Article 1(4) of Protocol I, *supra* note 1, reads: The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

In contrast, a government engaged in a civil war or other kind of internal hostilities, is not obliged to accord its armed opponents prisoner of war status since these dissidents do not have the combatant's privilege. One authority explains the reason for the non-applicability of this privilege in internal armed conflicts as follows:

Governments, particularly those that may be affected by an emerging dissident or separatist movement, are unwilling to concur in any rule of international law that, in effect, would repeal their treason laws and confer on their domestic enemies a license to kill, maim, or kidnap security personnel and destroy security installations subject only to honorable detention as prisoners of war until the conclusion of the internal armed conflict.¹⁹

Such governments therefore are free to try all captured dissidents for treason and their other violent acts.²⁰

There is, however, no rule of international law which prohibits a government during internal armed conflicts from according members of dissident armed groups prisoner of war or equivalent status.²¹ For example, the U.S. Government during the Civil War gave limited prisoner of war treatment to captured rebel combatants without expressly according them immunity from prosecution for treason.²²

Comparable policies have been followed in recent years by other governments involved in civil wars. In quelling the attempted secession of Biafra, the central government of Nigeria, although it considered the hostilities to be non-international, nevertheless, accorded Biafran combatants prisoner of war status. The Nigerian Army's code of conduct, issued in July 1967 stipulated in part: "Soldiers who surrender will not be killed, they are to be disarmed and treated as prisoners of war. They are entitled in all circumstances to humane treatment and respect for their person and their honor."²³

19 Solf, *supra* note 3, at 53.

20 Such trials must be conducted in accordance with the mandatory standards set forth in Article 3 common to the 1949 Geneva Conventions and Article 6 of Protocol II, if applicable. For a discussion of the application of these standards to trials of offenses arising from non-international armed conflicts see AMERICAS WATCH, VIOLATIONS OF FAIR TRIAL GUARANTEES BY THE FMLN'S AD HOC COURTS (1990).

21 In fact, paragraph 2 of common Article 3 envisions government and dissident forces making special agreements to apply all or part of the other provisions of the Geneva Conventions to the internal armed conflict. For a discussion of how such agreements are made see Veuthey, *Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the ICRC*, 31 Am.U.L.Rev. 83, 92-93 (1983); Goldman, *International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua*, 2 Am.U.J.Int'l & Pol. 539, 544-546 (1987).

22 See Articles 152-154 of the Lieber Instructions, *supra* note 5.

23 A. ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT. 196-197, 277 (1977) [hereinafter cited as ROSAS].

CONVENTIONAL LAW APPLICABLE TO PRIVILEGED COMBATANCY

One eminent law of war scholar, the late Waldemar Solf, has correctly noted that “[t]he history of rules concerning the qualifications of combatant status and entitlement to be a prisoner of war has been a controversial subject at all lawmaking conferences, and has always resulted in compromise.”²⁴ The controversy has centered principally on the question of whether and under what conditions irregular combatants, not members of regular armed forces, would be entitled to privileged combatant and prisoner of war status. Solf characterizes the debate on this question as follows:

Historically, nations which view themselves as likely victims of aggression and enemy occupation have argued that guerrillas, partisans and members of resistance movements should be regarded as patriots and privileged combatants, while major military powers have argued that only regular, uniformed and disciplined combatants who distinguish themselves clearly from the civilian population should have the right to participate directly in hostilities.²⁵

These powers also have maintained that such irregular combatants, by failing to wear a uniform and carry their arms openly, effectively feign protected civilian status in order to achieve unfair surprise in attacks. By so doing, these irregulars blur the mandatory distinction in all warfare between civilians and combatants, thereby placing the civilian population, particularly in occupied territory, at risk.

THE HAGUE REGULATIONS OF 1899 AND 1907

The Hague Conventions of 1899 and 1907²⁶ and their annexed Regulations, which updated and codified the laws and customs of land warfare, recognized three categories of lawful combatants: (1) armies or regular forces; (2) irregular forces; and (3) the *levée en masse*.²⁷

Article 1 of the Hague Regulations stipulate that the laws, rights, and duties of war apply to both regular and irregular combatants. The term “armies” in Article 1 refers to regular members of a belligerent party’s armed forces which could include, or be entirely composed

²⁴ Solf, *A Response to Douglas J. Feith’s Law in the Service of Terror - The Strange Case of the Additional Protocol*, 20 Akron L. Rev. 261, 269 (1986) [hereinafter Solf Response].

²⁵ *Id.*

²⁶ Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2227, T.S. 539 and the annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land, 36 Stat. 2295 [hereinafter cited as Hague Regulations].

²⁷ Article 2 of the 1907 Hague Regulations defines the *levée en masse* as follows:

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

of, irregular forces, such as militia or volunteer corps.²⁸ Article 3 provides that members of the armed forces of a party to the conflict, if captured by the enemy, are entitled to be treated as prisoners of war.

However, in the case of irregulars not formally integrated into the armed forces, Article 1 conditions recognition of their privileged combatant status and their entitlement to be prisoners of war on their meeting a series of requirements. In addition to being organized, such irregulars must: (1) be commanded by a person responsible for his subordinates; (2) have a fixed distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) conduct their operations in accordance with the laws and customs of war.

To comply with these provisions, the irregular forces must have a commander who exercises effective control and discipline over them. The commander may obtain his authority through election by his troops or through his superior commander. In addition, the irregular forces must possess a fixed, distinctive sign which is recognizable from a distance. The forces may satisfy this requirement by wearing uniforms or even by wearing helmets or headdresses. This requirement, which ensures that combatants distinguish themselves from civilians, is designed to protect the civilian population. Members of such forces also must carry their arms openly. They may not conceal them on their persons or hide them upon approaching the enemy. Finally, the irregular forces must observe the laws of armed conflict. In particular, they must refrain from unnecessary violence and destruction.

IRREGULARS UNDER THE THIRD GENEVA CONVENTION

During World War II most members of organized resistance movements, such as the French Maquis, which operated in Axis occupied countries were harshly treated as unlawful combatants and routinely denied prisoner of war status. Despite their recognition of this problem, the members of the 1949 Diplomatic Conference, which elaborated the four Geneva Conventions, reaffirmed and incorporated with some changes the Hague Regulations' standards applicable to irregular combatants in Article 4 A(2) of the Third Geneva Convention.²⁹

²⁸ For example, Switzerland's regular army is composed almost entirely of militia corps.

²⁹ Article 4(A) Third Geneva Convention, *supra* note 2, states:
Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;

One such change was to give explicit recognition to independent, i.e., irregular militias, volunteer corps and organized resistance movements, provided, however, that they are organized and belong to a party to the conflict. Another change was that such irregular forces were authorized to operate both within and outside their own territory, whether or not that territory is occupied.

However, Article 4A(2), as do the Hague Regulations, discriminates between members of regular armed forces and members of independent irregular groups, effectively holding the latter to higher standards. As set forth in Article 4A(2), members of such irregular forces, in order to qualify as privileged combatants entitled to prisoner of war status, must, as a legal and practical matter, comply with the following conditions:

- (1) they must belong to an organized group;
- (2) the group must belong to a Party to the conflict;
- (3) the group must be commanded by a person responsible for his subordinates;
- (4) the group must ensure that its members have a fixed, distinctive sign recognizable from a distance;
- (5) the group must ensure that its members carry their arms openly; and
- (6) the group must ensure that its members conduct their operations in accordance with the laws and customs of war.

ABUSES IN THE APPLICATION OF THESE CONDITIONS

The first three conditions are applicable to the irregular group collectively. The final

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- (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
 - (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
 - (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
 - (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
 - (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

three conditions are applicable to both the group collectively and its individual members. The overwhelming majority of the individual members must meet conditions (4), (5) and (6), continuously and not intermittently. If the members, generally, meet all six conditions all the time, then an individual member who fails to observe any of the last three conditions will not lose his privileged combatant status or prisoner of war status upon capture.

However, as one commentator notes, these conditions "... permit an occupying power to deny POW [prisoner of war] treatment to captured guerrillas who meet all the requirements of distinction through several escape clauses not applicable with respect to regular soldiers."³⁰ For example, it would be virtually impossible for the captured, single member of a resistance group to prove that his group complied with conditions (1) and (3) without endangering the security of his group. Indeed, a captured combatant who is compelled to prove that he is a member of an organized resistance movement with a responsible commander would be forced to reveal the identities and whereabouts of his comrades. To do so would be the end of the resistance movement.³¹

Moreover, condition (2), that the group belong to a party to the conflict, is also subject to abuse by the detaining power. A member of such a group, who otherwise observes all the conditions, can be denied prisoner of war status simply because his captors do not recognize the party to the conflict to which he belongs. This result is likely if that party is a government in exile or resistance or liberation movement. In contrast, Article 4A(2) of the Third Geneva Convention accords prisoner of war status to member of regular armed forces, even if they belong to a party not recognized by their captors.³²

In addition, it is both improbable and unrealistic to expect that members of irregular groups, particularly resistance movements in occupied territory and national liberation movements, can comply with condition (4) that requires them always to wear a distinctive sign recognizable at a distance.³³ Since such fighters are generally only part-time combatants, their compliance with this condition would be suicidal.³⁴ Nevertheless, failure to do so precludes privileged combatant and, hence, prisoner of war status upon capture.

Commander W.J. Fenrick maintains that since condition (4), as well as (5) and (6), apply both to the group collectively and to its individual members, if a *majority* of the members of

³⁰ Aldrich, *Guerrilla Combatants and Prisoner of War Status*, 31 AM. U.L.REV. 871, 872 (1982) [hereinafter cited as Aldrich].

³¹ *Id.*

³² "This would have covered the Free French Forces [under General De Gaulle], for example, but not the Maquis." *Id.*

³³ Although Article 4A(2)(b) does not explicitly state that such a distinctive sign be worn at all times, Solf notes that it "was nevertheless understood that it must be worn continuously in all circumstances." He states: "this requirement was, of course, incompatible with privileged combatant status for part-time combatants." Solf Response, *supra* note 24, at 272.

³⁴ See Baxter, *supra* note 12, at 327-28; Rosas, *supra* note 23 at 351; Aldrich, *supra* note 30; stating that "[a] rule that requires him [the guerrilla fighter] to distinguish himself all the times from the civilian population will simply make him an outlaw; he cannot respect it and hope to survive." *Id.* at 872.

the group fail to meet, for whatever reason, *all* or *any* of these three conditions at *any* time, then all members of the group will not qualify as privileged combatants.³⁵ Thus, despite his own compliance with these conditions, an individual belonging to such a group, as well as all other members thereof, will be denied upon capture prisoner of war status and may be tried and punished as unprivileged belligerent(s) by the detaining power.³⁶

With regard to condition (6), it is uncertain whether the captured individual irregular has the burden of proving that his group or unit conducted their operations in accordance with the laws and customs of war.³⁷ The detaining power could use this requirement to deny the single combatant prisoner of war status and therefore treat all captured members of this group or unit as war criminals on the ground that some of them may have committed war crimes. Members of regular armed forces, in contrast, do not have to prove their compliance with the laws of war and, in the event they commit war crimes, they still do not forfeit their privileged combatant status and right to be prisoners of war.

All of the requirements of Article 4A(2) of the Third Convention have proved over time to be extremely difficult if not, in fact, impossible for irregulars to comply with without jeopardizing their military operations. If such groups could not reasonably expect to qualify for prisoner of war status upon capture, they had little or no real incentive to observe these mandatory requirements. And, in practice, they generally have not done so. Aldrich writes in this connection:

... it seems clear that the 1949 rules, which were designed to protect civilians, have in fact endangered the civilian population in occupied territory. By adopting standards of distinction that are impossible to respect and by providing escape clauses through which the occupying power can deny POW status to captured guerrillas, the 1949 Convention virtually assures that guerrillas in occupied territory will disguise themselves as civilians and that the civilian population will suffer as a result.³⁸

35 See lecture delivered by Cdr. W.J. Fenrick on Combatant and Prisoner of War Status delivered at New York Un. Law School - International Committee of the Red Cross and American Red Cross Seminar on International Humanitarian Law (July, 1988).

36 Other authorities indicate that it is unclear whether failure by *one* or *several* members of the group disqualifies *all* the members as privileged combatants. See Rosas, *supra* note 23, at 334. Presumably, such unlawful combatants, while amenable to prosecution, are entitled to the limited protections accorded to civilians as "protected persons" by Article 5 of the Fourth Geneva Convention, assuming that they were operating in occupied territory or in territory of the enemy and they were nationals of a State Party to the Fourth Convention. Fenrick indicates that part of the evidence of the irregular group's failure to meet conditions (1), (2) and (3) will lie in the failure of most of its members to comply with conditions (4), (5) and (6) on any occasion. Fenrick, *supra* note 35.

37 See H. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICTS 52 (1977) [hereinafter cited as LEVIE].

38 Aldrich, *supra* note 30, at 873.

In a similar vein, Solf has written:

Realization of the inadequacy of these provisions to provide privileged combatant status for those who fight regular military forces in colonial wars, occupied territory and in struggles for self-determination, gave rise to strong initiatives to relax or abolish the 1949 convention standards for “freedom fighters,” frequently coupled with measures to release them from an obligation to comply with the law of armed conflict in their relation with unjust oppressors. Western states generally opposed these initiatives in U.N. Forums, but West European states, who had experienced Axis occupation during World War II or considered that they might again be subject to occupation, strove for some relaxation of the standard for resistance movement in occupied territory.³⁹

NEW RULES FOR IRREGULARS UNDER PROTOCOL I

Accordingly, one of the principal goals of the 1974-1977 Diplomatic Conference on International Humanitarian Law Applicable in Armed Conflict, which elaborated the two Protocols of 1977 Additional to the 1949 Geneva Conventions,⁴⁰ was to fashion new rules applicable to irregular forces that would strike a compromise between these disparate positions. The compromise, reflected in Articles 43 to 47⁴¹ of Protocol I, was essentially “[to] relax the rigid requirements of the Hague and Geneva Standards sufficiently to provide guerrillas a possibility of attaining privileged combatant status without exposing the forces fighting them to the danger inherent in the use of civilian disguise in order to achieve surprise.”⁴² By so doing, the delegates to the Conference sought to strengthen the protection of the civilian population, particularly in occupied territory, from the effects of hostilities.

Ambassador Aldrich, who was the principal drafter of this compromise, notes that these articles

... create a single and non-discriminatory set of rules applicable to all combatants, regular and irregular alike, and ... prescribe necessary, limited exceptions for spies, mercenaries, and those guerrillas in occupied territory who take advantage of their apparent civilian status and conceal their weapons while moving into position for an attack. The aim of the article in each case is to make the exception as narrow as possible and to provide presumptions and procedures to prevent abuse of the exceptions.⁴³

Article 43(l) of Protocol I provides the following new definition of armed forces:

³⁹ Solf Response, *supra* note 24, at 272.

⁴⁰ Protocol I and Protocol II, *supra* note II.

⁴¹ These articles form a section entitled: “Combatant and Prisoner of War Status.”

⁴² Solf Response, *supra* note 24, at 273.

⁴³ Aldrich, *supra* note 30, at 874.

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

Paragraph (2) of that Article stipulates that all members of the armed forces, other than medical personnel and chaplains, are combatants having the right to directly participate in hostilities. Article 44(1), in turn, states that “any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.”

Article 43 thus eliminates the distinction found in the Hague Regulations and the Third Geneva Convention between regular armed forces and irregular voluntary corps, militias, and other organized resistance movements. All components of a party’s armed forces are thereby put on an equal legal footing. Moreover, the requirement in Article 43(1) of a responsible command link between a party to the conflict and its armed forces, is not made a condition for irregulars to enjoy lawful combatant status, but a condition applicable to all combatants.⁴⁴ This provision also “... makes applicable to regulars and irregulars alike the exception from recognition of a government or authority presently applicable only to regulars under Article 4 of the [Third] Convention.”⁴⁵ Aldrich states in this regard: “[t]hus, the key issue for determining whether a person is a member of armed forces under this article is a factual issue, command link, rather than a political issue, recognition.”⁴⁶

Subject to one important exception, Article 44(2) mandates that a combatant who fails to comply with the laws of war does not forfeit his combatant or prisoner of war status. This article provides:

While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violation of these rules shall not deprive a combatant of his right to be a combatant, or, if he falls into the power of the adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

Article 45(1) establishes a presumption that a person who participates in hostilities is entitled upon capture to prisoner of war status if he claims that status, appears entitled thereto, or his Party claims it for him.⁴⁷ The second paragraph of that Article provides that anyone who is held not as a prisoner of war and is to be tried for an offense connected with the hostilities can

44 Aldrich notes, however, that “... the absence of either the required command link to a party to the conflict or the internal disciplinary system to enforce compliance with the law would justify a refusal to consider the force, group or unit in question no covered by Article 43. The absence would also justify a consequent refusal to accord the personnel of such a unit the right to be combatants or, if captured, to be prisoners of war.” Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 1,8 85 Am. J. Int’l L. (1991) [hereinafter cited as Aldrich: Ratification].

45 Aldrich, *supra* note 30, at 874.

46 *Id.* at 875.

47 Article 45 states:

assert a right to prisoner of war status before a judicial tribunal and have that issue adjudicated. These provisions effectively shift the burden of proof to the detaining power on the question of a combatant's non-compliance with the laws of war. The individual combatant will not have to prove that his group complied with applicable rules in order to qualify for prisoner of war status. Upon proof of guilt, the individual will be responsible for any war crimes he may have committed, but not his group collectively.⁴⁸ Aldrich notes in this connection:

These procedures and clarifications of the burden of proof are probably essential changes in the law, if the captured guerrilla is not to be placed in the position of having to reveal information about the structure of his armed forces and the identity of his colleagues in order to demonstrate his entitlement to POW status and his right to have engaged in combat. Although the Protocol is silent on this point, it was not intended to change the Geneva Conventions rule that prohibits his captor from compelling the captured soldier to reveal more information than the minimum required for his identification.⁴⁹

THE NEW RULE OF DISTINCTION

The first sentence of Article 44(3) prescribes the new rule of distinction applicable to all combatants by stating:

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.
2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offense arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offense. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.
3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

⁴⁸ *Id.* at 874-875.

⁴⁹ *Id.* at 875-876.

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.

Unlike other treaty law, Article 44(3) does not specify how combatants are required to distinguish themselves. One authoritative commentary on the Protocols states in this regard: “Presumably a distinctive sign, which need not be fixed, or carrying arms openly would satisfy the requirement. The second sentence suggests that the open carrying of arms is the minimum requirement.”⁵⁰

A combatant who failed to distinguish himself, as required by preexisting conventional and customary law, did not violate a rule of international law (unless his conduct involved treachery), but rather disqualified himself as a privileged combatant. He was, therefore, upon capture not entitled to prisoner of war status and could be tried as a common criminal for his unprivileged combatancy.

The language of this new relaxed rule makes clear, however, that the sanction for a combatant who fails to distinguish himself when so required is trial and punishment for a breach of the laws of war, but not loss of combatant and prisoner of war status.⁵¹ Furthermore, commanders who do not enforce this new rule of distinction are similarly amenable to punishment for violating Articles 86⁵² and 87⁵³ of Protocol I. By extending liability up the chain of command, the Article provides a considerable incentive to superiors to enforce compliance with this new rule.

50 M. BOTHE, K.J. PARTSCH, W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 253 (1982) [hereinafter cited as “NEW RULES”].

51 Aldrich states that “the captor will have to decide whether to prosecute captured irregulars for violation of that first sentence of paragraph 3, and the military courts of the captor will have to decide whether anyone prosecuted is guilty of a violation.” Aldrich Ratification, *supra* note 44 at 9.

52 Article 86 (failure to act) provides:

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

53 Article 87 (Duty of Commanders) states:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary to suppress and report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

Significantly, this new rule of distinction implicitly recognizes for the first time the legitimacy of part-time combatancy. Thus, the part-time combatant who is captured while pursuing his civilian vocation or participating in a military operation *not* preparatory to an attack must be accorded prisoner of war status.⁵⁴ Article 44 does not, however, give examples of such permissible military operations. The New Rules suggests that the following kinds of activities would qualify as such: gathering intelligence without deception, recruiting, training, general administration, law enforcement, aid to underground political authorities, collection of contributions and dissemination of propaganda.⁵⁵ But this commentary does state that the meaning of “military operations preparatory to an attack” should be “broadly construed” to include “administrative and logistical activities preparatory to an attack.”⁵⁶ It notes in this regard: “As such activities are more likely to be conducted in a civilian environment, the civilian population is in greater risk of failure to distinguish in such preparatory activities, than in the ambush attack which is frequently conducted in a remote defile.”⁵⁷

FORFEITURE OF COMBATANT AND POW STATUS

The second sentence of Article 44(3) sets forth the only situations which entail forfeiture of combatant and prisoner of war status. It states:

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

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

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Art. 37, para. 1(c).⁵⁸

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

⁵⁴ In this regard, para. 5 of Article 44 prohibits denial of prisoner of war status based on past activities. It states: “Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.” This provision, however, does not immunize the prisoner from prosecution for precapture offenses that violate the laws of armed conflict, including failure to distinguish himself (Art. 44(3)) or perfidy (Art. 37).

⁵⁵ New Rules *supra* note 50, at 252.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Aldrich admits that “the phrase ‘military operations preparatory to an attack’ is imprecise and will have to be interpreted in practice in the light of concrete situations, but the irregulars are the ones who run the risk that flows from this lack of precision, not their adversaries.” Aldrich: Ratification, *supra* note 44, at 9.

This sentence, which effectively relaxes the requirements of the new rule of distinction set forth in the previous sentence, is both limited in time and circumstances. If there are situations in which an armed combatant cannot distinguish himself from the civilian population by carrying his arms openly, he cannot be obliged to do so. The question, therefore, is when and where do such situations occur?

The answer, according to the New Rules, is that such situations are "... very exceptional and can exist only in occupied territory and in conflicts described in Article 1(4)" [of Protocol I, i.e., struggles against colonial domination, alien occupation and against racist regimes].⁵⁹ (Emphasis supplied). Both Aldrich⁶⁰ and Solf⁶¹ concur in this interpretation. But, even in such situations, an armed combatant must distinguish himself by carrying his arms openly

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

A captured combatant who fails to meet these relaxed standards of distinction forfeits his combatant status and hence entitlement to be a prisoner of war. Accordingly, he can be tried by the detaining power for all his hostile acts, although those acts fully complied with the laws and customs of war. Moreover, if his acts involved killing, wounding, or capturing an enemy combatant, he could also be tried for perfidy, made a breach of the law of armed conflict under

⁵⁹ New Rules, *supra* note 50, at 253.

⁶⁰ See Aldrich, *supra* note 30, at 877-878 (noting that combatants operating behind enemy lines in non occupied territory "... cannot expect to benefit from this provision and will certainly be vulnerable to loss of POW status unless they carry their arms openly or otherwise distinguish themselves at all times during their military operations preparatory to an attack.") *Id.* at 878; Aldrich: Ratification, *supra* note 44, at 9-10 (stating that Italy, Belgium and New Zealand, among others, have filed on ratification of Protocol I understandings to this effect).

⁶¹ Solf Response, *supra* note 24, at 276.

⁶² Article 37 provides:

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

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

paragraph 1(c) of Article 37⁶² of Protocol I. Conversely, combatants who comply with these standards in these specified situations do not lose their right to combatant or, upon capture, prisoner of war status. However, they can be tried and punished by their captor for violating the basic rule of distinction set forth in the first sentence of Article 44(3).

According to Solf, whether these relaxed standards in the second sentence of Article 44(3) “meet” minimum expectations of a conventional armed force that [they do] not legitimize the use of civilian disguise to achieve surprise in an attack, depend on the construction of the word ‘deployment.’ The word has many different meanings in military usage and is admittedly ambiguous.⁶³ In fact, the term was deliberately left ambiguous because the delegates to the Diplomatic Conference could not reach agreement on a single meaning.⁶⁴

Some delegations, including Egypt and the United Arab Emirates, stated that the term included only a final movement to a firing position.⁶⁵ Qatar and the PLO (nonvoting) gave the term a much narrower meaning as covering only moments immediately prior to attack.⁶⁶ Most Western delegations indicated that they understood this term to mean essentially “any movement toward a place from which an attack was to be launched.”⁶⁷ The United States and Great Britain both expressed this understanding upon signing the Protocol.⁶⁸ The New Rules states that “[c]onstruing the phrase in light of the object of the rule, namely, the protection of the civilian population, the understandings expressed by Western delegations are undoubtedly correct.”⁶⁹ Since the detaining power and its tribunals, as a practical matter, will interpret this term and, presumably, will do so in accordance with its own declaration or understanding in its instrument of ratification, it is most likely that the broader Western interpretation of deployment will be applied and thus establish prevailing state practice on this issue.

CONCLUSION

The new standards applicable to privileged combatant status for irregular combatants in

63 Solf Response, *supra* note 24, at 277.

64 *Id.*; see also Aldrich, *supra* note 30, at 878-879; Aldrich: Ratification, *supra* note 44, at 10; New Rules, *supra* note 50, at 253-254.

65 See NEW RULES, *supra* note 50, at 254.

66 See Solf Response, *supra* note 24, at 277.

67 See NEW RULES, *supra* note 50 at 254.

68 Aldrich: Ratification, *supra* note 44, at 10.

69 NEW RULES, *supra* note 50, at 254. This treatise quotes Dr. Hans Blix of Sweden, who gives the following explanation of the rationale for the rule of distinction:

... the most important and most difficult question is how to increase the legal protection of the guerrillas without endangering the civilian population. If a guerrilla movement were systematically to take advantage of a surprise element that lies in attacking while posing as civilians until -as one expert said “a split second before the attack”- it would inevitably undermine the presumption, which is vital to maintain, namely that apparently unarmed persons in civilian dress, do not attack. The result of undermining or eliminating this presumption is bound to have dreadful consequences for the civilian population. *Id.*

Protocol I are a pragmatic solution to a longstanding problem. By giving irregulars both a realistic chance and an incentive to comply with the law, the Protocol may succeed in diminishing the risks to the civilian population from the effects of guerrilla warfare. Realistically, these new standards in practice are likely to be implemented only in occupied territory since those states still facing national liberation movements of the kind envisioned in Article 1(4) of Protocol I have not acceded to the Protocol and other states which are Parties to this instrument, if confronted by similar movements, are likely to deny the applicability of this article to the particular situation.

It is also worth noting that the failure of the United States of America to ratify Protocol I may pose various problems for U.S. allies that are Parties to that instrument in the event of joint military action with the United States against another state that also is a Party to the Protocol. If, for example, Canada, which has ratified Protocol I, and the United States were to occupy the territory of such an enemy state and an organized guerrilla movement began to operate therein, both countries could be faced with a practical legal dilemma over the treatment to be accorded captured guerrillas belonging to that group.

Suppose, for example, that a unit composed of U.S. and Canadian soldiers stops a member of that group, who is dressed as a civilian with his weapon concealed, and several soldiers go to search him. But, before they can do so, the irregular takes out his weapon and opens fire, wounding a soldier. If the U.S. contingent in that unit took custody of the irregular, the United States would be free under customary law and the Geneva Conventions to treat him as an unprivileged combatant, deny him prisoner of war status and try him as a common criminal. On the other hand, if Canadian troops detained him, Canada would be obliged by Protocol I to accord him prisoner of war status unless it determines that he was engaged in a military deployment according to its understanding of that term. Assuming that it determined that the guerrilla was entitled to that status, Canada, as the detaining power, arguably could not turn him over to the United States for trial and punishment without violating its obligations under the Protocol and the Third Geneva Convention.

Such an anomalous result could be obviated if the United States, as wisely suggested by Ambassador Aldrich, were to undertake a "new and unprejudiced examination"⁷⁰ of the Protocol and decided to submit it with appropriate reservations and understandings to the Senate for its advice and consent to ratification.

70 Aldrich: Ratification *supra* note 44, at 1.