6 Individual Battlefield Status

6.0. Introduction

We have resolved, more or less, the first foundational question that a LOAC/IHL (law of armed conflict/international humanitarian law) student should answer regarding any armed conflict: What is the conflict status – what law of war, if any, applies in the armed conflict under examination? Now the second foundational question: What are the statuses of the participants in that conflict? For example, are all of them, or some of them, combatants, or are they unprivileged belligerents? Some of them or all of them? Are they civilians or insurgents? Prisoners of war (POWs) or retained personnel? A *levée en masse* or protected persons?

The first foundational question, status conflict, is critical because it determines if domestic law, limited LOAC or the entire spectrum of LOAC is in play. It is the difference between a criminal trial for murder in a domestic court and POW status with the protection of the combatant's privilege.

The second foundational question, the individual status of those on the battlefield, is just as significant. Individual status determines the rights and protections afforded a fighter, if captured, as well as the prohibitions that may apply to his/her conduct. If you are the officer-in-charge of a military unit ordered to parachute into, say, an African country that has requested U.S. training assistance, and several U.S. Army trainers have already been kidnapped and murdered by a splinter rebel group in the course of an internal rebellion, you know that you probably are going into a common Article 3 armed conflict in which Additional Protocol II probably does not apply – you know the LOAC that will apply on your battlefield.

You also want to know if you are going to jump as part of a uniformed airborne unit, in civilian clothes, or disguised as a local resident or as a soldier from a neighboring country. Different statuses are involved, each dictating how you should conduct yourself and how you should be treated, if captured. True, if you are captured by insurgents, it probably will not matter what Geneva calls for – you are in for a hard day; however, one does not observe or disregard LOAC according to the enemy's conduct. We know and respect LOAC because, as a nation, we have pledged to do so through our ratification of particular LOAC-related treaties. We respect LOAC and customary law because they are the law, and because it is the right and honorable thing to do.

6.1. Individual Status

In American law schools there are 1-Ls and 3-Ls. There are West Point firsties and West Point plebes. There are Navy ensigns and Navy captains. There are assembly line workers, shop stewards, and foremen; Broadway stagehands, understudies, and stars; assistant professors, professors, and deans. Each has a different status in the educational, military, employment, or career system within which the person functions. Status can dictate one's autonomy, authority, salary, office location, vacation length, parking space – in a sense, one's way of life. On the battlefield, individual status may determine your life in a literal sense. It determines if you are a lawful target or not; a POW or a spy, a combatant or a noncombatant.

On the battlefield, no one is without some status and an accompanying level of humanitarian protection.

> In short, . . . [there is] a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.[1]

There are many possible battlefield individual statuses. We examine several that, combined, represent the bulk of those individuals encountered on the battlefield in common Article 2 and 3 armed conflicts, as well as in combat operations against nonstate actors, such as terrorists and insurgents.

6.2. Lawful Combatants/Prisoners of War

In his 1863 Code, Francis Lieber writes in Article 155, "All enemies in regular war are divided into two general classes – that is to say, into combatants and noncombatants . . . " Modern warfare has complicated Lieber's recitation of nineteenth-century customary law of war, but in broad terms it remains true that on any common Article 2 battlefield there are combatants and there are others.

Combatants fall into two categories: members of the armed forces of a party to a conflict (other than medical and religious personnel), and any others who take a direct part in hostilities.[2] **The defining distinction of the lawful combatant's status is that upon capture he or she is entitled to the protections of a POW**, "one of the most valuable rights of combatants under the Law of War."[3] "Entitlement to the status of a prisoner of war – on being captured by the enemy – is vouchsafed to every combatant, subject to the *conditio sine qua non* that he is a lawful combatant."[4]

[1] Jean Pictet, ed., *Commentary, IV Geneva Convention* (Geneva: ICRC, 1958), 51.
[2] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (New York: Cambridge University Press, 2004), 27.
[3] Col. G.I.A.D. Draper, "Personnel and Issues of Status," in Michael A. Meyer and Hilaire McCoubrey, eds., *Reflections on Law and Armed Conflicts* (The Hague: Kluwer Law International, 1998), 194, 197.
[4] Dinstein, *The Conduct of Hostilities*, supra, note 2, at 29.

Article 43.2 of 1977 Additional Protocol I defines combatants in common Article 2 conflicts: "**Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains . . .) are combatants, that is to say, they have the right to participate directly in hostilities.**" Members of the armed forces involved in the conflict including, in the case of U.S. armed forces, Reserve forces, and National Guard units, and, excepting medical personnel and chaplains, are combatants who may engage in hostilities. They may attack and be attacked; they may kill and be killed.

Many categories of soldiers, sailors, Marines, airmen, and Coast Guardsmen contribute to the combat effort in ways that have little to do with actually firing weapons – cooks, administrative personnel, graves registration teams, musicians, and so on. They are nevertheless combatants, for they are *entitled* to fight.[5] There no longer are statuses of "quasi-combatant"[6] or "semi-civilian."[7] The status of combatant is not conduct-based;[8] while assigned as an army cook (conduct) you remain a combatant (status) authorized to fight. "[A] combatant is a person who fights . . . [T]he combatant is a person who is authorized by international law to fight in accordance with international law applicable in international armed conflict."[9] The consideration of combatant status occupies much of LOAC study because in traditional warfare combatants are the most numerous battlefield players, with an entire Geneva Convention devoted to their treatment upon capture.

"Combatants may be attacked at any time until they surrender or are otherwise hors de combat, and not only when actually threatening the enemy."[10] A combatant remains a combatant when he/she is not actually fighting. When a soldier is bivouacked and sleeping she remains a combatant and so remains a legitimate target. While sleeping, she may be lawfully killed by an opposing lawful combatant. If a combatant is targeted far behind the front lines, no matter how unlikely such targeting may be, she continues to be a legitimate target for opposing lawful combatants. Taken an unrealistic step further, if a combatant is home on leave and in uniform, far from the combat zone, and is somehow targeted by an opposing combatant, she remains a legitimate target and may be killed – just as the opposing combatant, if discovered outside the combat zone, may be killed by *his* enemy. That illustrates the downside of combatancy: A lawful combatant enjoys the combatant's privilege, but also is a continuing lawful target.

Common Article 2 combatants are not combatants forever, however. They "can withdraw from hostilities not only by retiring [or demobilizing] and turning into civilians, but also by becoming *hors de combat* [i.e., out of the fight]. This can happen either by

[5] Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman, eds., *Commentary on the Additional Protocols* (Geneva: ICRC/Martinus Nijhoff, 1987), 515.
[6] Maj. Gen. A.P.V. Rogers, *Law on the Battlefield*, 2d ed. (Huntington, NY: Juris, 2004), 9.
[7] Sandoz, *Commentary on the Additional Protocols*, supra, note 5, at 515.
[8] See, e.g., Charles H.B. Garraway, "'Combatants' – Substance or Semantics?" in Michael N. Schmitt and Jelena Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff, 2007), 317. Status often *is* conduct-based, but combatant status is not.
[9] Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), para. 301, at 67.
[10] Marco Sassòli and Laura M. Olson, "The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts," 871 *Int'l Rev. of the Red Cross* (Sept. 2008), 599, 605–6.

choice through a lying down of arms and surrendering, or by force of circumstance as a result of getting wounded, sick or shipwrecked. A combatant who is *hors de combat* and falls into the hands of the enemy is in principle entitled to the privileges of a prisoner of war."[11]

Consider this possibility: in World War II, a pilot in a British "Eagle Squadron" who was a U.S. citizen. Was he a lawful combatant? If not, what was his individual status? How about a Romanian citizen in a World War I German infantry unit? A lawful combatant or not? What if a U.S. Marine retired from active military service and returned to his native state of Arcadia, where he joined the Arcadian army, which then engaged in a common Article 2 armed conflict with the United States. If captured by U.S. forces, what is the retired Marine's status? In all three cases, the individuals are uniformed members of the armed forces of a party to the conflict and therefore all three are lawful combatants. Citizenship is not the point of lawful combatancy; membership in an army of a party to the conflict is the issue.

In December 2003, Iraq's Saddam Hussein was captured by U.S. forces. What was his individual status? The common Article 2 phase of the conflict had ended the previous May, and the United States was occupying Iraq. Common Article 2 makes clear, however, that all of the Geneva Conventions continue to apply during "cases of partial or total occupation." Saddam commanded the Iraqi army, often wore a military uniform, and frequently went about armed. He was a combatant. Captured in civilian attire, was he a *lawful* combatant? In World War II, if British Field Marshal Bernard Montgomery had been captured by German forces, would he have been a lawful combatant and a POW? Of course. As members of the armed forces of a party to the conflict, Saddam and Montgomery, even when not engaged in combat, remained lawful combatants.

But Iraqi soldiers often violated the law of war, the fourth requirement for lawful combatancy. (See Chapter 6, section 6.3.1.) Does that bear on Saddam's status? Certain members of the Iraqi armed forces did violate the law of war, but law of war violations committed by individuals may not be ascribed to every member of the violator's armed force. Saddam was presumed to be a POW, and that is the status eventually accorded him.[12]

In 2007, a former U.S. police officer was hired by a U.S. armed security contractor to provide security for American diplomatic officials in Iraq. Being a man of action, the ex-policeman longed to participate in an operational U.S. Army convoy in the Baghdad area, where he was posted. After a period of wheedling and cajoling his new-found Army buddies, the former policeman was finally allowed to surreptitiously participate in a resupply run as the top-side machine-gunner on a humvee. If captured while on the resupply mission by an enemy who observed the Geneva Conventions, what was his individual status?[13]

[11] Dinstein, *Conduct of Hostilities*, supra, note 2, at 28.

[12] U.S. Dept. of Defense, Armed Forces Press Service, "Red Cross Visits Saddam Hussein," (21 Feb. 2004), available at: http://www.defenselink.mil/news/newsArticle.aspx?id=27283. A significant question is why other captured members of the Iraqi armed forces were not accorded POW status.

[13] In fact, while on the resupply run, the former policeman was killed by an Improvised Explosive Device (IED). Does that make a difference to his status? No. Does it make a difference that he was not a member of the army of a party to the conflict? Yes. See section 6.4 for his individual status.

SIDEBAR. During World War II, in April 1943, Admiral Isoroku Yamamoto, Commander-in-Chief of the Japanese Combined Fleet, was on an inspection tour hundreds of miles behind the front lines. Having broken the Japanese navy's message code, U.S. forces knew his flight itinerary and sent sixteen Army Air Force P-38 Lightning fighter aircraft to intercept him.* Near Bougainville, in the northern Solomons, the U.S. fighter pilots shot down their target, a Betty bomber, killing all on board, including Admiral Yamamoto. Yamamoto's status was that of a combatant in a common Article 2 armed conflict, and he was killed by opposing combatants. "There is nothing treacherous in singling out an individual enemy combatant (usually, a senior officer) as a target for a lethal attack conducted by combatants distinguishing themselves as such. . . . even in an air strike."[14] The fact that Yamamoto was targeted far away from the front lines is immaterial. Combatants may be targeted wherever found, armed or unarmed, on a front line or a mile or a hundred miles behind the lines, "whether in the zone of hostilities, occupied territory, or elsewhere."[15]

In a common Article 2 international conflict, captured combatants are entitled to POW status, with its Geneva Convention III rights and protections. As Lieber points out, "A prisoner of war is subject to no punishment . . . nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment . . . death, or any other barbarity. . . . Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity."[16] A century ago, the 1914 edition of the U.S. Army's *Rules of Land Warfare* similarly noted, "Prisoners of war must not be regarded as criminals or convicts. They are guarded as a measure of security and not of punishment."[17] While they may be tried for any unlawful precapture acts they may have committed, and for unlawful acts they commit while in captivity,[18] POWs are confined only to keep them from returning to further fighting. Captured fighters who are not entitled to POW status, such as unlawful combatants (unprivileged belligerents), do not enjoy the same consideration or treatment.

Nowhere is it *required* that captured unlawful combatants be denied POW status. "Indeed, U.S. practice has been to accord POW status generously to irregulars, to support such status for irregular forces at times, and to raise objections whenever an adversary has sought to deny U.S. personnel POW status based on a general accusation that the

* One of the Navy code breakers was Navy Lieutenant John Paul Stevens, later Associate Justice of the Supreme Court of the United States. Jeffrey Rosen, "The Dissenter," *New York Times Magazine*, Sept. 23, 2007, 50.

[14] Dinstein, *Conduct of Hostilities*, supra, note 2, at 200.

[15] FM 27–10, *The Law of Land Warfare* (Washington: GPO, 1956), para. 31.

[16] *Instructions for the Government of Armies of the United States in the Field* (April 24, 1863), Arts. 56, 75. Hereafter: the Lieber Code.

[17] War Department, *Rules of Land Warfare – 1914* (Washington: GPO, 1914), para. 60, at 27.

[18] E.g., *Rex v. Perzenowski, et al.*, Canada, Supreme Ct. of Alberta (App. Div.), Oct. 1946, in H. Lauterpacht, ed., *1946 Annual Digest and Reports of Public International Law Cases* (London: Butterworth, 1951), 300. Perzenowski, a German POW held in Medicine Hat, Alberta, conspired with others and killed a fellow German POW they believed to be a communist.

U.S. forces were not in compliance with some aspect of the law of war."[19] More often, captives are treated as if they were POWs while not actually being accorded POW status – a subtle but significant difference. During the Spanish Civil War (1936–1939), there was a special agreement between the two sides, the Madrid Government of Spain and the Burgos Junta, that certain prisoners would have a status equivalent to POWs. During the U.S.-Vietnam conflict, "[t]he MACV [U.S. Military Advisory Command-Vietnam] policy was that all combatants captured . . . were to be accorded prisoner of war status, irrespective of the type of unit to which they belonged."[20] There has been no such accommodation for captured Taliban or al Qaeda fighters, however.

What about common Article 3 non-international armed conflicts? The traditional view is that, just as there are no POWs in non-international armed conflicts, there are no "combatants," lawful or otherwise, in common Article 3 conflicts. There may be combat in the literal sense, but in terms of LOAC there are fighters, rebels, insurgents, or guerrillas who engage in armed conflict, and there are government forces, and perhaps armed forces allied to the government forces. There are no combatants as that term is used in customary law of war, however. Upon capture such fighters are simply prisoners of the detaining government; they are criminals to be prosecuted for their unlawful acts, either by a military court or under the domestic law of the capturing state.

6.2.1. *Retainees*

Retainees occupy a unique place in the law of war. Upon capture they are not POWs, although they receive the same treatment as POWs. They are "retained personnel," described in Article 28 of Geneva Convention I. More than one hundred forty years ago, Lieber wrote, "The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American Army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit." LOAC remains much the same today.

Medical personnel and chaplains, although members of the armed forces, are not combatants – they are the only members of the armed forces of a state who are non-combatants. "The term noncombatant as used in the present connection to describe certain elements [medical personnel and chaplains] within the armed forces is, of course, to be distinguished from the term noncombatant as applied to the general population of a belligerent, that is, those who do not belong to its armed forces."[21] So, the presence of noncombatant members of the armed forces at a military objective does not require an attacking enemy to take any special precautionary measures, as would the presence of civilians. Medical personnel and chaplains are subject to capture by the enemy, but they do not hold POW status. Although they are POWs to all outward appearances, their status is "retained personnel," or retainees. Retainees include dentists, surgeons, and other medical doctors, but not medical orderlies or chaplains'

[19] Jennifer Elsea, *Treatment of "Battlefield Detainees" in the War on Terrorism*, Congressional Research Service, Rpt. for Congress (13 Jan. 2005), at CRS-8.
[20] MG George S. Prugh, *Law at War: Vietnam 1964–1973* (Washington: Dept. of the Army, 1975), 66.
[21] Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press, 1959), 57.

assistants.[22] The distinction is based on the fact that orderlies and chaplains assistants, formally titled "Religious Program Specialists," or "RPs," are not considered "permanent staff"[23] in medical or pastoral terms. Orderlies and chaplains' assistants are armed and may lawfully directly participate in hostilities.

Captured medical personnel and chaplains are "retained by the detaining power with a view to providing medical care or religious ministration to prisoners of war . . . and they are to be given treatment not less favorable than that given prisoners of war."[24] Retainees may not lawfully be compelled to do work other than their medical or pastoral work. When there no longer is a need for their services (no pun intended, Chaplain) they are to be returned to their own lines – repatriated.[25] Although there were a number of prisoner exchanges throughout World War II,[26] repatriation of retained personnel is a requirement seldom observed since then, because as long as there are POWs, the retainee's unique skills will likely be needed.

In combat, medics and corpsmen traditionally wore brassards – armbands – bearing "the distinctive sign," a red cross on a white background, to mark the wearers as non-combatants and not lawful targets.[27] (In U.S. practice, the Army refers to field medical personnel as "medics," whereas the Marine Corps and Navy call them "corpsmen.") Since World War II, the grim reality of combat has caused medics and corpsmen to frequently discard their distinctive red cross insignia, which too often becomes an enemy aiming point rather than a protective emblem. Additionally, they have usually armed themselves with light individual weapons, which is in accord with LOAC, as long as the weapons are only used for self-defense or the defense of the wounded in their charge.[28] "The expression 'light individual weapons', in both Article 13(2) and Article 65(3), denotes 'weapons which are generally carried and used by a single individual', including sub-machine guns . . . "[29] During World War II, in the 1945 battle for Okinawa, Navy Corpsman Robert E. Bush, in the words of his Medal of Honor citation,

> was advancing to administer blood plasma to a marine officer lying wounded on the skyline when the Japanese launched a savage counterattack . . . [H]e resolutely maintained the flow of lifegiving plasma. With the bottle held high in 1 [sic] hand, Bush

[22] 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Arts. 25, 29. Hereafter: Geneva Convention I. In accordance with these Articles, "hospital orderlies, nurses, or auxiliary stretcher-bearers . . . shall be prisoners of war," rather than retained personnel. FM 27–10, *Law of Land Warfare*, supra, note 15, para. 68, at 29. The British take a broader view of who is a retained person: "The term [medical personnel] embraces not only doctors and nurses but also a wide range of specialists, technicians, maintenance staff, drivers, cooks, and administrators." UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 7.11.1., at 126.

[23] Jean Pictet, ed., *Commentary, I Geneva Convention* (Geneva: ICRC, 1952), 221.

[24] *Manual of the Law of Armed Conflict*, supra, note 22, at para. 8–8, at 146. Also see: Geneva Convention I, Art. 32.

[25] Id., *Manual*, para 8.58, at 165. Also see: Geneva Convention I, Arts. 28 and 30 and 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Arts. 33 and 35. Hereafter: Geneva Convention III.

[26] See: David Miller, *Mercy Ships* (London: Continuum, 2008). Miller documents U.S.-German exchanges of POWs, female nurses, diplomatic internees, and others, as well as U.S.–Japanese, U.K–German, and U.S./U.K./German–Swiss exchanges.

[27] Geneva Convention I, Arts. 41, 25.

[28] Id., Art. 22(1); 1977 Additional Protocol I, Art. 13.2(a).

[29] Dinstein, *The Conduct of Hostilities*, supra, note 2, at 151, citing Sandoz, *Commentary on the Additional Protocols*, supra, note 5, at 178.

> drew his pistol with the other and fired into the enemy's ranks until his ammunition was expended. Quickly seizing a discarded carbine, he trained his fire on the Japanese charging pointblank over the hill, accounting for 6 of the enemy despite his own serious wounds and the loss of one eye suffered during the desperate battle in defense of the helpless man . . .

Corpsman Bush employed light individual weapons in self-defense and in defense of the wounded marine in his charge, textbook compliance with the Convention then in effect, the 1929 Geneva Convention for the Amelioration of the Condition of the Sick and Wounded in Armies in the Field, Article 8.1, which reads essentially the same as 1949 Geneva Convention I, Article 22(1).

In 2008, in Iraq, the U.S. Marine Corps, concerned about reports of its Navy corpsmen directly participating in hostilities, issued written instructions to "knock it off":

> 1. Situation. U.S. Navy Hospital Corpsmen are being assigned to duties unrelated to their medical service . . . and may be jeopardizing the special protections and status they are afforded as noncombatants . . .
>
> 3.a. Commander's Intent. . . . Corpsmen may perform only those duties related to their medical service . . . Corpsmen may be armed only for the limited purpose of self-defense and/or defense of their patients and abstain from any form of participation in hostile acts.
>
> 3.c.(2). Prohibited Duties. . . . Corpsmen may not be assigned as a gunner in a turret of a tactical vehicle. • . . . Corpsmen may not set down suppressive fire for a Marine unit in order to allow maneuver. • Corpsmen may not man defensive positions or checkpoint/control points . . . • Corpsmen may not be utilized as members of an ambush/sniper team. . . . [30]

This instruction may have had the desired effect in the short term but probably was ignored in the long term. A year later, it was revealed that a Navy doctor, on patrol with a joint American and Afghan unit, had been awarded the Navy Cross, second only to the Medal of Honor, for his combat valor in firefights with al Qaeda and Taliban forces.[31]

Chaplains, by reason of their noncombatancy,[32] are prohibited by U.S. service regulations from carrying or using any weapon.[33] Their enlisted "RPs," (often referred to as "chaplains' assistants"), are tasked with protecting their chaplains in combat situations. In ancient times, "not only were all clerics exempt from military service, but their presence on the battlefield frequently resulted in a temporary cessation of hostilities, just as

[30] USMC, Multi National Force – West, II Marine Expeditionary Force (Forward); Policy Letter 16–07, Oct. 8 2007, on file with author.

[31] Andrew Scutro, "Mystery medical officer earned a Navy Cross he can't display," *Marine Corps Times*, Nov. 10, 2008, 24. The doctor's 2003 award details, including his name, were secret because the action occurred in Pakistan at a time when U.S. forces were not permitted to be there. The unclassified citation for the Navy's second highest combat award reveals that the doctor returned enemy fire and led a "fighting retreat" when his unit was caught in an ambush. His identity, Lt. Mark Donald, and an additional Silver Star medal, were made public in 2009.

[32] 1977 Additional Protocol I, relating to international armed conflicts, Art. 43.2 Hereafter, Additional Protocol I.

[33] National Guard Recruiting, "Will I Carry A Gun?" at www.nh.ngb.army.mil/Recruiting/Chaplain.htm.

conflict ceased on saints' days and religious holidays."[34] Times, and battlefield customs, change. Today, fighting does not abate for the presence of clerics.

On rare occasions American chaplains in Iraq have disregarded the weapons prohibition. In April 2003, a U.S. Army chaplain was with a unit in the initial push into Baghdad, which involved intense close combat:

> As he surveyed the melee around him, he was afraid the U.S. troops would be overrun. Army chaplains were under instructions not to bear arms. In the most extreme circumstances, where their lives were at stake, chaplains could declare an exception. It was called the "moment of decision" and was a judgment each chaplain had to make for himself, but one the Army Chaplain Corps discouraged. [The chaplain] decided it was time to fight. He picked up a weapon and started firing at the enemy. . . . "I picked up a weapon and I was firing, and I have no problem with that in my conscience."[35]

There is no authority for chaplains to "declare an exception." The Baghdad chaplain was hardly the first man of the cloth to engage in combat, however. During the U.S. Civil War, Union Chaplain Milton L. Haney also took up arms. His brief Medal of Honor citation reads: "Voluntarily carried a musket in the ranks of his regiment and rendered heroic service in retaking the Federal works which had been captured by the enemy."

Today, any chaplain or medical person who takes a direct part in hostilities becomes an unlawful combatant, forfeits noncombatant immunity, and becomes a lawful target. If captured by an opposing force that abides by LOAC, they still would be retained persons, but would be subject to trial for their unlawful precapture combatant acts,[36] just as lawful combatant POWs would be subject to trial for their unlawful precapture acts.[37]

[34] L.C. Green, *The Contemporary Law of Armed Conflict*, 2d ed. (Manchester: Juris/Manchester University Press, 2000), 103, footnote omitted. A modern instance of a holiday cessation of hostilities was the World War I "Christmas truce" of 1914. On Christmas day troops spontaneously, albeit cautiously, emerged from their opposing trench lines, then greeted one another, traded cigarettes, buried their dead, and sang Christmas carols together, and briefly even played soccer in fields of mud and barbed wire. AP, "Alfred Anderson, 109, Last Man From 'Christmas Truce' of 1914," *NY Times* obituary, Nov. 22, 2005, B9. Also: "Though [the Christmas truce] was to become so widespread as to impact much of the front, no one was ever certain where or how it had begun." Commanders, fearing the will to fight would be lost, ordered an immediate resumption of fighting. On both sides many soldiers complied by firing harmlessly into the air. Stanley Weintraub, *Silent Night* (New York: Free Press, 2001), 21. In a World War II incident in the Huertgen Forest, during a Nov. 7, 1944 local truce at the Kall River Gorge, American and German doctors and corpsmen converged to retrieve and evacuate their own, and each other's, wounded. Charles B. MacDonald, *United States Army in World War II: The European Theater of Operations; The Siegfried Line Campaign* (Washington: Center of Military History, 2001), 371–2. John Keegan discusses similar nonholiday truces in *The Face of Battle* (London: Barrie & Jenkins, 1988), 239. Briefer, less dramatic truces are not unknown to the battlefield. An example was a Sept. 24, 1944, two-hour British–German truce during Operation Market Garden's battle of Nijmegen, during which both sides held fire while the British collected their wounded. Cornelius Ryan, *A Bridge Too Far* (New York: Simon & Schuster, 1974), 556–9.

[35] Michael R. Gordon and Lt.Gen. Bernard E. Trainor, *Cobra II* (New York: Pantheon Books, 2006), 405–6.

[36] Geneva Convention III, Art. 85.

[37] E.g., *Trial of Max Schmid*, U.S. General Military Government Court at Dachau, Germany, 19 May, 1947. LRTWC, vol. XIII (London: UNWCC, 1949), 151. In the dispensary he commanded, Schmid, a medical doctor, beheaded the dead body of a U.S. airman. He boiled it, removed the skin, bleached the skull and kept it on his office desk. Convicted of violating Articles 3 and 4 of 1929 Geneva Convention I, he was convicted and sentenced to ten years confinement.

6.3. Others Whose Status upon Capture is POW

Recall that POW status arises only in common Article 2 international armed conflicts, and in such conflicts the 1949 Geneva Conventions apply *in toto*, along with 1977 Additional Protocol I.

In common Article 2 conflicts, a combatant is a member of the armed forces of a party to the conflict, wearing a uniform or other distinguishing sign. Although lawful combatants make up the greater number of POWs, by far, the 1949 POW Convention specifies six other groups that are also entitled to those protections.[38]

6.3.1. *Members of Other Militias and Members of Other Volunteer Corps*

Here is the age-old issue of partisans, guerrillas, and POW status. Geneva Convention III, Article 4A also encompasses a state's auxiliary and reserve armed forces, as well as partisans. The term, "reserve armed forces," does not refer to organized military reserve units that have been incorporated into a nation's armed forces. Rather, it refers to a reserve force that, for whatever reason, has not been integrated into the armed forces but nevertheless actively participates in hostilities – an unusual circumstance today.

As noted in Chapter 4, for partisans (or reserve armed forces just described) to gain POW status the Convention has four special requirements.

> 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 the 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;
> (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.[39]

Special requirements (b) and (c) are modified by 1977 Additional Protocol I, Article 44.3, which requires that combatants distinguish themselves ("a fixed distinctive sign") only while in an attack or preparatory to an attack and, if they cannot do that because of the nature of the situation, they still must carry their arms openly during that period. (Chapter 4, section 4.2.1.3.) What does this modification mean for members of "other militias" and "other volunteer corps" or for rebels and insurgents? The International Committee of the Red Cross (ICRC) points out, "if resistance movements are to benefit by the Convention, they must respect the four special conditions . . . "[40] If they fail to do so they are unlawful combatants.

The first of the four special conditions is clear. In an international armed conflict, the partisan, guerrilla, or rebel group, however designated, must have a leader, civilian or military, who is responsible for their conduct. This requirement is not for a hierarchical

[38] 1949 Geneva Convention III, Art. 4A.(2)–(6).
[39] Id.
[40] Jean Pictet, *Commentary, III Geneva Convention* (Geneva: ICRC, 1960), 59.

"chain of command" that is familiar to military units[41] – although there often is such a chain of authority in resistance movements. The requirement is merely intended to exclude individuals acting on their own who, in effect, initiate private wars. Such unaffiliated fighters always have been forbidden by LOAC.

The second special condition: a distinctive sign. The distinctive sign of a state's armed forces usually is a uniform. For partisans, a distinctive sign may be any emblem recognizable at a reasonable distance, in daylight, with unenhanced vision. A distinctive sash, coat, shirt, badge, or emblem, even just a distinctive armband will do, but it must be the same distinctive sign for everyone in the partisan group and it must be used only by them. A white shirt, for example, may not be "the distinctive sign" because a white shirt is not distinctive. A distinctive cap or hat, like the beret of the World War II French *Maquis* resistance fighters, is not adequate because it may easily be removed or put on, too easily defeating the requirement for distinction.* A uniform, per se, is not required for irregular forces. A uniform is obviously distinctive, but a uniform is not required for a combatant to be distinctive; any distinctive sign is permitted. Nor is camouflage outlawed. "The issue is not whether combatants can be seen, but the lack of desire on their part to create the false impression that they are civilians."[42] In 1999, during armed conflict in Kosovo, press and television depicted members of a paramilitary group, the Kosovo Liberation Army (KLA), wearing camouflage uniforms with the KLA patch at their shoulder.[43] Although they were not members of an army of a party to the conflict, the KLA did take pains to distinguish themselves from noncombatants.

The third requirement, carrying arms openly, has always been difficult.[44] "Carrying arms openly" does not mean one's weapon must be carried *visibly*. How can a weapon be carried openly, yet not visibly? A good question. What is required is that the fighter carry his weapon openly "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."[45] A U.S. Air Force reference cited in the ICRC's study of customary law says that this requirement is not met "by carrying arms concealed about the person or if the individuals hide their weapons on the approach of the enemy."[46] A handgun or grenade may be carried in a pocket or holster, however. "[W]hat counts is not the ambiguous language [of the requirement] but the nucleus of the condition. A lawful combatant must abstain from creating the false impression that he is an innocent civilian . . . He must carry his arms openly in a reasonable way, depending on the nature of the weapon and the prevailing circumstances."[47]

The final special condition, that the laws and customs of war be complied with, is essential, and is inherent in the three other requirements. Although "the laws and customs of war" is a somewhat vague locution, it reasonably informs the partisan or insurgent of

[41] *Prosecutor v. Musema*, ICTR-95–13-T (27 Jan. 2000), para. 257.

* The *Commentary* is ambiguous on this point, saying, "It may be a cap (although this may frequently be taken off and does not seem fully adequate) . . ." Pictet, *Commentary*, *III Geneva Convention*, supra, note 40, at 60. Indeed a cap does not seem adequate.

[42] Dinstein, *The Conduct of Hostilities*, supra, note 2, at 38.

[43] Rogers, *Law on the Battlefield*, supra, note 6, at 37.

[44] W. Hays Parks, "Air War and the Law of War," 32–1 *Air Force L. R.* (1990), 1, 84.

[45] 1977 Additional Protocol I, Art. 44.3.

[46] Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge: Cambridge University Press, 2005), Rule 106, at 386.

[47] Dinstein, *The Conduct of Hostilities*, supra, note 2, at 39.

LOAC's requirements. "Unless a combatant is willing himself to respect [LOAC/IHL], he is estopped from relying on that body of law when desirous of enjoying its benefits."[48]

6.3.1.1. Additional Conditions for POW Status?

Some commentators contend that there are additional requirements for POW status for members of militias and other volunteer groups. An additional three that are sometimes proposed: hierarchical organization; belonging to a party to the conflict; and nonallegiance to the detaining power.

The first of these asserted additional requirements, hierarchical organization, requires that "[l]awful combatants must act within a hierarchic framework, embedded in discipline, and subject to supervision by upper echelons of what is being done by subordinate units in the field."[49] This additional requirement would task irregulars with having a military-style chain of command. Even if complying with the traditional four conditions for POW status, bands of combatants cannot operate "free style," on their own. They must have a leader and, this additional requirement would add, a command structure including senior leaders to oversee their operations. This requirement is not cited as a precondition for POW status in most texts. The ICRC study of customary law specifies the number of preconditions when it says, "members of militias and volunteer corps are required to comply with *four* conditions . . ."[50] Nowhere are further preconditions mentioned.

The second asserted additional requirement, belonging to a party to the conflict, stipulates that irregulars be affiliated with one side or the other. Such a requirement is not new. In a common Article 2 conflict, an individual may not form an independent group of fighters to fight for their own cause or goals, unassociated with either of the states opposing each other in the conflict. Private citizens and independent armed groups have always been excluded from entitlement to the combatant's privilege and POW status. This requirement of state affiliation is seen in the *Kassem* case, in this chapter's Cases and Materials.

The third asserted additional requirement is nonallegiance to the detaining power. To oversimplify, POWs cannot be nationals of the nation holding them. For example, during the U.S.–Vietnam conflict, if a U.S. national of Vietnamese extraction returned to North Vietnam, enlisted in the North Vietnamese army, and was then captured by U.S. forces, as a U.S. national that individual would not be entitled to POW status while held by U.S. forces. Although he would retain the combatant's privilege, he would be subject to trial, conviction, and imprisonment under U.S. law for having enlisted in a foreign service.[51] This asserted additional requirement is illustrated in a 1967 U.K. case decided by the U.K.'s Privy Council.[52] Like the first additional requirement, nonallegiance is not cited in texts as a precondition for POW status.

The careful student will know Geneva Convention III's four customary requirements for POW status for irregulars, guerrillas, and insurgents, but be aware that some authorities

[48] Id.
[49] Id.
[50] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, supra, note 46, Rule 106, at 385. Emphasis added.
[51] 18 U.S. Code, § 959, Enlistment in Foreign Service.
[52] *Public Prosecutor v. Koi et al.* (1967), [1968] AC 829.

urge these three additional requirements, the first and third of which are not state practice. The second has always been an unspoken requirement.

6.3.2. *Regular Armed Forces Professing Allegiance to an Unrecognized Authority*

This group of potential POWs is unlikely to be encountered today. The provision reads, "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power [are prisoners of war]."[53] It was added to the Convention to remedy a specific circumstance of World War II.

After Germany occupied France, "Free French" forces under General Charles de Gaulle continued armed resistance in France against the Nazis. The Germans did not recognize de Gaulle's Free French government in exile. An Article of the 1942 French–German armistice stipulated that, because the Free French were, the Germans said, fighting unlawfully, they would not be protected under the law of war and would not be accorded POW status if captured. General de Gaulle's Free French forces were considered by the Allies as France's lawful regular armed force; an armed force that professed allegiance to a French government not recognized by Germany, their detaining power if captured. A similar situation arose in 1943, when Germany refused to recognize Italy's government in exile, or its forces fighting in Italy under Marshal Pietro Bagdoglio.

To ensure that such attempts to put combatants beyond the protections of the Conventions would not arise in the future, Geneva's Conference of Government Experts added this provision.[54] (See the *Kassem* case, Cases and Materials, this chapter.)

6.3.3. *Persons Who Accompany the Armed Forces without Being Members Thereof*

The POW convention provides protection for groups other than combatants. In October 2007, for the first time, the U.S. Marine Corps based a squadron of MV-22B Osprey tiltrotor transport aircraft in Iraq. The mechanically novel part-helicopter, part-turboprop aircraft was twenty-four years and twenty-two billion dollars in development. Its two wingtip-mounted engines, which rotate in flight from helicopter mode to aircraft mode, are complex to operate and maintain. Three civilian technical representatives from the plane's manufacturer, Boeing-Bell, and one civilian from the engine-maker Rolls-Royce, deployed to Iraq with the squadron.[55] If these four civilians were to be captured by an enemy force that recognized and complied with LOAC, what would their status be?

The answer is found in Article 4A.(4): "Persons who accompany the armed forces without actually being members thereof, such as . . . 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 . . . with an identity card . . . "

In 1863, Lieber wrote, "Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such. . . . "[56] Although the purposes for

[53] 1949 Geneva Convention III, Art. 4A.(3).
[54] Pictet, *Commentary, III Geneva Convention*, supra, note 40, at 61–4.
[55] Richard Whittle, "A Test, Not a Final Exam," U.S. Naval Institute *Proceedings* (Feb. 2008), 20, 21.
[56] The Lieber Code, supra, note 16, at Art. 50.

which individuals may accompany the armed forces are limited, Lieber's recitation of then-customary law remains much the same today.

The Osprey "tech reps" accompany the armed forces, but they are not members of the armed forces. Their status upon capture is POW. If a CNN reporter, cameraman, and sound technician are captured? POWs. If a Red Cross worker, USO show cast member, or civilian mess hall worker were captured, all three would be POWs.

Should they be captured, are employees of an American-based armed private security contractor POWs? In 2007, in Iraq, such a company, Blackwater Worldwide, was prominent in news stories involving the deaths of noncombatants. Logic and Blackwater's military-like armament suggested that they would be POWs if captured, but they would not be. Their contracts are with the U.S. Department of State, not the Department of Defense (DoD).[57] Blackwater accompanies not the armed forces, but the State Department. That unsatisfying explanation is why, if captured, their status would be that of "protected persons," with far fewer protections than a POW. (Protected persons are discussed in Chapter 6, section 6.10.)

6.3.4. *Merchant Marine and Civilian Aircraft Crews*

Upon capture in a common Article 2 international armed conflict, the crews of merchant marine vessels and civilian aircraft of a party to the conflict are entitled to POW status. The merchant seamen and women who crew government-contracted civilian vessels transporting supplies to the combat zone are often armed. Civilian aircraft manned by unarmed civilians often transport troops to and from the combat zone. In the event of the capture they, too, merit POW status. Not included in this category are civilians who are aboard ship or aircraft not as crew, but passengers – Department of State civilians or technical representatives returning home on leave or having completed their contractual obligation, for instance. Medical aircraft are exempt from capture, as are (oddly) fishing boats.[58]

The capture of civilian crew members is unusual, but it happens. In 1965, during the U.S.–Vietnam conflict, Ernest C. Brace, a civilian pilot flying U.S. Agency for International Development (USAID) supply missions, was captured in Laos by North Vietnamese Army troops. He was held prisoner for seven years and ten months, longer than any other civilian in that conflict. A former U.S. Marine, Brace received the civilian Medal for Distinguished Service for his conduct as a POW.[59] Of the 771 Americans and allies captured during the conflict in Vietnam, fifty-one were civilians – tech reps, construction workers, teachers, interpreters, U.S. and British government employees, nurses and missionaries, as well as civilian air crew like Brace. No merchant seamen were captured. Civilians usually received the same poor treatment as captured military pilots.[60] "[T]he Hanoi government stated that it would treat captured American fliers

[57] U.S. Dept. of State, Secretary Condoleezza Rice, "Interview With the New York Post Editorial Board," (Oct. 1, 2007), available at: http://www.state.gov/secretary/rm/2007/10/93046.htm.

[58] Louise Doswald-Beck, ed., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: Cambridge University Press, 1995), 36, para. 142(a) regarding medical aircraft; and 1907 Hague Convention XI, Art. 3, as to fishing boats.

[59] Ernest C. Brace, *A Code to Keep* (New York: St. Martin's Press, 1988), 261.

[60] Stuart I. Rochester and Frederick Kiley, *Honor Bound* (Washington: Historical Office, Office of the Secretary of Defense, 1998), 58, 64, 253, 283, 450, and 452.

humanely, but it would not accord them prisoner of war status as they were 'pirates' engaged in unprovoked attacks on North Vietnam."[61] The treatment of all captives held by the North Vietnamese was far short of humane.

6.3.5. *Levée en Masse*

On December 24, 1941, two weeks after Pearl Harbor, U.S.-held Wake Island fell to invading Japanese forces. More than eleven hundred American civilian construction workers were among the island's population. "More than sixty civilians are known to have taken part in the ground fighting, and their valor – if not their combat skills – equaled that of the servicemen."[62] One hundred twenty-four Americans died before Wake Island was forced to surrender. Seventy-five of the dead were civilians who manned shore batteries and heavy machine guns, held defensive positions and, when Japanese infantry landed, fought in counterattacks.[63]

What was the status of the approximately 1,118 civilians who were captured on Wake Island by Japanese forces?*

Traditionally, wrote Lieber, "the people of that portion of an invaded country which is not yet occupied by the enemy . . . at the approach of a hostile army, [may] rise . . . *en masse* to resist the invader . . . and, if captured, are prisoners of war."[64] The Wake Island civilians are what Lieber described – inhabitants of nonoccupied U.S. territory who, on the approach of the enemy, spontaneously took up arms to resist the invading Japanese force without having had time to form themselves into regular armed units, carrying their arms openly and respecting the laws and customs of war. They were a *levée en masse*, a gathering entitled to POW status upon capture.[65]

In the Wars of the French Revolution (1792–1800), at the 1793 Battle of Wattignies, French *levées en masse* beat back invading Austrian troops. In the U.S. Civil War, in May 1864, upon the approach of Union forces, 257 cadets of Virginia Military Institute took up arms and fought at the Battle of New Market. Ten were killed and forty-five wounded. Seven months later, at Tulifinny, South Carolina, a battalion of cadets from The Citadel, along with South Carolina home guard and militia units, were called out to stop Union forces marching toward Charleston.[66] The cadet units were *levées en masse*.

"The law of war has had to evolve an uneasy . . . compromise between the legitimate defence of regular belligerent forces and the demands of patriotism. . . . The protected position afforded the members of the *levée en masse* is a monument to these sentiments . . ."[67] The International Criminal Tribunal for the Former Yugoslavia (ICTY)

[61] Prugh, *Law at War: Vietnam*, supra, note 20, at 63.
[62] Gregory J.W. Urwin, *Facing Fearful Odds* (Lincoln: University of Nebraska Press, 1997), 528.
[63] Lt.Col. Frank O. Hough, Maj. Verle E. Ludwig, and Henry I. Shaw, *History of Marine Corps Operations in World War II*, vol. I, *Pearl Harbor to Guadalcanal* (Washington: GPO, 1958), 132–43.
* The 1949 Geneva Convention on POWs was not in effect in 1941 but, under Art. 81 of the 1929 POW Convention, the answer is the same.
[64] The Lieber Code, supra, note 16, at Art. 51.
[65] 1949 Geneva Convention III, Art. 4A.(6).
[66] Gary R. Baker, *Cadets in Gray* (Lexington, SC: Palmetto Bookworks, 1990), 134–52; and, Rod Andrew, Jr., *Long Gray Lines: The Southern Military School Tradition, 1839–1915* (Chapel Hill, NC: University of North Carolina Press, 2007), 30–1.
[67] Major Richard R. Baxter, "So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs," 28 *BYIL* (1951), 335.

has defined a *levée en masse* as "inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously took up arms to resist the invading forces, without having had time to form themselves into regular armed units, and at all times they carried arms openly and respected the laws and customs of war."[68]

"The conditions [of a *levée en masse*] are those of emergency and a form of last-ditch defence of a country when time permits of no other means."[69] Partisans, rebels, guerillas, and insurgents, then, are not a *levée en masse*, for they are not a last-ditch defense of a country. Because of the character of a *levée en masse*, its members are allowed to dispense with the otherwise required commander responsible for subordinates and the wearing of a fixed distinctive sign – the only time that the four customary requirements for POW status are eased. But, "In the absence of any distinctive sign, the requirement of carrying arms 'openly' is of special significance . . . [T]his requirement is in the interest of combatants themselves who must be recognizable in order to qualify for treatment as prisoners of war. They must therefore carry arms visibly."[70]

Finally, a *levée en masse* can lawfully exist only during the actual period of invasion – a common Article 2 conflict. Resistance beyond the period of the actual invasion must be conducted by regular forces, or the *levée* members must be incorporated into regular forces. Armed resistance by civilian combatants that continues into an occupation renders the fighters unlawful combatants unprivileged belligerents.

Despite its history, and although it is recognized in Geneva Convention III, the *levée en masse* may be an historical relic. Since World War II, "[t]his situation has hardly ever arisen in actual practice . . ."[71] and is "extremely rare and limited . . ."[72] Still, in August 2008, Russian troops invaded the South Ossetia region of neighboring Georgia and, overcoming resistance of the Georgian army, pushed on, into Georgia itself.[73]

> As swaths of the country fell before Russian troops, it was not only the army that rose in its defense but also regular citizens . . . [Two young Georgian men] hoped to join the fight . . . despite the fact that neither had served in the military . . . part of a group of a dozen civilians, some in camouflage and some wearing bullet-proof vests, who said they were there to defend the city from Russian attack. "Many of them now think it is the last chance to defend their homeland," Ms. Lagidze said. "It comes from the knowledge that the army is not enough and every man is valuable.[74]

Perhaps future *levées en masse*, ill-advised as civilian attempts at combat may be, are not as improbable on today's battlefields as believed.

[68] *Prosecutor v. Delalić*, IT-96–21-T (16 Nov. 1998), para. 268.
[69] Draper, "Personnel and Issues of Status," supra, note 3, at 198.
[70] Pictet, *Commentary, III Geneva Convention*, supra, note 40, at 68.
[71] Pictet, *Commentary, IV Geneva Convention*, supra, note 1, at 51.
[72] Draper, "The Legal Classification of Belligerent Individuals," in Meyer and McCoubrey, *Reflections on Law and Armed Conflicts*, supra, note 3, at 202.
[73] Michael Schwirtz and Andrew E. Kramer, "Russian Forces Capture Military Base in Georgia," *NY Times*, Aug. 12, 2008, A8.
[74] Nicholas Kulish and Michael Schwirtz, "Sons Missing in Action, If Indeed They Found It," *NY Times*, Aug. 12, 2008, A10. Both young men described in the media account were swiftly captured, harshly treated, forced to clean up debris left from the fighting, and released nineteen days later, after all fighting ended. They never held a weapon, never fought the enemy. Michael Schwirtz, "2 Georgians Went to War But Never Got to Fight," *NY Times*, Sept. 2, 2008, A8.

6.3.6. *Demobilized Military Personnel and Military Internees in Neutral Countries*

An often overlooked provision of Geneva Convention III, Article 4, is subparagraph B, again included as a direct result of World War II experience. In occupied territories, the Nazis often arrested and shot retired or demobilized military personnel, often ex-officers who refused to comply with internment orders or attempted to rejoin their former units. To prevent such acts in future conflicts, this provision of Article 4 requires that such detained individuals receive POW protection.[75]

The internment of military personnel in neutral countries was a significant World War II issue, particularly for the United States. For British-based American bomber crews, Switzerland was not far from many German targets. U.S. bombers too badly damaged over Germany to return to their distant English bases often opted to land in Switzerland, rather than risk crash-landing in Axis territory. As required by Article 57 of 1899 Hague Regulation II, Switzerland, a neutral state, interned the American air crews as "troops belonging to the belligerent armies . . . "[76] One thousand, seven hundred forty American officers and enlisted air crew, and 13,500 other foreign military personnel, primarily German, British, and Russian,[77] were interned in Switzerland during the war. The crews were held in approximately a hundred camps across the country, all with armed Swiss guards. The interned former combatants were guarded at night and forbidden to attempt escape, but during the day were allowed outside the camps, often passing time in the small towns near their internment facilities. Article 4B of Geneva Convention III clarifies the status, treatment, and repatriation of such belligerents who are detained by a neutral state.

6.4. Direct Participation in Hostilities

Giving definitional substance to the phrase "direct participation in hostilities" has vexed LOAC/IHL students and practitioners since it was included in the 1977 Additional Protocol I. Article 51.3 of Protocol I reads: "Civilians shall enjoy the protection afforded by this Section, [General Protection Against Effects of Hostilities], unless and for such time as they take a direct part in hostilities." Publicists, practitioners, and scholars have debated the meaning of "for such time" and "direct part" since the publication of the Protocol.

Direct participation in hostilities is a concept that applies only to civilians, and the hostilities may be either international or non-international. In an international armed conflict, civilians are "persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* . . . "[78] In a non-international armed conflict, the term, "civilian" takes its usual meaning, a person not associated with the military.

[75] Pictet, *Commentary, IV Geneva Convention*, supra, note 1, at 68–9.

[76] 1899 Hague Convention II Respecting the Laws and Customs of War on Land. 1899 H.C. II was the analogue of 1907 H.R. IV and most of its Articles were the basis for similar Articles in 1907 H.R. IV. Article 57 is an exception, with no similar Article in 1907 H.R. IV. Although the United States, Germany, Italy, and Japan ratified 1899 H.C. II, Switzerland did not, in keeping with her long-standing neutral stance.

[77] Cathryn J. Prince, *Shot from the Sky: American POWs in Switzerland* (Annapolis: Naval Institute Press, 2003), 21–43.

[78] Civilians are defined in Additional Protocol I, Art. 50.

But what constitutes a civilian taking "a direct part in hostilities"? Direct participation must refer to specific hostile acts, and it clearly suspends a civilian's noncombatant protection. The *Commentary* to Protocol I provides some clarification: direct participation means "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[79] Direct participation "implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."[80] These two statements are helpful, but can be difficult to apply to real-world situations. Few legal phrases of significance can be perfectly or comprehensively defined in a few paragraphs, but in this case, more comprehensive guidance was needed, and it is provided in a 2009 report issued jointly by the ICRC and the Asser Institute that reflects a five-year study of the phrase by panels of experts.[81] Although not perfect, the report provides a clarity previously absent.

6.4.1. *Criteria for Direct Participation in Hostilities*

According to the ICRC report, in a common Article 2 international armed conflict, three criteria must be met for a civilian to be considered directly participating in hostilities. All three criteria must be met to constitute direct participation.

First, **the civilian's act must be likely to adversely affect the military operations of a party to the conflict or, alternatively, be likely to inflict death, injury or destruction of persons or objects protected against direct attack**. This is the threshold of harm requirement. That the harm actually occur is not required, only that there is an objective *likelihood* that it will occur. Attempts, for example, meet this criterion. Sabotage or other unarmed activities qualify, if they restrict or disturb logistics or communications of an opposing party to the conflict. Clearing mines, guarding captured military personnel, even computer attacks, meet this qualification. Violent acts specifically directed against civilians or civilian objects, such as sniper attacks or the bombardment of civilian residential areas, satisfy this requirement.[82]

Second, **there must be a direct causal link between the act and the harm likely to result**. This is a requirement of direct causation that goes beyond the actual conduct of armed hostilities. Direct causal links include war-sustaining acts that objectively contribute in a direct way to the defeat of an opposing armed force.

A frequent classroom example of such a link is a civilian volunteer driving a military ammunition truck to operationally engaged fighters. The driver's act is a direct causal link to a likely adverse affect on the military operations of the opposing party to the conflict. The civilian is taking a direct part in hostilities and forfeits his civilian protection.

Moving ammunition from the factory where it is manufactured to a port for shipment to a warehouse in the conflict zone is *not* a direct causal link, however. Political, economic, and media activities, such as propaganda dissemination, and supportive financial transactions, although war-sustaining, are too indirect to result in a civilian's loss of

[79] *Commentary*, supra, note 5, para. 1679, at 516.
[80] Id., para. 1944, at 619.
[81] ICRC, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law," reprinted in 872 *Int'l Rev. of the Red Cross* 991-1047, 995 (Dec. 2008). Although the date of the journal is 2008, the guidance was not released until mid-2009.
[82] Id., at 1016–19.

protection.[83] The design, production, assembly, or shipment of weapons and military equipment and the construction or repair of roads or bridges are all part of the general war effort but, according to the ICRC report, do not constitute a sufficiently *direct* causal link likely to adversely affect the military operations of an opposing party. This should not be confused with the planting or detonation of bombs, mines, booby-traps, or improvised explosive devices – acts that *do* have a direct link and result in a loss of the civilian's targeting protection. Identifying and marking targets and transmission of tactical intelligence also are direct causal links. The report cautiously holds that "[w]here civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they *could* directly cross the threshold of harm required for a qualification as direct participation."[84] While the possible death or wounding of civilians, including voluntary human shields, always figures in proportionality calculations, opposing commanders are likely to take a harsher view of such civilian volunteers.

A civilian's provision to an armed terrorist group of financial contributions or construction materials or supplies, alone, is too attenuated to rise to the direct causal link required to constitute direct participation. The same may be said of scientific research and design of weapons and equipment. The recruitment and general training of personnel "may be indispensable, but [is] not directly causal, to the subsequent infliction of harm."[85] Cooks and housekeepers provide no direct causal relation.

Not only must the civilian's act objectively be likely to adversely affect the military operations of a party to the conflict, or be likely to inflict death, injury, or destruction of persons or objects protected against direct attack and have a direct link between the act and the harm likely to result, it must, third, **specifically be designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another**. In other words, there must be a belligerent nexus between the civilian's act and the resultant harm. An example is an exchange of gunfire between police and hostage takers during a bank robbery. There is no connection between that brief shooting and an armed conflict. It is a matter for resolution by domestic law enforcement and domestic courts. Additionally, "although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another."[86] In such an instance, civilians employing armed force against rogue soldiers would not constitute direct participation in hostilities because the force is not employed to support any party to the conflict.

The three criteria include a civilian's actions preparatory to acts of direct participation. That is, direct participation in hostilities includes deployment to and return from the location of the direct participation. It includes the preparatory collection of tactical intelligence, the transport of personnel, the transport and positioning of weapons and equipment, as well as the loading of explosives in, for example, a suicide vehicle – although

[83] Id., at 1020.
[84] id., at 1024. Emphasis supplied. The human shield, voluntary or otherwise, is never the targeted object. That which they attempt to shield is the military object. A commander's proportionality question is whether the military object remains a proper target despite the presence of the human shield.
[85] Id., at 1022.
[86] Id., at 1028.

not, without more, the hiding or smuggling of weapons; not financial or political support of armed individuals.

> Applied in conjunction, the three requirements of *threshold of harm*, *direct causation* and *belligerent nexus* permit a reliable distinction between activities amounting to direct participation in hostilities and activities which, although occurring in the context of an armed conflict, are not part of the conduct of hostilities and, therefore, do not entail loss of protection against direct attack.[87]

These three criteria constitute a reasonably broad description of direct participation; one that, in an armed conflict against an enemy without uniforms or insignia, who moves among and depends on civilians for concealment, gives the unlawful combatant's opponent guidance that offers significant targeting latitude.

6.4.2. *Organized Armed Groups*

In a common Article 2 armed conflict, unlawful combatants/unprivileged belligerents are usually an exception rather than the norm, and they are identified by their armed activities. However, in a common Article 3 non-international conflict, the unlawful combatant is the norm.

In an armed conflict between a state and an organized armed group, such as al Qaeda or the Taliban, the organized armed group does not enjoy the combatant's privilege but, the ICRC report notes, it is in fact "the armed forces of a non-State party to the conflict."[88] Just as the *Légion étrangère*, the Foreign Legion, is an armed force of France, or just as the U.S. Army is an armed force of the United States, organized armed Taliban fighters are the armed force of that Sunni Muslim fundamentalist movement. Of course, not every Sunni Muslim fundamentalist is a terrorist or Taliban fighter. Not all Taliban are unlawful combatants taking a direct part in hostilities. Who among the Taliban and al Qaeda, then, are "the armed forces" of those nonstate parties to conflicts in Afghanistan and Iraq and how are they recognized?

In a non-international armed conflict, "both State and non-State parties to the conflict have armed forces distinct from the civilian population."[89] An organized armed group, if present, is the armed force of the non-state party to the conflict. That implies that the group belongs to a party to the conflict – that it has a *de facto* relationship with a party to the conflict and that there is an articulable criterion for membership in such an armed force. Accepting that the armed forces of a non-state party to a non-international conflict is comprised of individuals whose function is to take a direct part in hostilities, **the defining criterion for such individuals is that they have a continuous combat function.**

6.4.3. *Continuous Combat Function*

Continuous combat function is a term new to LOAC/IHL and first described in the 2009 ICRC report. The term and its definition were necessitated by the twentieth-century reinvigoration of terrorism, combined with twenty-first century weaponry. The

[87] Id., at 1030–31. Emphasis in original.
[88] Id., at 995.
[89] Id., at 995.

term illustrates the evolution and continuing relevance of the 1949 Geneva Conventions through the ongoing interpretation of its terms through informed debate and eventual international consensus.

Although the term "continuous combat function" is not found in the Conventions, the phrase, "armed forces" in Geneva Convention common Article 3(1), by clear implication, includes the armed forces of nonstate parties – organized armed groups. The armed forces of the nonstate party (i.e., the organized armed group belonging to the nonstate party to the conflict) "refers exclusively to the armed or military wing of [the] non-state party; its armed forces in a functional sense."[90] Membership in organized armed groups is not evidenced by uniform or ID card, but by function.

> [M]embership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict . . . [T]he decisive criterion for individual membership in an organized group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities . . . "continuous combat function" . . . [which] requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict . . . A continuous combat function may be . . . for example, where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role . . . [91]

Thus, a civilian's unorganized or occasional hostile act does not constitute membership in an organized armed group or represent continuous combat function. (Naturally, in any armed attack by armed civilians, an opposing combatant's right to self-defense is unconstrained, even if the individual's attack is unorganized or sporadic in nature.)

This description of continuous combat function goes far to erase the significance of the phrase in Article 51.3 that was formerly subjected to minute parsing: " . . . unless and for such time as . . . " The report's description clarifies that an al Qaeda leader does not regain civilian protection against direct attack merely because he temporarily stores his weapon to visit his family in government-controlled territory. A Taliban fighter who plants improvised antipersonnel mines remains a lawful target when he puts down his tools and walks home for lunch with his family. A senior terrorist insurgent may be targeted when he is asleep. An insurgent commander remains a lawful target whenever he may be located and whatever he may be doing. Proportionality always remains an issue, but his targeting is not precluded because the organized armed group member who has a continuous combat function is not actually fighting at the moment of his targeting.

6.5. Unlawful Combatants/Unprivileged Belligerents

The terms "unlawful combatant" and "unprivileged belligerent," which describe the same individuals, do not appear in the Geneva Conventions, the Additional Protocols, or

[90] Id., at 1006.
[91] Id., at 1007, 1008.

any other LOAC treaty, convention, or protocol. Nevertheless, "**unlawful combatant,**" a term frequently employed by the United States,[92] is a *de facto* individual status.

"[T]he term 'combatant,' as well as derivations such as 'unlawful combatant,' 'enemy combatant,' 'unprivileged combatant' and 'unprivileged belligerent', are germane only to common Article 2 international armed conflict."[93] A characteristic of unlawful combatants is that upon capture they are *not* entitled to POW status.

"Unlawful combatant" has been described by an ICRC legal advisor "as describing all **persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy**."[94] **(One might add to that definition that the persons taking a direct part must be civilians.)** Some contend that there is no such status as unlawful combatant, but there is a body of scholarship and state practice that defines the status.[95]

Recall that there are only two categories of individual on the battlefield: combatants and civilians. Unlawful combatants/unprivileged belligerents are *not* a third battlefield

[92] Professor Kalshoven derides recent American use of the term to legitimize prisoner treatment. "In American jurisprudence, 'unlawful combatant' is a magic term: combatants so qualified are beyond the pale and . . . they should not expect any protection from the U.S. courts." Frits Kalshoven, *Reflections on the Law of War* (Leiden: Martinus Nijhoff, 2007), 924. Professor George Fletcher and Dr. Jens Ohlin agree: "The Bush administration has pointed to the concept [of unlawful combatant] to explain its posture of nonreciprocal warfare. When combatants are unlawful, the argument goes, they are subject to the burdens of combatancy (they can be killed), but they have no reciprocal rights . . . The phrase unlawful combatant as used today combines the aspect of unlawful from the law of crime and the concept of combatant from the law of war. For those thus labeled, it is the worst of all possible worlds." George P. Fletcher and Jens David Ohlen, *Defending Humanity* (New York: Oxford University Press, 2008), 183.

[93] Jelena Pejic, "'Unlawful/ Enemy Combatants:' Interpretations and Consequences," in Schmitt and Pejic, *International Law and Armed Conflict*, supra, note 8, at 335.

[94] Knut Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants,'" 849 *Int'l Rev. of Red Cross* (2003), 45. In U.S. domestic law, an unlawful combatant is defined as a person who has engaged in, or purposefully and materially supported another in engaging in, hostilities against the United States and its allies, and who does not qualify as a lawful combatant, or an individual who has been deemed an unlawful enemy combatant by a Combatant Status Review Tribunal or any other competent tribunal. *Military Commissions Act of 2006*, 10 USC 47(A), § 948a(1).

[95] Judge Aharon Barak, retired President of Israel's Supreme Court, correctly wrote, "It is difficult for us to see how a third category [unlawful combatants] can be recognized in the framework of the Hague and Geneva Conventions. It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law." *The Public Committee Against Torture in Israel v. the Government of Israel* [The Targeted Killing Case] (2006) HCJ 769/02, para. 28, available at: http://elyon1.court.gov.il/ eng/home/index.html. Yoram Dinstein, Georg Schwarzenberger, L.C. Green, BGen. Kenneth Watkin, and Dieter Fleck, among others, describe unlawful combatants not as a third battlefield category but as a subcategory of civilian. See Dinstein, *The Conduct of Hostilities*, supra, note 2, at 29–33: "The distinction between lawful and unlawful combatants is a corollary of the fundamental distinction between combatants and civilians."; Georg Schwarzenberger, *International Law*, vol. II: *The Law of Armed Conflict* (London: Stevens & Sons, 1968), 116–17: "By the introduction of the additional distinction between lawful and unlawful combatants . . . it becomes possible to give far-reaching protection to the overwhelming majority of the civilian population of occupied territories and captured members of enemy forces." (Citation omitted.); Green, *Contemporary Law of Armed Conflict*, supra, note 34, at 104: "[T]oday they [civilians who forcibly resist] are more likely to be treated as unlawful combatants."; Kenneth Watkin, "21st Century Conflict and International Humanitarian Law: Status Quo or Change?" in Schmitt and Pejic, *International Law and Armed Conflict*, supra, note 8, at 285: "[T]here is no universal agreement . . . that persons who take a direct part in hostilities have civilian status. One approach has been to categorize such participants as 'unlawful combatants' . . . "; and Fleck, *Handbook of Humanitarian Law*, supra, note 9, at 68: "[P]ersons who take a direct part in the hostilities without being entitled to do so (unlawful combatants) face penal consequences."

category. "'[U]nlawful combatant' is a shorthand expression useful for describing those civilians who take up arms without being authorized to do so by international law. It has an exclusively *descriptive* character. It may not be used as proving or corroborating the existance of a third category of persons . . . "[96] Just as guerrillas and militias are a subset of "combatant," unlawful combatants are a subset of "civilian."[97]

The origin of the term "unprivileged belligerents" is usually ascribed to a 1951 Richard Baxter article.[98] The privileges not due the unprivileged belligerent are the combatant's privilege and the privileges of POW status – both considerable losses. Although the term "unprivileged belligerent" is as valid as "unlawful combatant," the more familiar term, "unlawful combatant," is commonly used.

> The . . . civilians who carry out belligerent acts that might well be conducted lawfully by combatants [are unlawful belligerents]. . . . Civilians who engage in combat lose their protected status and may become lawful targets for so long as they continue to fight. They do not enjoy immunity under the law of war for their violent conduct and can be tried and punished under civil law for their belligerent acts. However, they do not lose their protection as civilians under the Geneva Convention if they are captured.[99]

Unlawful combatants sometimes band together to form unlawful combatant organizations; that is, armed opposition groups. During the U.S.–Vietnam War, an often-heard phrase regarding the Viet Cong, a Vietnamese civilian group of clandestine fighters, was, "Farmer by day, fighter by night." (When did he sleep?) "A person who engages in military raids by night, while purporting to be an innocent civilian by day, is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status . . . "[100] This characterization does not suggest that an unlawful combatant is outside LOAC/IHL. At a minimum, captured unlawful combatants are entitled to the basic humanitarian protections of common Article 3, and Article 75 of Additional Protocol I.[101]

In an international conflict, a civilian who fires an infrequent shot at Afghan government forces and a Taliban fighter are both unlawful combatants. Their difference is that the Taliban fighter has a continuous combat function and may be targeted and killed whenever he can be positively identified. The civilian shooter may only be targeted for such time as he is actually engaged in his unlawful combatancy.

[96] Antonio Cassese, expert opinion, "On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law," (2006), available at: http://www.stoptorture.org.il. Emphasis in original.

[97] *A and B v. State of Israel*, Supreme Court of Israel, sitting as the Court of Criminal Appeals, No. 6659/06 (11 June 2008), available at: http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf, para. 12, citing *Israel v. The State of Israel* ("The Five Techniques case") (HCJ 5111/94), 1999: "[T]he term 'unlawful combatants' does not constitute a separate category but is a sub-category of 'civilians' recognized by international law."

[98] Baxter, "So-Called 'Unprivileged Belligerency,'" supra, note 67, at 323. In his article, Baxter uses the term "unlawful combatancy."

[99] Elsea, *Treatment of "Battlefield Detainees*," supra, note 19, at 22.

[100] Dinstein, *The Conduct of Hostilities*, supra, note 2, at 29.

[101] Pejic, "'Unlawful/Enemy Combatants," supra, note 93, at 340; FM 27–10, *Law of Land Warfare*, supra, note 15, at para. 31; UK MOD, *Manual of the Law of Armed Conflict*, supra, note 22, at para. 9.18.1, at 225; and, *Prosecutor v. Delalic*, supra, note 68, at para. 271.

Alexander the Great, in his central Asian operations (329–327 B.C.) battled Sogdianan guerrillas. Throughout France's invasion of Spain during the Peninsular War (1807–1808), Napoleon Bonaparte's invading army was beset by local insurgents, the term "guerrilla" originating here. In the mid-nineteenth century, the insurgent fighter, Giuseppe Garibaldi, was admired throughout Europe.[102] In 1863, however, Lieber wrote of insurgents:

> Men, or squads of men, who commit hostilities, whether by fighting . . . or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers – such men, or squads of men . . . if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.[103]

We no longer summarily execute unlawful combatants, but the point remains that unlawful combatants are as old as warfare, even if the title is not.

Unlawful combatants, including those with a continuous combat function, are not entitled to the privileges and protections of POW status but, as mentioned, a state may accord POW status or, in the words of Additional Protocol I, Article 44.4, "protections equivalent in all respects to those accorded prisoners of war," to dissidents in an internal armed conflict, even to unlawful combatants in an international armed conflict. The United States has given limited POW status to enemy captives in the Civil War, the Philippine War, and the Vietnam War.[104]

Unlawful combatants should not be confused with "unlawful enemy combatants," a purported battlefield status in the war on terrorism. Neither unlawful combatants nor unlawful enemy combatants merit POW status upon capture, but the two are different individual statuses. (See Chapter 6, section 6.7.3.)

The wrongfulness of the unlawful combatant is reflected in Additional Protocol I, Article 48. "In order to ensure respect for and protection of the civilian population . . . the Parties to the conflict shall at all times distinguish between the civilian population and combatants. . . . " Unlawful combatants, fighters without uniform or distinguishing insignia, violate the bedrock concept of distinction. (Aircraft can violate the concept of distinction, as well.[105]) When the distinction requirement is disregarded, opposing combatants cannot discern fighters from civilians, opposing shooters from friendly shooters, good guys from bad guys,* eroding the lawful combatant's presumption that civilians

[102] Tim Parks, "The Insurgent," *The New Yorker*, July 9 and 16, 2007, 92–7.

[103] The Lieber Code, supra, note 16, at Art. 132. Also see Art. 135, describing "war rebels."

[104] Elsea, *Treatment of "Battlefield Detainees,"* supra, note 19, at 27. Elsea mentions only Philippine POWs.

[105] Draft Rules of Air Warfare Drafted by A Commission of Jurists at The Hague, December, 1922–February 1923, Art. 3. "A military aircraft shall bear an external mark indicating its nationality and military character." The Draft Hague Rules of Air Warfare were never adopted or embodied in an international convention but are instructive. See J.M. Spaight, *Air Power and War Rights*, 3d ed. (London: Longmans, Green, 1947), 42. During the abortive April 1980 U.S. rescue of hostages held in the American embassy in Tehran, Iran (Operation Eagle Claw), all U.S. aircraft participating in the rescue effort carried false Iranian markings. Some carried the markings of several additional countries, to be applied over U.S. markings in case the aircraft had to be abandoned.

* In Sept. 1944, Charles A. Lindbergh, first man to fly the Atlantic nonstop, apparently engaged in aerial action that rendered him an unlawful combatant. His offer to enlist having been refused by the Army Air Corps, Lindbergh traveled to Marine Corps airfields in the Pacific as a civilian consultant for Chance

he encounters are noncombatants who present no danger. "If combatants were free to melt away amid the civilian population, every civilian would suffer the results of being suspected as a masked combatant. . . . It follows that a sanction . . . must be imposed on whoever is seeking to abuse the standing of a civilian while in fact he is a disguised combatant."[106]

> Irregulars . . . do not merely breach the formal reciprocal rules of fair play, their tactics and camouflage and disguise take advantage of the very code they breach. Irregulars are . . . free riders on the prohibitions civilized nations adhere to. Furthermore, by acquiring a hybrid identity of combatant-civilian, they also blur the more basic moral distinction between those who may and those who may not be targeted in wartime. Thus, the more fundamental vice of irregular combatants is not merely their formal lawlessness, or even unfairness, but rather the threat they pose to "civilized" conduct of war and the protections it affords to an identifiable defenseless civilian population.[107]

U.S. Navy SEAL Marcus Luttrell, describing conflict in Afghanistan, takes a pessimistic view of the requirement for distinction: "The truth is, in this kind of terrorist/insurgent warfare, no one can tell who's a civilian and who's not. So what's the point of framing rules that cannot be comprehensively carried out by anyone? Rules that are unworkable, because half the time no one knows who the goddamned enemy is, and by the time you find out, it might be too late to save your own life."[108] Without the rules Petty Officer Luttrell derides, however, a combat zone would spiral into chaos, an old west Dodge City without a sheriff, where one can shoot first and ask no questions at all.

The *Commentary* to Additional Protocol I discusses what constitutes unlawful combatancy:

> In general the immunity afforded civilians is subject to a very stringent condition: that they do not participate directly in hostilities, i.e., that they do not become combatants, on pain of losing their protection. Thus, "direct" participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.[109]

The *Commentary* further notes, "Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place."[110] It is this direct causal relationship that is explained in the 2009 ICRC report on direct participation in hostilities.

Vought Aircraft to instruct pilots in the advanced operation of the F-4U Corsair fighter. While on Roi Namur, he flew a Corsair on a bombing mission to Wotje island, a Japanese base. See: Col. E. Gerald Tremblay, "Charles Lindbergh Saved My Life," *Marine Corps Gazette*, May 1990, 89–90. Lindbergh reportedly flew a total of fifty fighter combat missions and shot down at least one Japanese plane. Mark M. Boatner, *Biographical Dictionary of World War II* (Novato, CA: Presidio Press, 1996), 320.

[106] Yoram Dinstein, "The Distinction Between Unlawful Combatants and War Criminals," in Yoram Dinstein, ed., *International Law At A Time of Perplexity* (Dordrecht: Nijhoff Publishers, 1989), 103, 105.

[107] Tamar Meisels, "Combatants – Lawful and Unlawful," 26–1 *L. & Phil.* (2007), 31, 55–56.

[108] Marcus Luttrell, *Lone Survivor* (New York: Little, Brown, 2007), 169.

[109] Sandoz, *Commentary on the Additional Protocols*, supra, note 5, at 619. Emphasis in original, bolding supplied.

[110] Id., at 516. This description of "direct participation" is also cited in: Michael J. Dennis, "Current Developments: Newly Adopted Protocols To the Convention on the Rights of the Child," 94–4 *AJIL* (Oct. 2000), 789, 792.

Being an unlawful combatant/unprivileged belligerent is not a war crime in itself. Rather, the price of being an unlawful combatant is that he forfeits the immunity of a lawful combatant – the combatant's privilege, and potential POW status – and he may be charged for the LOAC/IHL violations he committed that made him an unlawful combatant. Judicial proceedings may be conducted before either military or domestic courts.[111] Spain, for example, employed its domestic courts to try the 2004 Madrid train-bombing suspects,[112] as did the United Kingdom, after the 2005 London bombings.[113] The Madrid and London bombings were not considered armed conflicts by the victim governments, but the point that captured terrorists may be tried in domestic courts was validated in those cases.

A problem in the U.S. conflicts in Iraq and Afghanistan is that "the sheer numbers of 'unprivileged belligerents' . . . makes it impossible to deal with the problem by way of criminal proceedings."[114] Issues such as questionable jurisdiction, chain of custody problems, and coerced statements also make trials of unlawful combatants in U.S. domestic courts difficult.

6.5.1. *The Status of Taliban Fighters*

What is the individual status of Taliban fighters? Initially, decide the first question when considering any conflict: What is the conflict status? What LOAC, if any, is applicable to the U.S. conflict in Afghanistan, the location of most Taliban fighters? On October 7, 2001, the United States invaded Afghanistan,[115] initiating an armed conflict between two state parties to the 1949 Geneva Conventions, a common Article 2 international armed conflict. The LOAC/IHL that applied was the 1949 Geneva Conventions in their entirety and, for states that had ratified it, 1977 Additional Protocol I.

At the same time, in northern Afghanistan, there was an ongoing conflict between Afghanistan's Taliban government and the United Islamic Front for the Salvation of Afghanistan – the Northern Alliance, made up of various Afghan groups. That was a common Article 3 non-international armed conflict – an internal conflict. The LOAC/IHL that applied to that fighting was common Article 3 and, possibly, 1977 Additional Protocol II. The common Article 2 conflict soon ended and a brief U.S. occupation of Afghanistan followed, with continuing U.S. combat operations against the Taliban. The Geneva Conventions and Additional Protocol I continue to apply during periods of occupation.[116]

The U.S.-backed Afghan Interim Authority assumed power on December 22, 2001 and formed a new Afghan government in January 2004.[117] At that point the U.S. occupation ended, although armed conflict within Afghanistan did not. When the new government assumed power, continuing American involvement became an armed presence bolstering Afghanistan's fight against the Taliban insurgents; a common Article 3 non-international conflict. Where the insurgents were from was irrelevant.

[111] Dinstein, *The Conduct of Hostilities*, supra, note 2, at 31.
[112] Victoria Burnett, "Detainees Plotted Bombing in Spain, Judge Says," NY *Times*, Jan. 24, 2008, A6.
[113] "Britain: Prison for 5 Who Helped Failed London Bombers," NY *Times*, Feb. 5, 2008, A6.
[114] Garraway, "'Combatants' – Substance or Semantics?" supra, note 8, at 331.
[115] U.S. Department of State, "Key Events in Afghanistan's Political and Economic Reconstruction," available at: http://usinfo.state.gov/sa/Archive/2006/Jan/26–44634.html.
[116] 1949 Geneva Convention I, Art. 2.
[117] Department of State, "Key Events," supra, note 115.

Accepting that the Taliban did not then exercise such control over any part of Afghanistan as to enable them to carry out sustained and concerted military operations, a point open to argument, Additional Protocol II did not apply. Accordingly, after the formation of the new Afghan government, common Article 3 and no other part of the Geneva Conventions applied.

If we consider that the Taliban *did* control sufficient territory to carry out sustained and concerted military operations, Additional Protocol II also applied. That would bring added nuance to common Article 3 protections, but no new protections of note.

Next, answer the second question relevant to any armed conflict: What is the individual status of Taliban fighters *after* the new Afghan government was established and common Article 3 became applicable? Recall that there are no combatants, lawful or otherwise, in a common Article 3 conflict.[118] In approaching the question of individual status we need not consider whether black turbans constitute a distinctive sign, or whether the Taliban carry their arms openly, or whether they obey the law of war, for those issues are not encountered in common Article 3 conflicts.

In a common Article 3 non-international armed conflict, Taliban fighters are terrorists, in violation of domestic law. If engaged in combat, they have a continuous combat function and may be targeted at any time by opposing forces. They are criminals who, upon capture, enjoy common Article 3 protections. They may be tried in domestic or military courts for unlawful acts that they committed before capture.

If captured, they are not POWs, for there are no POWs in a common Article 3 conflict. They have no combatant immunity. The U.S. position was that captured Taliban were "unlawful enemy combatants," or simply, "detainees."

What was the Taliban's status during the brief period of the U.S.–Afghan common Article 2 conflict? Were the Taliban the army of a party to the conflict? Additional Protocol I defines an army: "[A]ll organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."[119] Considering that definition, the Taliban might appear to qualify as the army of Afghanistan in a common Article 2 conflict, entitled to POW status upon capture.[120]

Or, were the Taliban akin to the post–World War I *Freikorps* in defeated Germany? Private paramilitary groups, ultraconservative and highly nationalistic, *Freikorps* proliferated throughout Germany in 1919, one eventually becoming the National Socialist Workers' Party – the Nazi party. But in 1920 the Nazis were just another *Freikorps* competing for a role in a new German government they talked of forming, with allegiance not to any German government but to their own *Freikorps*.[121]

[118] See: Marco Sassòli, "Terrorism and War, in 4–5 *J. of Int'l Crim. Justice* (Nov. 2006), 958, 970; and: Marko Milanovic, "Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killing Case," 866 *Int'l Rev. of the Red Cross* (June 2007), 373, 388.

[119] 1977 Additional Protocol I, Art. 43.1.; 1949 Geneva Convention I, Art. 13(1).

[120] Marco Sassòli, "Query: Is There a Status of 'Unlawful combatant?'" in Richard B. Jaques, ed., *International Law Studies: Issues in International Law and Military Operations*, vol. 80 (Newport, RI: Naval War College, 2006), 57–67, 61.

[121] William L. Shirer, *The Rise and Fall of the Third Reich* (New York: Simon & Schuster, 1960), 33–4, 42–3.

There is an argument that Afghanistan's armed forces ceased to exist after the fall of the Communist government, in September 1996, and the Afghan armed forces were then supplanted by a variety of *Freikorps*-like "armies," the Taliban one of the more powerful. The argument continues that there is no showing that the Taliban became the armed force of Afghanistan, professing allegiance to the government of that state.[122] Rather, the argument goes, they were merely the armed group in control of Afghanistan and its government.

The better view is that, during the common Article 2 phase of the U.S.–Afghanistan conflict, the Taliban were indeed the armed force of Afghanistan. The International Law Commission (ILC) has developed guidelines to state responsibility. Article 8 of the ILC's 2001 reporting document, *Responsibility of States for Internationally Wrongful Acts*, reads: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[123] That guidance, combined with Additional Protocol I's Article 43.1, lead to the conclusion that the Taliban was the armed force of Afghanistan.

During the period of the common Article 2 conflict with American forces, did captured Taliban fighters therefore merit POW protection as members of "the armed forces of a Party to the conflict . . . "?[124] Applying the four conditions for lawful combatancy and POW status upon capture, the answer is no: Although they were the armed force of Afghanistan, the Taliban did not wear uniforms or other distinctive fixed sign. Black turbans, common to many males in the region, do not suffice. "Since the [four] conditions are cumulative, members of the Taliban forces failed to qualify as prisoners of war under the customary law of war criteria. These criteria admit no exception, not even in the unusual circumstances of . . . the Taliban regime. To say that '[t]he Taliban do not wear uniforms in the traditional western sense' is quite misleading, for the Taliban forces did not wear any uniform in any sense at all . . . "[125] Throughout the common Article 2 phase of the U.S.–Afghanistan conflict, the Taliban failed to distinguish themselves and were not entitled to POW status.[126] Although there are reasoned views in disagreement,[127] the

[122] John B. Bellinger, Legal Advisor, U.S. Dept. of State, "Armed Conflict with Al Qaeda?" *Opino Juris* blog (15 Jan. 2007), available at: http://lists.powerblogs.com/pipermail/opinojuris/2007-January/001103.html.

[123] Available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20Articles/9_6_2001.pdf. Art. 10 adds, "The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law." Finally, Art. 11 reads, "Conduct which is not attributable to a State under the preceding Articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own." These three Articles surely encompass the Taliban's relation to the State of Afghanistan.

[124] 1949 Geneva Convention III, Art. 4A.(1).

[125] Dinstein, *The Conduct of Hostilities*, supra, note 2, at 48. Footnote omitted.

[126] Professor Marco Sassòli writes, "This allegation may astonish those who remember that during Operation Enduring Freedom, the United States stressed that it attacked Taliban command and control centers and did not complain that it was impossible to distinguish the Taliban from civilians." Sassòli, "Query: Is There a Status of "Unlawful combatant?'" supra, note 120, at 61.

[127] Elsea, *Treatment of "Battlefield Detainees*, supra, note 19, at 7. " . . . Taliban, whose members would arguably seem to be eligible for POW status as members of the armed forces of Afghanistan under a plain reading of GPW Art. 4A(1) . . . " Also: Robert K. Goldman and Brian D. Tittemore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian Law and Human Rights Law," ASIL Task Force on Terrorism report (Dec. 2002), at 23–31; and George H. Aldrich, "The Taliban, al Qaeda, and the Determination of Illegal Combatants, 96–4 *AJIL* (Oct. 2002),

Taliban captured during the common Article 2 U.S. invasion were not entitled to POW status.

In a common Article 2 international armed conflict, Taliban who directly participate in hostilities are unprivileged belligerents/unlawful combatants with a continuous combat function who may be targeted. If captured, they are criminals and protected persons[128] entitled to common Article 3 protections. They may be interned and may be tried in domestic or military courts for acts they committed that rendered them unlawful combatants.

(In a common Article 2 conflict, should a captured Taliban fighter be a national of the capturing state – an Afghan citizen captured by Afghani armed forces, for example – they are not Geneva Convention IV, Article 4 protected persons. They remain protected, however, by common Article 3 and Additional Protocol I, Article 75.)

The U.S. position was that captured Taliban were "unlawful enemy combatants," or simply, "detainees." It would have been wise to have competent tribunals determine the status of Taliban fighters captured during the international phase of the conflict because their presumptive individual status upon capture was POW.[129] Such tribunals are called for in cases of doubt regarding the captive's status. Was there doubt as to their status?[130] The Congressional Research Service specifies several *illegitimate* reasons for not granting POW status:

> The Administration has argued that granting [al Qaeda or Taliban] detainees POW status would interfere with efforts to interrogate them, which would in turn hamper its efforts to thwart further attacks. Denying POW status may allow the Army to retain more stringent security measures . . . The Administration also argued that the detainees, if granted POW status, would have to be repatriated when hostilities in Afghanistan cease, freeing them to commit more terrorist acts.[131]

The U.S. position toward captured Taliban and al Qaeda status was initially based on such flawed reasoning.

Acts of terrorism are prohibited by Geneva law, including the 1977 Protocols,[132] but status determinations were needlessly complicated by the inexplicable U.S. position that the conflicts with Taliban and al Qaeda were armed conflicts, yet were neither common Article 2 nor common Article 3 conflicts.[133] Despite warnings from the Secretary

891, 894: "I find it quite difficult to understand the reasons for President Bush's decision that all Taliban soldiers lack entitlement to POW status."

[128] FM 27–10, *Law of Land Warfare*, supra, note 15, para. 73, at 31: "If a person is determined . . . not to fall within any of the categories listed [for POW status], he is not entitled to be treated as a prisoner of war. He is, however, a 'protected person' . . . "

[129] 1949 Geneva Convention III, Art. 5. Also, 1977 Additional Protocol I, Art. 45.1. Professor Thomas Franck writes, "Without doubt, the most difficult element to defend of the decisions made . . . with respect to the prisoners taken in Afghanistan is the blanket nature of the decision to deny POW status to the Taliban prisoners. By one sweeping determination, the president ruled that not a single Taliban soldier, presumably not even the army commander, could qualify for POW status under the Geneva Convention." Thomas M. Franck, "The Taliban, al Qaeda, and the Determination of Illegal Combatants," 96–4 *AJIL* (Oct. 2002), 891, 897.

[130] 1949 Geneva Convention III, Art. 5.

[131] Elsea, *Treatment of "Battlefield Detainees,"* supra, note 19, at 7.

[132] 1949 Geneva Convention IV, Art. 33; 1977 Additional Protocol I, Art. 51(2); Additional Protocol II, Arts. 4 (2)(d), and 13(2).

[133] Memorandum for William J. Haynes II, General Council, Department of Defense; From: John Yoo, Deputy Assistant Attorney General; Subject: Application of Treaties and Laws to al Qaeda and Taliban

of State[134] and the Department of State's Legal Advisor,[135] the United States initially held that captured Taliban and al Qaeda fighters were unprotected by the Geneva Conventions,[136] including common Article 3.[137] "Incredibly, [the Bush administration] also argued that even if the Geneva Conventions do not apply, the United States could prosecute members of the Taliban for war crimes, including, illogically, 'grave violations of . . . basic humanitarian duties under the Geneva Conventions.'"[138] (The view that captured Taliban and al Qaeda were outside the protections of common Article 3 was rejected by the Supreme Court in the 2006 *Hamdan* decision.[139] The Bush administration later reaffirmed its initial view,[140] but subsequently softened that position.) The U.S. view was that human rights law, as well, did not apply to the Taliban or al Qaeda because

Detainees (9 Jan. 2002) (Hereafter: Yoo Memorandum). ". . . . Common Article 2 . . . is limited only to cases of declared war or armed conflict 'between two or more of the High Contracting Parties.' Al Qaeda is not a High Contracting Party. . . . Al Qaeda is not covered by common Article 3, because the current conflict is not covered by the Geneva Conventions . . . Article 3 . . . shows that the Geneva Conventions were intended to cover either: a) traditional wars between Nation States . . . or non-international civil wars. . . . Our conflict with al Qaeda does not fit into either category." The same conclusion applied to the Taliban: "Article 2 states that the Convention shall apply to all cases of declared war or other armed conflict between the High Contracting Parties. But there was no war or armed conflict between the United States and Afghanistan . . . if Afghanistan was stateless at that time. Nor, of course, is there a state of war or armed conflict between the United States and Afghanistan *now*." And, "Even if Afghanistan under the Taliban were not deemed to have been a failed State, the President could still regard the Geneva Conventions as temporarily suspended during the current military action." Memorandum reprinted in Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers* (New York: Cambridge University Press, 2005), 38.

134 Memorandum to Council to the President and Assistant to the President for National Security Affairs; From: Colin L. Powell, Secretary of State; Subject: Draft Decision Memorandum for the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan (26 Jan. 2002). Id., at 122.

135 Memorandum to Counsel to the President; From William H. Taft, IV; Subject: Comments on Your Paper on the Geneva Convention (2 Feb. 2002). Id., at 129.

136 Yoo Memorandum, supra, note 133. "The weight of informed opinion strongly supports the conclusion that . . . Afghanistan was a 'failed State' whose territory had been largely overrun and held by violence by a militia or faction rather than by a government. Accordingly, Afghanistan was without the attributes of statehood necessary to continue as a party to the Geneva Conventions, and the Taliban militia, like al Qaeda, is therefore not entitled to the protections of the Geneva Conventions."

137 Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel of the Department of Defense; From: U.S. Department of Justice, Office of Legal Counsel; Subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 Jan. 2002). "Further, common Article 3 addresses only non-international conflicts that occur within the territory of a single state party, again, like a civil war. This provision would not reach an armed conflict in which one of the parties operated from multiple bases in several different states." Reprinted in Greenberg and Dratel, *Torture Papers*, supra, note 133, at 81.

138 Jordan J. Paust, *Beyond the Law* (New York: Cambridge University Press, 2007), 10, citing John Yoo, Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (9 Jan. 2002). Also see Yoo Memorandum, supra, note 133: "The President has the legal and constitutional authority to subject both al Qaeda and Taliban to the laws of war, and to try their members before military courts or commissions. . . . This is so because the extension of the common laws of war to the present conflicts is, in essence, a *military* measure that the President can order as Commander-in-Chief." Emphasis in original.

139 *Hamdan v. Rumsfeld*, 548 U. S. 557 (2006).

140 Executive Order 13,440, "Interpretation of the Geneva Conventions, Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency (July 2007). ". . . On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination. . . ." Cited at 101–4 *AJIL* (Oct. 2007), 866.

human rights law is not applicable in time of war and, in any event, is inapplicable extraterritorially – that is, outside U.S. borders.[141]

If not covered by the Geneva Conventions and beyond the protections of common Article 3 and human rights law, what was the individual status of captured Taliban and al Qaeda members in the view of the United States, and what treatment were they to be accorded? The murky answer was provided three months after 9/11 by Secretary of Defense Donald Rumsfeld: "The Combatant Commanders shall, in detaining al Qaeda and Taliban individuals under the control of the Department of Defense, treat them humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949."[142] No individual status was specified. A former senior Assistant U.S. Attorney General writes, "This formulation sounded good. But it was very vague, it was not effectively operationalized into concrete standards of conduct, and it left all of the hard issues about 'humane' and 'appropriate' treatment to the discretion of unknown officials."[143] Nor was it consistent with LOAC/IHL.

6.5.2. *The Status of al Qaeda Fighters*

What of al Qaeda fighters in Iraq and elsewhere? What is their individual status? Was it, is it, different than that of the Taliban? No, it is not. The amended 2006 Military Commissions Act summarily states that al Qaeda members are unlawful enemy combatants.[144] A closer examination of that questionably ascribed status is called for.

Can there be an armed force without a state? "All too easily, if the history of the horse peoples of the Central Asian steppe is taken into account. . . . In the thirteenth century . . . a thitherto unknown horse people, Genghis Khan's Mongols, emerged from the great Central Asian sea of grass to fall on settled civilisation in the greatest campaign of conquest ever known."[145] Terrorist armed opposition groups like al Qaeda and the Taliban are modern-day armed opposition groups without a state.

Al Qaeda do not observe LOAC/IHL. Are they protected by it? If nonstate actors do not observe LOAC, may their enemies disregard LOAC in their armed conflicts against them, as well? Of course not. "[T]here is no textual or historical evidence suggesting that the Conventions embrace this understanding of reciprocity."[146] The Geneva Conventions are not a matter of, "we will if you will." Having been ratified by a state, they constitute an obligation that the state owes its own citizens, as well as all victims of war.

[141] Milanovic, "Lessons for Human Rights," supra, note 118, at 386–7. The author, Law Clerk to ICJ Judge Thomas Berganthal, cites as authority: opening remarks by John Bellinger, Legal Advisor, U.S. Department of State, before the UN Committee Against Torture, 5 May 2006, available at: http://www.us-mission.ch/Press2006/0505BellingerOpenCAT.html; and, opening Statement of Mathew Waxman, Head, U.S. Delegation before UN Human Rights Committee, 17 July 2006, available at: http://geneva.usmission.gov/0717Waxman.html. Those two sources provide very weak confirmation, however.

[142] Memorandum for Chairman of the Joint Chiefs of Staff; from the Secretary of Defense; Subject: Status of Taliban and Al Qaeda (19 Jan. 2002). Reprinted in Greenberg and Dratel, *Torture Papers*, supra, note 133, at 80.

[143] Jack Goldsmith, *The Terror Presidency* (New York: Norton, 2007), 121.

[144] 10 U.S.C. §§ 948a(1)(i).

[145] John Keegan, *War and Our World* (New York: Vintage, 1998), 36–7.

[146] Derek Jinks, "The Applicability of the Geneva Conventions to the 'Global War on Terrorism,'" 46–1 *Virginia J. of Int'l L.* (2006), 1, 15.

In 2001, shortly after the invasion of Afghanistan, the U.S. Under Secretary of Defense for Policy noted:

> [A] major issue was the legal status of these prisoners . . . Early interagency discussions among lawyers clarified that the 1949 Geneva Conventions . . . applied to conflicts between "High Contracting Parties" . . . and al Qaeda was *not* such a party. I heard no one argue that the Conventions, as a matter of law, applied to . . . al Qaeda, or that they governed U.S. detention of the al Qaeda prisoners taken in Afghanistan or anywhere else. . . . [S]ome lawyers at the Justice Department, White House, and Pentagon believed that the United States should not apply the Conventions to its conflict with the Taliban.[147]

In the tumultuous days following 9/11, senior U.S. government lawyers were apparently unaware of common Article 3's application, or Geneva Convention IV's provisions for protected persons. The Under Secretary continues, "The Pentagon's leadership appreciated the importance of honoring the Geneva Conventions, but issues arose time and again that required the very difficult balancing of weighty but competing interests. . . . "[148] *In LOAC and IHL there are no "competing interests" that render the Geneva Conventions inapplicable*. Yet, in a 2002 memorandum, the President wrote, "Pursuant to my authority as Commander-in-Chief and Chief Executive of the United States . . . I hereby determine . . . none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world. . . . "[149]

Lieutenant General Ricardo Sanchez, a former commander of all coalition troops in Iraq, writes, "This presidential memorandum constituted a watershed event in U.S. military history. Essentially, it set aside all of the legal constraints, training guidelines, and rules for interrogation that formed the U.S. Army's foundation for the treatment of prisoners on the battlefield . . . "[150]

What is the individual status of al Qaeda fighters? Again, answer the usual first question: Characterization of the U.S.–al Qaeda conflict as a "Global War on Terrorism" does not mean that an actual war is in progress.[151]

"Much of the debate on this issue has been clouded by the decision to categorize the campaign against transnational terrorism as a 'war' with consequent confusion over the appropriate legal regime to apply."[152] The Legal Advisor to the U.S. Secretary of State concluded that the war on terrorism is not a war.[153] "While the notion of 'war' against terrorism is a political slogan – comparable to the 'war' against poverty or the 'war' against

[147] Douglas J. Feith, *War and Decision* (New York: Harper, 2008), 160–1.
[148] Id., at 165.
[149] Reprinted in Greenberg and Dratel, *Torture Papers*, supra, note 133, at 134.
[150] Lt.Gen. Ricardo S. Sanchez, *Wiser in Battle* (New York: Harpers, 2008), 144.
[151] "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Prosecutor v Tadić*, IT-94–1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (2 Oct. 1995), para. 70.
[152] Garraway, "'Combatants' – Substance or Semantics?" supra, note 8, at 334.
[153] "The phrase 'the global war on terror' to which some have objected – is not intended to be a legal statement. The United States does not believe that it is engaged in a legal state of armed conflict at all times with every terrorist group in the world . . . When we state that there is a 'global war on terror,' we primarily mean that the scourge of terrorism is a global problem that the international community must recognize and work together to eliminate." Bellinger, "Armed Conflict with Al Qaeda?" supra, note 122.

AIDS – the attack on a third country transforms such a [anti-terrorist] campaign into an armed conflict . . . ,"[154] but not an armed conflict between two states, required to engage the full coverage of the Geneva Conventions and Additional Protocol I.

To suggest that the war on terrorism is not a war is no slight to the armed forces that have fought and died in Iraq, Afghanistan, and other battlefields, no disrespect to families and friends of warfighters killed, wounded, or emotionally scarred. It is an objective conclusion driven by LOAC. To be a "war" in the sense of Geneva Convention common Article 2, it must be an armed conflict between two states. There is no second option.[155] "Terrorist movements themselves generally have a non-state character. Therefore military operations between a State and such a movement, even if they involve the State's armed forces acting outside its own territory, are not necessarily such as to bring them within the scope of application of the full range of provisions regarding international armed conflict . . . "[156] Even considering all the worldwide acts of terrorism, they remain separate criminal acts, not parts of one and the same conflict.[157]

The component parts of the "war on terrorism," however, can be examined and LOAC applied to them. In the armed conflict in Iraq, the initial U.S. invasion ended quickly. In that brief common Article 2 phase in which U.S. forces opposed Iraqi Army units, al Qaeda members were not an army of a party to the conflict. Any al Qaeda members who directly participated in the hostilities were, in addition to members of a criminal grouping, unlawful combatants.

U.S. combat operations in Iraq commenced on March 20, 2003.[158] President Bush's May 1, 2003 "mission accomplished" speech aboard a U.S. aircraft carrier is a logical termination date for the common Article 2 conflict.[159] U.S. occupation of Iraq

[154] Hans-Peter Gasser, "Acts of Terror, 'Terrorism' and International Humanitarian Law," 847 *Int'l Rev. of the Red Cross* (Sept. 2002), 547, 549–50.

[155] A 16 March 2004 ICRC Statement, available at: http://www.icrc.org/Web/eng/siteeng0.nsf/html/5XCMNJ, says, "The phrase 'war on terror' is a rhetorical device having no legal significance. There is no more logic to automatic application of the laws of armed conflict to the 'war on terror' than there is to the 'war on drugs', 'war on poverty' or 'war on cancer'." Professor George H. Aldrich scolds, "[I have] limited tolerance for any purported legal concept of a war against terrorism or of a 'global war against terror'. . . . One can speak of a war only emotively, as when one speaks of a war against crime or a war against drugs." 100–2 *AJIL* (April 2006), 496; Yoram Dinstein writes, "The expression 'war on terrorism' by itself is a figure of speech or metaphor," in "*Ius ad Bellum* Aspects of the 'War on Terrorism'," in Wybo P. Heere, ed., *Terrorism and the Military* (The Hague: Asser Press, 2003), 22; Judge Richard Goldstone writes, "Terrorism is not new and it is not a 'war' in the conventional understanding of that word. Terrorism is unlikely ever to end, and formulating a policy based upon a model of 'war' is only calculated to allow the government to regard anyone who opposes undemocratic means as unpatriotic" in, "The Tension Between Combating Terrorism and Protecting Civil Liberties," in Richard Ashby Wilson, ed., *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005), 164–6; finally, the ICRC's Jelena Pejic writes in, "Terrorist Acts and Groups: A Role for International Law," 75 *BYIL* (2004), 71, 88, "Terrorist acts . . . are as a matter of law properly characterized as criminal acts that should . . . be dealt with by the application of domestic and international human rights law, as well as international criminal law." For discussion of the status of the conflict in Iraq, see: Jinks, "Applicability of the Geneva Conventions," supra, note 146.

[156] Adam Roberts, "The Laws of War in the War on Terror – Discussion," id, Heere, at 69.

[157] ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," 867 *Int'l Rev. of the Red Cross* (Sept. 2007), 719, 725.

[158] Thomas E. Ricks, *Fiasco* (New York: Penguin Press, 2006), 116.

[159] Id., at 135: "[I]n the view of [Commanding General Tommy] Franks and other military commanders, the assigned job had been completed . . . When President Bush landed on that carrier with the 'Mission

commenced at the same time. The U.S. posits that the occupation ended and Iraqi sovereignty was reassumed by an appointed Iraqi government on June 28, 2004, fifteen months after the invasion.[160] During the occupation, the Geneva Conventions applied in their entirety, as did 1977 Additional Protocol I, for states that ratified that treaty.

If the U.S.–Iraq conflict no longer constitutes a common Article 2 armed conflict, what must it be? As of this writing, al Qaeda does not control sufficient territory from which to launch sustained and concerted military operations, so the threshold for application of Additional Protocol II is not met.[161] As to the United States, it cannot be an internal armed conflict because the conflict is not geographically sited on U.S. territory. As in Afghanistan, the conflict in Iraq is an insurgency, a common Article 3 non-international armed conflict pitting al Qaeda against the Iraqi government, assisted by armed forces of the United States and other coalition states.[162]

"No group conducting attacks in such an egregious fashion [as the 9/11 attacks] can claim for its fighters prisoners of war status. Whatever lingering doubt which may exist with respect to the entitlement of Taliban forces to prisoners of war status, there is – and there can be – none as regards Al Qaeda terrorists."[163]

Although agreement is not universal,[164] in a common Article 2 international armed conflict, al Qaeda fighters who directly participate in hostilities are unlawful belligerents/unlawful combatants with a continuous combat function who may be targeted as combatants. If captured, they are criminals, not entitled to POW status. They are protected persons entitled to common Article 3 protections. They may be interned and may be tried in domestic or military courts for acts they committed that rendered them unlawful combatants. In a common Article 3 non-international armed conflict, they similarly are criminals who, upon capture, enjoy common Article 3 protections. They may be tried in domestic or military courts for unlawful acts they committed before capture.

As in the case of captured Taliban, in a common Article 2 conflict, should captured al Qaeda fighters be nationals of the capturing state – Iraqi citizens captured by Iraqi armed forces, for instance – they are not Geneva Convention IV, Article 4 protected persons. They remain protected, however, by Additional Protocol I, Article 75.

Accomplished' banner, it was right: The mission, as defined for the military as getting rid of the regime, had indeed been accomplished.'"

160 Kenneth Katzman, Congressional Research Service Report for Congress, "*Iraq: Reconciliation and Benchmarks*" (12 May 2008), 1. "After about one year of occupation, the United States handed sovereignty to an appointed Iraqi government on June 28, 2004. A government and a constitution were voted on thereafter, in line with a March 8, 2004, 'Transitional Administrative Law'. . . . " The UN cites 30 June as the end of the period of occupation. UN SC Res. 1546 (2004).

161 1977 Additional Protocol II, Art. 1.1.

162 Geoffrey S. Corn, "'Snipers in the Minaret – What is the Rule?' The Law of War and the Protection of Cultural Property: A Complex Equation," *The Army Lawyer* (July 2005), 28, 29; and Sanchez, *Wiser in Battle*, supra, note 150, at 231. "By mid-July . . . we were facing an insurgency. There was just no other way to describe it . . . "

163 Dinstein, *The Conduct of Hostilities*, supra, note 2, at 49.

164 E.g., Jordan J. Paust, "Detention and Due Process Under International Law," in Heere, *Terrorism and the Military*, supra, note 155, 180–96, at 188. Professor Paust argues that al Qaeda fighters with the Afghan Taliban during the common Article 2 phase of the U.S.-Afghan conflict, were lawful combatants. Also Franck, "The Taliban, al Qaeda, and the Determination of Illegal Combatants," supra, note 129, at 897; and John Yoo, "Enemy Combatants and the Problem of Judicial Competence," in Peter Berkowitz, ed., *Terrorism, the Laws of War, and the Constitution* (Stanford, CA: Hoover Institution Press, 2005), 69, 74.

6.6. World War II Allied Resistance Fighters: Historical Aside or Modern Preview?

Guerrilla warfare came into its own in World War II, when countries occupied by the Axis Powers were able to continue the fight only through guerrillas and resistance fighters, who might be called "insurgents" today. "The Soviet Union . . . regarded its guerrilla forces as an integral part of its armed forces. . . . The Germans and Japanese took a contrary view and denied that international law protected guerrillas. Their common practice was to summarily shoot captured guerrillas."[165] Field Marshal Wilhelm Keitel "repeated Hitler's belief that the [1929] Geneva Conventions and 'soldierly chivalry' did not apply in the war against the partisans and sent the following instructions: No disciplinary action can be taken against a German engaged in anti-band [guerrilla] warfare, nor can he be called to account before a court-martial for his conduct in fighting the bands and their helpers."[166] For this and similar orders, the Nuremberg International Military Tribunal sentenced Keitel to hang.[167]

Although no Allied nation other than the Soviet Union regarded non-uniformed resistance fighters as units of their regular forces, after the war the United States and its Allies aggressively tried former enemies who had disregarded the battlefield rights of partisans. Allied concern for the just treatment of friendly guerrillas was not always as keenly applied by them to enemy soldiers who were captured out of uniform and without distinctive sign. In 1942, eight Nazi saboteurs were captured in New York and Chicago.[168] Nine days later, they were tried in secret before a military commission, despite the civilian courts being open. The 3,000-page record of trial was considered and approved by President Roosevelt, and the saboteurs' death sentences carried out within five days of the verdicts. The Supreme Court's opinion affirming the trial results was written months after the executions.[169] Discussion of the case continues to this day, one reason being that we still send soldiers behind enemy lines disguised as civilians – just as the 1942 Nazi saboteurs were disguised. The mixed record of World War II resistance fighters raises a modern LOAC/IHL issue: What is a fighter's status if captured without uniform or other distinguishing sign?

6.6.1. *Out of Uniform, Out of Status?*

Article 4A.(2) of Geneva Convention III, relative to POWs, specifies that, to gain POW status, members of organized resistance movements must meet the familiar four

[165] Greenspan, *Modern Law of Land Warfare*, supra, note 21, at 54.
[166] I.P. Trainin, "Questions of Guerrilla Warfare in the Law of War, 40–3 *AJIL* (July 1946), 534–62, 561–2.
[167] *Trial of the Major War Criminals* (Nuremberg: International Military Tribunal, 1947), 366. The Nuremberg IMT's judgment notes, "On 7 December 1941 . . . the so-called "*Nacht und Nebel*" Decree, over Keitel's signature, provided that in occupied territories civilians who had been accused of crimes of resistance against the army of occupation would be tried only if a death sentence was likely; otherwise they would be handed to the Gestapo for transportation to Germany. . . . Keitel does not deny his connection with these acts. Rather, his defense relies on the fact that he is a soldier, and on the doctrine of 'superior orders', prohibited by Article 8 of the Charter as a defense. There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.", at 290–1.
[168] *Ex parte Quirin*, 317 U.S. 1 (1942).
[169] David J. Danelski, "The Saboteur's Case," vol. 1, *J. of S.Ct. History* (1996), 61.

conditions – a responsible individual in charge, a fixed distinctive sign, carry arms openly, and observe the law of war. The same four conditions apply to members of the army of a party to the conflict, although that is not explicitly stated in the Convention. "The delegates to the 1949 Diplomatic Conference," the *Commentary* reports, "were . . . justified in considering that there was no need to specify for such armed forces the requirements stated in [Article 4A.(2)] . . . "[170] That suggests that, should a member of the armed forces of a party to a conflict engage in combat without a uniform, or other distinctive sign, it would potentially be an act of perfidy. (See Chapter 11, section 11.1.) Even absent perfidy, upon capture such a prisoner, although a member of the army of a party, would not have complied with the "fixed distinctive sign" requirement and he would not be entitled to POW status.

As to uniforms, the removal of one's uniform or other fixed distinctive sign in favor of civilian garb is not a war crime, but, **in an international armed conflict, if an otherwise lawful combatant engages in combat without a uniform or fixed distinctive sign he becomes an unlawful combatant/unprivileged belligerent and, if captured, is not entitled to POW status**.

As to precapture LOAC violations, the 1914 edition of U.S. *Rules of Land Warfare* says, "A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own army."[171] Loss of POW status is not mentioned for unlawful precapture acts, such as fighting without uniform or distinctive sign. As a matter of fact, Geneva Convention III, Article 85, reads, "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present [prisoner of war] Convention." The *Commentary* confirms that, "the Conference agreed – that prisoners of war should continue to enjoy those benefits [of POW status] even after they had been judged."[172] How does one reconcile the Convention III provisions that, even if convicted of precapture LOAC violations an individual retains POW status (Article 85), with the provision that if a prisoner fought without uniform or other fixed sign he is denied POW status (Article 4A.2)?

Press coverage of the early stages of the conflicts in Afghanistan and Iraq detailed instances in which American combatants, Army Delta and Special Forces soldiers, wore civilian clothing in the combat zone – jeans, tee shirt, and baseball cap; in Afghanistan, they occasionally wore the flowing *abah* of local males. They were U.S. "soldiers, special operators from the units that had been at the forefront of the war in Afghanistan . . . dressed in civilian clothes and [they also] wore their hair longer than most American soldiers are allowed. All sported the beards that were ubiquitous among American special operators and intelligence operatives in Afghanistan."[173] If one of those American soldiers were captured (and if the capturing force observed LOAC), would he be entitled to POW status because he was a member "of the armed forces of a Party to the conflict," even though he had committed an unlawful precapture act, per Article 85? Or, because of his lack of uniform or distinguishing sign while engaged in combat, would he be denied such status, per Article 4A.(2)?

[170] Pictet, *Commentary, III Geneva Convention*, supra, note 40, at 63.
[171] War Department, *Rules of Land Warfare – 1914* (Washington: GPO, 1914), para. 71.
[172] Pictet, *Commentary, III Geneva Convention*, supra, note 40, at 415.
[173] Sean Taylor, *Not A Good Day to Die* (New York: Berkley Books, 2005), 9.

The issue is the LOAC core concept of distinction: the ability to see and distinguish a warfighter from a noncombatant. (See Chapter 7, section 7.1.) Customary law of war did not forbid the wearing of nondistinguishing clothing, or even wearing of the enemy's uniform, but it did prohibit *engaging in combat* while doing so.[174] "[M]embers of the military who merely wear civilian clothes do not violate the law of armed conflict. Rather, they lose combatant status because they lack the prerequisites thereof . . . "[175] However, if a soldier *fights* in nondistinguishing clothing, or in the enemy's uniform, and kills, wounds, or captures an enemy in that circumstance, that constitutes perfidy, a LOAC violation.[176]

The wearing of enemy uniforms was central to the World War II case of SS *Obersturmbannführer* (Lieutenant Colonel) Otto Skorzeny. During the December 1944 "Battle of the Bulge," Skorzeny led an understrength Nazi brigade in operations behind U.S. lines. In planning the operation, "Skorzeny had been worried that any of his men captured while wearing U.S. uniforms might be treated as spies, but [he was advised] that the practice was within the rules as long as the men did not actually participate in combat."[177] When his mission failed and some of his men were captured, eighteen of them who were found in U.S. uniforms were indeed executed as spies. Skorzeny escaped, but was arrested and brought to trial after the war, in 1947, along with nine co-accused. In its opinion, Skorzeny's Military Court held, "When contemplating whether the wearing of enemy uniforms is or is not a legal ruse of war, one must distinguish between the use of enemy uniforms in actual fighting and such use during operations other than actual fighting." All ten accused were acquitted. The opinion does not explain the basis of acquittal. "Popular speculation," Colonel Hays Parks writes, "has been that the court accepted Skorzeny's claim that his men did not fight in US uniforms."[178] Indeed, his instruction to his men was that they not do so.

Today, however, the *Skorzeny* case is only of historical interest. In 1977, Additional Protocol I altered customary law and superseded the *Skorzeny* holding. Under the Protocol, wearing an enemy uniform is prohibited in essentially any circumstance.[179] Today, if a soldier is captured in civilian clothing, as opposed to an enemy uniform, with no showing that he engaged in combat while wearing civilian clothing (an unlikely but possible scenario), it would not be a LOAC violation. Without additional facts, a charge of spying

[174] FM 27–10, *Law of Land Warfare*, supra, note 15, at para. 54: "In practice, it has been authorized to make use of national flags, insignia, and uniforms as a ruse. . . . It is certainly forbidden to employ them during combat, but their use at other times is not forbidden."

[175] Michael N. Schmitt, "War, Technology and the Law of Armed Conflict," in International Law Studies, vol. 82, *The Law of War in the 21st Century: Weaponry and the Use of Force* (Newport, RI: Naval War College, 2006), 151.

[176] *Trial of Otto Skorzeny and Others*, General Military Government Court of the U.S. Zone of Germany (18 Aug. 1947), IX *LRTWC* 90, 92 (London: UNWCC, 1949).

[177] Donald M. Goldstein, Katherine V. Dillon, and J. Michael Wenger, *Nuts!: The Battle of the Bulge* (Washington: Brassey's, 1994), 85.

[178] W. Hays Parks, "'Special Forces' Wear of Non-Standard Uniforms," 4–2 *Chicago J. of Int'l. L.* (Fall, 2003), 493, 545 fn. 133. In agreement, Rogers, *Law on the Battlefield*, supra, note 6, at 41.

[179] 1977 Additional Protocol I, Arts. 39.1 and 39.2: "1. It is prohibited to make use in an armed conflict of the . . . uniforms of neutral or other States not Parties to the conflict," and, "2. It is prohibited to make use of . . . uniforms of adverse Parties while engaging in attacks or in order to shield, favor, protect or impede military operations." On today's battlefield it is difficult to conceive of any situation in which wearing the enemy's uniform would not be a LOAC violation.

also would not be warranted.[180] If captured in an enemy uniform with no showing that he engaged in combat while so dressed, it would be a violation of Additional Protocol I, and a minor LOAC violation, but if the soldier is captured while directly participating in hostilities while wearing an enemy uniform, the wearer has committed perfidy and forfeits POW status.[181]

U.S. Army Field Manual 27–10, *The Law of Land Warfare*, (1956) clarified the issue of uniforms and POW status:

> Members of the armed forces of a party to the conflict . . . lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces.[182]

The ICRC, in its customary law study, repeats the Field Manual's position: "Rule 106: Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status."[183] The position of the United Kingdom is similar.[184]

". . . [R]egular forces are not absolved from meeting the cumulative conditions binding irregular forces. . . . [A] regular soldier committing an act of sabotage when not in uniform loses his entitlement to a prisoner of war status."[185] This does not conflict with Convention III, Article 85 ("Prisoners of war prosecuted . . . for acts committed prior to capture shall retain . . . benefits of the Convention.") because the captured soldier, due to his lack of uniform or distinguishing sign, never achieved a POW status to retain.

Hays Parks encapsulates arguments for wearing or not wearing a uniform or distinguishing sign in combat:

> The standard military field uniform should be worn absent compelling military necessity for wear of a non-standard uniform or civilian clothing. *Military convenience* should not be mistaken for *military necessity*. That military personnel may be at greater risk in wearing a uniform is not in and of itself sufficient basis to justify wearing civilian clothing. "Force protection" is not a legitimate basis for wearing a non-standard uniform

[180] Rogers, *Law on the Battlefield*, supra, note 6, at 43, discussing the inappropriateness of spying charges against soldiers.

[181] Parks, "Special Forces' Wear of Non-Standard Uniforms," supra, note 178, at 545–6: "[S]tate practice in international armed conflicts has tended *not* to treat wear of civilian attire, non-standard uniforms, and/or enemy uniforms by regular military forces as a war crime." Emphasis supplied.

[182] FM 27–10, *Law of Land Warfare*, supra, note 15, at para. 74.

[183] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, supra, note 46, Rule 106, at 384.

[184] UK MOD, *Manual of the Law of Armed Conflict*, supra, note 22, at 43–4, para. 46. Interestingly, the British Manual also says, "Members of the armed forces who do not wear uniform, combat gear, or an adequate distinctive sign and whose sole arm is a concealed weapon, or who hide their arms on the approach of the enemy, will be considered to have lost their combatant status." Para. 4.4.3., at 42. Accordingly, they lose POW entitlement, if captured.

[185] Dinstein, *The Conduct of Hostilities*, supra, note 2, at 37. Citations omitted. Dinstein looks to two U.K. Privy Council cases, *Mohamed Ali et al. v. Public Prosecutor* (1968), [1969] AC 430, 449, and *Public Prosecutor v. Koi et al.* (1967), [1968] AC 829, in support.

> or civilian attire. Risk is an inherent part of military missions, and does not constitute military necessity for wear of civilian attire.[186]

The law of war as to captured spies, as opposed to captured lawful combatants, is the same.[187] Spies, including spies who may be members of the armed forces of a party to the conflict, who are captured in civilian clothing behind enemy lines may be denied POW status, and are subject to trial for espionage under the domestic law of the capturing state.

Regardless of the prohibition against engaging in combat in nondistinguishing clothing or in enemy uniform, armies have always sent combatants behind enemy lines disguised as civilians. In World War I, British Lieutenant Colonel Thomas E. Lawrence fought in white Arab robes and became famous as Lawrence of Arabia.[188] In World War II, Office of Strategic Services (OSS) teams in Europe almost always wore civilian clothing. In China, U.S. officers working with Chinese guerrilla forces wore Chinese uniforms, enemy uniforms, and civilian attire.[189] Throughout history such examples are many. LOAC will not alter that practice. Commanders will continue to order subordinate combatants behind enemy lines to fight without uniform or distinctive sign and, knowing the risk, subordinate combatants will willingly comply. The United States makes no secret of having issued such orders in Afghanistan.[190]

> [E]ach belligerent party is at liberty to factor in a cost/benefit calculus . . . If members of Special Forces units are fighting behind enemy lines, and if the enemy has a demonstrably poor track record in . . . the protection of *hors de combat* enemy military personnel, the conclusion may be arrived at that on the whole it is well worth assuming the risks of (potential) loss of prisoner of war status upon capture while benefiting from the (actual) advantages of disguise.[191]

Petty Officer Marcus Luttrell, a SEAL operator in Afghanistan, confirms that Navy combatants dressed as civilians: "Each one of us had grown a beard in order to look more like Afghan fighters. It was important for us to appear nonmilitary, to not stand out in a crowd."[192] Although contrary to LOAC, the practice of fighting without distinguishing oneself is not going to end, but there is a potentially high price for doing so.

6.7. Detainee, Enemy Combatant, and Unlawful Enemy Combatant

The war on terrorism has brought new variations to individual status. The terms "detainee," "enemy combatant," and "unlawful enemy combatant" do not appear in 1907 Hague Regulation IV, in any Geneva Convention, or in the 1977 Additional Protocols. There is no internationally agreed upon definition of any of the three terms, yet they are

[186] Parks, "Special Forces' Wear of Non-Standard Uniforms," supra, note 178, at 543. Emphasis in original.
[187] 1907 Annex to Hague Convention IV Respecting the Laws and Customs of War on Land, Art. 29. "A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Thus soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army for the purpose of obtaining information are not considered spies."
[188] Lowell Thomas, *With Lawrence in Arabia* (London: Hutchison, 1927).
[189] Parks, "Special Forces' Wear of Non-Standard Uniforms," supra, note 178, at 504, fn. 20.
[190] Id., at 498.
[191] Yoram Dinstein, "*Jus in Bello* Issues Arising in the Hostilities in Iraq in 2003," in Jaques, *International Law Studies*, supra, note 120, at 45.
[192] Luttrell, *Lone Survivor*, supra, note 108, at 15.

commonly used in the war on terrorism. Each suggests a variation on unlawful combatant status and, upon capture, each may determine the treatment of an individual so labeled.

6.7.1. *Detainee*

In the U.S.–Vietnam conflict, "detainee" referred to a recently captured individual on his way to a POW camp or holding facility, where his actual status would be determined. "In U.S. operations in Somalia [October 1993] and Haiti [February 2004] . . . captured persons were termed 'detainees'. . . . During Operation Just Cause in Panama [December 1989-January 1990], members of the Panamanian armed forces were termed 'detainees' but were reportedly treated as POWs."[193]

In the war on terrorism "Detainees" are described in joint forces doctrine applicable to all U.S. Armed Forces as "any person captured or otherwise detained by an armed force."[194] Any individual captured on the battlefield, the circumstances of whose capture do not immediately indicate a status, is a detainee. Additionally, any civilian suspected of being an insurgent, or aiding the insurgency, who is seized by U.S. forces is a detainee.

Confusingly, a DoD Directive, also applicable to all U.S. Armed Forces personnel, provides a different definition of "detainee": "Any person captured, detained, held, or otherwise under the control of DoD personnel (military, civilian, or contractor employee). It does not include persons being held primarily for law enforcement purposes, except where the United States is the occupying power. A detainee may also include the following categories:. . . . "[195] The six "following categories" are: enemy combatant, lawful enemy combatant, unlawful enemy combatant, enemy POW, retained person, and civilian internee. Under this second definition, "detainee" is an umbrella term for all captives, including POWs, even if held by U.S. civilian Central Intelligence Agency (CIA) and Defense Intelligence Agency (DIA) agents, unless they are held "for law enforcement purposes." Does the DoD Directive's word "contractors" include employees of civilian armed security contractors? Who is a person "held primarily for law enforcement purposes," and what are those purposes? What does the inclusion of POWs and retained persons in the definition imply?

Under the DoD Directive's definition, it appears that a captive might or might not be a detainee, according to the captor's assessment. Given the divergent rights and responsibilities of individuals falling within the Directive's various categories, that is unsatisfactory. The lack of a uniform and consistent use of the term "detainee" makes an authoritative definition elusive.

Whether either of these definitions attain international usage, or are maintained in U.S. usage beyond current armed conflicts, remains to be seen.

6.7.2. *Enemy Combatant*

In U.S. practice there also were several definitions of "enemy combatant," none agreed to be controlling, and some apparently generated only for detention and targeting purposes.

[193] Id., at 37. Footnote deleted.
[194] Joint Publication 3–36, *Detainee Operations*, (6 February 2008), at GL-3.
[195] DoD Directive 2310.01E, "The Department of Defense Detainee Program," Sept. 5, 2006, at Enclosure 2, Definitions.

The phrase "enemy combatant" first appeared in the muddled World War II Nazi saboteur case, *Ex parte Quirin*.[196] U.S. Supreme Court Chief Justice Stone wrote, "[A spy or] an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."[197] Contrary to the court's implication, spying is not, and was not in 1942, a LOAC violation. It was/is a domestic law violation.

The ICRC, employing the traditional definition, says "an 'enemy combatant' is a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an international armed conflict."[198]

"Traditionally, the term 'enemy combatant' refers to legitimate combatants who are entitled to prisoner of war status. It is a new usage to describe those who are deemed to be unlawful belligerents as such. What term is left for those legitimate combatants belonging to enemy armed forces?"[199] Because "a combatant, by definition, enjoys a 'privilege of belligerency', the term 'lawful combatant', is redundant, and thus, the term 'unlawful combatant' is an oxymoron."[200] The United States did not join in that view.

A definition of "enemy combatant" binding U.S. Armed Forces was found in the same DoD Directive that unsatisfactorily defines "detainee": "Enemy combatant. In general, a person engaged in hostilities against the United States or its coalition partners during an armed conflict. The term 'enemy combatant' includes both 'lawful enemy combatants' and 'unlawful enemy combatants.'"[201]

Joint Publication 3–63, *Detainee Operations*, contains a different but similar definition, except for its last sentence: "**enemy combatant**. In general, a person engaged in hostilities against the United States or its coalition partners during an armed conflict." In a 2004 case, *Hamdi v. Rumsfeld*,[202] the government offered yet another definition of "enemy combatant."

> That definition was properly circumscribed by the direct participation standard, and the Court's plurality decision adopted it: "an individual who . . . was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan *and who* 'engaged in an armed conflict against the United States' there." That is, individuals must themselves be engaged in armed conflict with the United States to be deemed combatants. It does not suffice for an individual only to support others who are engaged in the conflict.
>
> A few weeks after the ruling in *Hamdi*, however, the Defense Department issued the Order Establishing Combatant Status Review Tribunals, which subtly altered the definition such that the direct participation standard vanished. The order defines "enemy combatants" to include "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its

[196] *Ex parte Quirin*, supra, note 168.
[197] Id. at 31.
[198] ICRC, "Official Statement: The Relevance of IHL in the Context of Terrorism," available at: http://www.icrc.org/web/eng/siteengo.nsf/htmlall/terrorism-ihl-210705?opendocument.
[199] Garraway, "'Combatants' – Substance or Semantics?," supra, note 8, at 327.
[200] Gabor Rona, "An Appraisal of US Practice Relating to 'Enemy Combatants,'" in Timothy L.H. McCormack, ed., *Yearbook of I.H.L.*, vol. 10, 2007 (The Hague: T.M.C. Asser Press, 2009), 232, 240.
[201] Directive 2310.01E, "Department of Defense Detainee Program," supra, note 195. Underlining in original.
[202] 542 U.S. 507 (2004).

> coalition partners. Thus, individuals who merely support al Qaeda or the Taliban may be defined as combatants . . . Congress essentially ratified the Defense Department's new definition in the Military Commissions Act of 2006.[203]

Note that, under any "enemy combatant" definition, civilians taking even an *in*direct part in hostilities may be subjected to detention and internment, if "absolutely necessary."[204]

Adding to the confusion, Guantanamo's Combatant Status Review Tribunals employ yet another definition.[205] Definitional confusion abated when, in March 2009, in multiple pending habeas corpus cases, the U.S. indicated it would no longer characterize detained al Qaeda or Taliban members or supporters as enemy combatants.

6.7.3. *Unlawful Enemy Combatant*

In common Article 2 armed conflicts it is redundant to refer to an unlawful combatant as an "unlawful *enemy* combatant," yet the term is pervasively applied to captured Taliban and al Qaeda fighters.

A DoD Directive defines unlawful enemy combatants as ". . . persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict." So far, it is a straightforward definition of an unlawful combatant, with an Iraq-specific tinge in the reference to "coalition partners." But the Directive's definition continues, "For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners."[206] Thus, the definition is war on terrorism–specific and freighted with terms open to interpretation. Are captives whose unlawful enemy combatant status is doubtful presumed to be POWs until their status is determined by a competent tribunal? Who might be "part of" Taliban or al Qaeda forces, and what constitutes "supporting" them? What forces are al Qaeda "associated forces"? Who decides these questions?

The Military Commissions Act of 2006[207] contains a surprisingly broad definition of "unlawful enemy combatant." It includes one "who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant."[208] Under this definition an individual who supports hostilities against an ally of the United States, who has never been in a battlefield or place of hostile

[203] Ryan Goodman, "Editorial Comment: The Detention of Civilians in Armed Conflict," 103–1 *AJIL* (Jan. 2009), 48, 61. Footnote omitted. Emphasis in original.

[204] See 1949 Geneva Convention IV, Arts. 41 and 42. This point is forcefully made in the excellent Goodman article, id., at 63–5.

[205] "An individual who was part of or supporting the Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." This CSRT definition is available at: http://www.defenselink.mil/news/Sep2005/d20050908process.pdf.

[206] Directive 2310.01E, "Department of Defense Detainee Program," supra, note 195.

[207] Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2006; 10 U.S.C. §§ 948a-950w, and other sections of Titles 10, 18, 28, and 42.

[208] 10 U.S.C. § 948a(1)(a)(i).

activity, may be an unlawful enemy combatant. This "dramatically expands the scope of combatancy."[209]

In August 2007, fourteen "high-value detainees" previously held in foreign locations in secret CIA prisons were transferred to the U.S. detention facility at Guantanamo Bay, Cuba. One of the transferees was Khalid Sheik Mohammed, alleged 9/11 master planner. He and the other thirteen were designated "enemy combatants."[210] Why were they not *unlawful* enemy combatants? Why were they not detainees? Who made the labeling decisions, and on what basis? The designation of the fourteen illustrates the ad hoc subjective nature of labeling captured terrorists. And why the terms are not widely accepted statuses.

Canadian Brigadier Kenneth Watkin suggests, "it may be time for humanitarian law advocates to concentrate more on detailed common standards of treatment for all detainees, rather than focusing on the status of participants."[211]

6.8. Article 5 "Competent Tribunals"

"Competent tribunals" have been mentioned. What is a competent tribunal, what is its purpose, how is one constituted, and when is one required?

The basic rule is that members of the armed forces of a party to the conflict have POW status upon capture. Article 5 is not evolved from the 1929 POW Convention or the 1907 Hague Regulations; it is new to the 1949 Convention.

Article 5 of Geneva Convention III raises a *presumption* that individuals who might be POWs *shall* have the POW Convention applied to them. "Presumption" and "shall" are powerful words in any legal context. A captured combatant is entitled to POW status, but, "[i]n addition, there are certain non-combatants who are entitled to this status."[212] Article 5 is the vehicle by which that entitlement is determined. An identical presumption and competent tribunal requirement is in Article 45.1, Additional Protocol I.

Article 5 responds to the sometimes difficult question facing commanders: "On the common Article 2 battlefield, how do I know who merits POW status and who does not?" Article 5 instructs, "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[213]

The words "competent tribunal" are used so that tribunals other than military tribunals are not precluded. Unlike most of the POW Convention, Article 5 is directed to irregular fighters who might have complied with the four requirements for POW status, as well as regular troops. Article 5 applies to the person who says she was accompanying the armed forces but was not a soldier, to the enemy deserter who has lost his identifying Geneva Convention card, and to the fighter who swears he was a member of a *levée en masse*. If there is a chance their story is true – "any doubt" – they *shall* be presumed to be POWs

[209] Jack M. Beard, "The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations," 101–1 *AJIL* (Jan. 2007), 56, 60.
[210] Josh White, "Detainees Ruled Enemy Combatants," *NY Times*, Aug. 10, 2007, A2.
[211] Watkin, "21st Century Conflict," in Schmitt and Pejic, *International Law and Armed Conflict*, supra, note 8, at 291.
[212] UK MOD, *Manual of the Law of Armed Conflict*, supra, note 22, at 143, para. 8.3. Footnotes omitted.
[213] 1949 Geneva Convention III, Art. 5.

until it is determined that their status is something else. A "competent tribunal" need be employed only when there is doubt regarding a prisoner's status. When a uniformed enemy soldier is captured in the course of a common Article 2 armed conflict, there seldom is doubt that she is a POW, and no tribunal is called for. When an Afghan insurgent in civilian clothing is seized, dazed and bleeding, after a final assault on the mountain house where he and his fellow insurgents were firing on U.S. forces, there is no doubt that he is a criminal fighter. No tribunal is necessary.

Not all cases are so clear. In Iraq, imagine that a Dutch patrol has detained an individual dressed in civilian clothes, carrying an AK-47 assault rifle and, in his backpack, three magazines of ammunition for the AK, a fragmentation hand grenade, and ten feet of detonation cord.* The individual was seized at a site from which the Dutch patrol had received rifle fire an hour before. Many Iraqi males lawfully carry AK-47s, however. The detainee says he found the grenade, and says he uses the "det cord" in his father's construction business. Shall the presumption of POW status continue in the face of possession of such suspicious armament? A competent tribunal should be held. The tribunal should hear his story, assess the circumstances of his apprehension, and judge his veracity. Until the tribunal's determination is made, the presumption of POW status continues.

When several individuals have been captured as a group, there may be "doubt" as to one of the detainees' status. The circumstances or place of his capture may raise doubt, or the detainee himself may raise the required doubt simply by claiming POW status.[214] Once a captive persuades his captors that he is a member of the enemy armed forces, the burden of proof that he is anything else is on the capturing force.[215] As tedious as it may initially seem, when a detainee argues that he is a POW or that he is an innocent civilian, a competent tribunal is called for.

In U.S. practice, these tribunals are commonly referred to as "Article 5 hearings." They first were instituted by the United States in the Vietnam War, in 1966,[216] although not by that name. The United States did not initially consider captured VC as entitled to POW status. A 1966 MACV Directive changed that. "The MACV policy was that all combatants captured during military operations were to be accorded prisoner of war status, irrespective of the type of unit [VC Local Force, VC Main Force, or North Vietnamese Army] to which they belonged."[217] This directive was in hopes that VC holding U.S. soldiers and civilians would reciprocate. For U.S.-captured VC/North Vietnamese Army, postcapture processing included questioning and classification at a combined U.S.-Vietnamese interrogation center – essentially, Article 5 hearings.[218]

Today, Article 5 hearings are well-established proceedings. In the first Gulf War (1990), the United States held 1,196 Article 5 hearings. "As a result, 310 persons were granted

* A high-speed fuse commonly used for detonating explosives.

214 *Public Prosecutor v. Ooi Hee Koi* [1968] A.C. 829, an opinion of the U.K.'s Privy Council. Also, Elsea, *Treatment of "Battlefield Detainees" in the War on Terrorism*, supra, note 19, at CRS-35.

215 Yoram Dinstein, "Unlawful Combatancy," in Fred L. Borch and Paul S. Wilson, eds., *International Law Studies, vol. 79; International Law and the War on Terror* (Newport, RI: Naval War College, 2003), 151–74, 164.

216 MACV Directive 20–5, "Inspections and Investigations: Prisoner of War Determinations of Status," dtd 17 May 1966. A later version, Directive 20–4, dtd 18 May 1968, is at Prugh, *Law at War*, supra, note 20, at 136.

217 Prugh, *Law at War*, supra, note 20, at 66.

218 Id.

EPW [enemy prisoner of war] status; the others were determined to be displaced civilians and were treated as refugees."[219] In the war on terrorism, hundreds of Article 5 hearings have been conducted in Afghanistan and Iraq.

No DoD guidance for U.S. forces' conduct of Article 5 hearings has been located. "As the Third Geneva Convention is silent on the procedures to be followed, procedural issues fall within the purview of the Detaining Power . . . [I]t is fairly clear that [the tribunals] were not envisaged as judicial bodies obliged to comply with fair trial guarantees."[220] Several U.S. orders relating to hearings, and the procedure to be followed, are available. (See Cases and Materials, this chapter, for one such order.)

In U.S. practice, five persons are necessary for an Article 5 hearing: an interpreter, an officer who acts as both recorder and the presenter of evidence, plus a panel of three officers who constitute the "tribunal." At least one of the three tribunal members is a judge advocate. The senior tribunal member is a major, or higher rank. The tribunal can order the appearance of U.S. military witnesses and can request the presence of others, all of whom testify under oath. With the detainee present and his rights to present evidence and examine witnesses having been explained, the tribunal hears the evidence and the witnesses, and makes its determination. It is a fact-finding procedure, rather than an adversarial proceeding. Hearsay evidence may be considered. Unless it is established by a preponderance of the evidence that the detainee is *not* entitled to POW status, upon majority vote of the tribunal he is granted that status. Hearings may be as brief as a half hour. The written hearing summaries in which detainees are denied POW status are examined by a senior judge advocate for legal sufficiency.[221]

Because there is no service-wide directive for Article 5 hearings, the procedure described may vary from command to command in minor ways.

Shortly after 9/11 the President and his advisors, apparently thinking the Geneva Conventions were irrelevant to the war on terrorism,[222] and believing there was no doubt as to the individual status of the few Taliban captured in Afghanistan, determined that Article 5 hearings in the cases of all captured Taliban and al Qaeda fighters were unwarranted.[223] "[T]he President could reasonably interpret GPW [Geneva Prisoner of War Convention] in such a manner that none of the Taliban forces fall within the legal definition of POWs," Assistant Attorney General Jay S. Bybee advised the White House. "A presidential determination of this nature," Bybee erroneously continued, "would

[219] DoD, *Conduct of the Persian Gulf War* (Washington: GPO, 1992), App. L, at 578.

[220] Pejic, "'Unlawful/Enemy Combatants," in Schmitt and Pejic, *International Law and Armed Conflict*, supra, note 93, at 336.

[221] Army Judge Advocate General's School, *Law of War Workshop Deskbook* (Charlottesville, VA: JAG School, 1997), at 5F-10–13, citing Appendix "A" of U.S. Central Command Regulation 27–13, "Captured Persons, Determination of Eligibility for enemy Prisoner of War Status," dtd 7 Feb. 1995. The procedures related in Appendix "A" are more detailed than summarized here.

[222] John Yoo, *War By Other Means* (New York: Atlantic Monthly Press, 2006), 22. "To pretend that rules written at the end of World War II, before terrorist organizations and the proliferation of know-how about weapons of mass destruction, are perfectly suitable for this new environment refuses to confront new realities."

[223] Yoo Memorandum, supra, note 133. "Therefore, neither the Geneva conventions nor the WCA [War Crimes Act] regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict."; and, Memorandum for Alberto Gonzales and William Haynes; from Department of Justice, Office of Legal Counsel; Subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 Jan. 2002), supra, note 137. " . . . [W]e conclude that the President has more than ample grounds to find that our treaty obligations under Geneva III toward Afghanistan were suspended during the period of the conflict."

eliminate any legal 'doubt' as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for Article 5 tribunals."[224]

Internationally and domestically, this was seen by many as a needless disregard of the Geneva Conventions, particularly given the brief and uncomplicated nature of Article 5 hearings. "[W]hile the US claimed in the 'war on terror' all the prerogatives that IHL of international armed conflicts confers upon a party to such a conflict, it denied the enemy the protection afforded by most of that law."[225] A former Assistant U.S. Attorney General and head of the Office of Legal Counsel wrote, "If the administration had simply followed the Geneva requirement to hold an informal 'competent tribunal,' or had gone to Congress for support on their detention program in the summer of 2004, it probably would have avoided the more burdensome procedural and judicial requirements that became practically necessary under the pressure of subsequent judicial review."[226] Not all agreed. The Congressional Research Service, for example, notes:

> If there is no uncertainty that none of the detainees qualifies as POWs and their treatment would not change . . . then holding tribunals to determine each detainee's status would be largely symbolic and therefore a waste of resources. Critics of the policy respond that the U.S.' position regarding the inapplicability of the Geneva Conventions could be invoked as precedent to defend the poor human rights practices of other regimes, and it could lead to harsh treatment of U.S. service members who fall into enemy hands during this or any future conflict.[227]

The price of holding Article 5 hearings for captured Taliban and al Qaeda fighters would have been modest and the outcomes generally predictable. Silencing critics of that aspect of U.S. confinement of "unlawful enemy combatants" would have made Article 5 hearings worth the minimal effort.

6.8.1. *U.S. Military Practice*

A 2006 DoD directive applicable to all U.S. Armed Forces, and in all conflicts no matter how characterized, sets a policy that "[a]ll detainees be treated humanely and . . . [all service members] shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 . . . "[228] The same DoD Directive repeats the requirement of Geneva Convention III, Article 5, that, "[w]here doubt exists as to the status of a detainee, the detainee's status shall be determined by a competent authority." In the first six years of the war on terrorism, the directive was largely ignored.

[224] Memorandum for Alberto R. Gonzales, Counsel to the President; From: Office of Legal Counsel, U.S. Department of Justice (7 Feb. 2002). Reprinted in Greenberg and Dratel, *Torture Papers*, supra, note 133, at 136, 142.

[225] Marco Sassòli, "The Implementation of International Humanitarian Law: Current and Inherent Challenges," in Timothy L.H. McCormack, ed., *Yearbook of International Humanitarian Law* (The Hague: Asser Press, 2009), 45, 51.

[226] Goldsmith, *The Terror Presidency*, supra, note 143, at 140.

[227] Elsea, *Treatment of "Battlefield Detainees,"* supra, note 19, at CRS-38. Also, John C. Dehn, "Why Article 5 Status Determinations are not 'Required' at Guantanamo," 6–2 *J. of Int'l Crim. Justice* (May 2008), 371.

[228] DoD Directive 2310.01E, "Department of Defense Detainee Program," supra, note 195, at para. 4.1–4.2.

6.9. Civilians

An individual status encountered on every battlefield is the civilian – the noncombatant. The ICTY notes, "The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law . . . Indeed, it is now a universally recognized principle . . . that deliberate attack on civilians or civilian objects are absolutely prohibited by international humanitarian law."[229] Civilians may never be purposely targeted. "In the context of modern-day conflicts, it is the deliberate targeting of civilians, rather than the incidental loss of civilian life . . . that have placed the . . . responsibilities of armed groups so prominently on the international agenda."[230]

Article 50.1, Additional Protocol I, requires that, "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian." Although this defines "civilian" in the negative, essentially, a civilian is anyone not a member of the armed forces.[231]

The paradigmatic example is the civilian worker in an enemy munitions factory. If civilians may never purposely be attacked, how can LOAC/IHL allow civilian armament workers to be attacked? This question arose along with the first long-range bomber aircraft. In 1930, air power proponent J. M. Spaight argued:

> There can be no shadow of a doubt that . . . all persons employed . . . in the metal works, aircraft and engine factories, petrol refineries, etc., . . . are subject to attack. The case for attacking workers of these categories is overwhelming and it is idle to seek to resist it . . . The person who makes the killing machine is more dangerous than the soldier or sailor who uses it . . . Such workers, though civilians, cannot be regarded as non-combatants while actually at work.[232]

In the intervening eighty years a different view has come to prevail. "By 1939 higher-level military schools such as the Army War College were teaching America's senior leaders that despite European acceptance of wanton air attacks on defenseless civilians as inevitable, such tactics were considered 'butchery in the eyes of a trained soldier' . . . "[233] Although this statement idealizes American interwar thought, it is correct that in World War II the United States pursued precision bombing rather than area bombing and, to the degree possible, avoided civilian casualties.* Among other objectives was the targeting by American bombers of enemy munitions plants and weapons-manufacturing factories. Civilians were known to be working in the targeted plants and factories, but civilians were not the targets. The factories were the targets. The incidental injury and

[229] *Prosecutor v. Kupreškić et al.*, IT-95–16-T, Trial Judgment (14 Jan. 2000), para. 521.
[230] Howard M. Hensel, ed., *The Law of Armed Conflict* (Aldershot, UK: Ashgate, 2005), 172.
[231] Id. Article 50.1 further reads: "any person who does not belong to one of the categories of persons referred to in Article 4A(1) [a member of the armed forces of a Party to the conflict]; (2) [a member of other volunteer corps, including those of organized resistance movements], (3) [regular armed forces who profess allegiance to a government not recognized by the Detaining Power] and (6) [a *levée en mass*] of the Third Convention and in Article 43 [again, the armed forces of a Party to the conflict] of this Protocol . . . " is a civilian.
[232] J.M. Spaight, *Air Power and the Cities* (London: Longmans & Green, 1930), 150–2.
[233] Conrad C. Crane, *Bombs, Cities, and Civilians* (Lawrence, KS: University Press of Kansas, 1993), 23.
* There were notable exceptions, such as the American bombing of Hamburg and Dresden. The United States also took a far different approach in the Pacific Theater of Operations, where more than a score of Japanese cities were fire-bombed, and atom bombs targeted city centers.

death of civilians is addressed through the principle of proportionality.[234] (See Chapter 7, section 7.4.)

"Did indiscriminate bombing occur during World War II? Of course, and each major participant was guilty of it at one time or another."[235] But contrary to Spaight's 1930 prediction, civilian armorers and workers were not targeted. This approach is all the easier to maintain with the advent of laser-designated targeting and precision-guided munitions.

"It is essential for the conduct of civilized warfare that a firm line be drawn between the armed forces and the rest of the population, so that the enemy soldier will know who can kill and wound him and therefore be subject to the like treatment; and which elements of the population have the rights and obligations of civilians, that is, not to be intentionally killed or wounded and, therefore, not to kill and wound."[236] Care must always be taken when attacking legitimate targets "that civilians are not needlessly injured through carelessness."[237] This basic premise is affirmed by war crime tribunal convictions. The ICTY, for instance, has held that when the civilian population is the primary object of the attack, such targeting may constitute a crime against humanity.[238]

In an insurgency, as in Iraq and Afghanistan, the LOAC/IHL requirement to distinguish civilians from combatants is easier stated than done. Yet, "the [U.S. counterinsurgency] field manual directs U.S. forces to make securing the civilian, rather then destroying the enemy, their top priority. The civilian population is the center of gravity – the deciding factor in the struggle . . . Civilian protection becomes *part of* the counterinsurgent's mission, in fact, the most important part."[239] Civilians are critical actors on the insurgency battlefield, and their safety must be an important operational and LOAC/IHL consideration.

Terrorists are not true civilians,[240] they are criminals in combat, but which civilians are terrorists? Additional Protocol I, Article 45.3, without specifically referring to them, notes that terrorists are persons taking part in hostilities who are not military persons but who are entitled to the fundamental protections of Article 75, suggesting their unique status. As Professor Dinstein writes, "You are either a combatant or a civilian, you cannot be both."[241]

Should civilian casualties occur, they are not necessarily criminal. What LOAC forbids is making civilians the object of attack. "Collateral damages are a part of almost every military operation and are regarded as acceptable to the extent that precautions are taken so that the civilian casualties are not disproportionate to the anticipated military advantage."[242] To constitute a LOAC/IHL violation – murder or manslaughter, rather

[234] UK MOD, *Manual of the Law of Armed Conflict*, supra, note 22, para. 2.5.2., at 24.
[235] Parks, "Air War and the Law of War," supra, note 44.
[236] Greenspan, *The Modern Law of Land Warfare*, supra, note 21, at 55.
[237] *Prosecutor v. Kupreškić*, supra, note 229, at para. 524.
[238] *Prosecutor v. Naletilic*, IT-98–34-T, (31 March 2003), para. 235; and *Prosecutor v. Kunarac*, IT-96–23 & 23-T (22 Feb. 2001), para. 421.
[239] *The U.S. Army-Marine Corps Counterinsurgency Field Manual* (Chicago: University of Chicago Press, 2007), at xxv.
[240] Roberts, "The Laws of War in the War on Terror – Discussion," in Heere, *Terrorism and the Military*, supra, note 155, at 107. However, former Senator Max Cleland, who lost three limbs in Vietnam combat, says of civilians, "This objective of 'hearts and minds?' Well, *hello*! You didn't know which heart and mind was going to blow you up!" Matt Bai, "The McCain Doctrines," NY *Times Magazine*, May 18, 2008, 42.
[241] Yoram Dinstein, "Discussion," in Heere, *Terrorism and the Military*, supra, note 155, at 109.
[242] Guénaël Mettraux, *International Crimes and the* Ad Hoc *Tribunals* (Oxford: Oxford University Press, 2005), 159.

than a collateral death – the act must involve a course of criminal conduct, rather than being an isolated incident.

6.10. Protected Persons

Another individual status in an insurgency is that of "protected person." A protected person enjoys the benefits (and responsibilities) of Geneva Convention IV. Absent that status, an individual is protected only by common Article 3 and Articles 13–26 of Convention IV, and Article 75 of Additional Protocol I. These protections are considerable, but fall far short of all the Convention IV protections. This status is possible only in a common Article 2 international armed conflict. In a common Article 3 conflict, because only that common Article applies, there are no protected persons, although common Article 3 confirms protections akin to protected person status.

Article 4 of Geneva Convention IV, the civilians' Convention, says, "**Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.**" This definition is followed by several qualifying phrases.

More simply put, **a protected person is a noncombatant who finds him/herself in the hands of the other side**. Civilian inhabitants of occupied territory are protected persons with specific rights, including humane treatment. Additional Protocol II, Article 2.1, provides similar protections for civilians in internal conflicts, without suggesting they have any special status. Several ICTY opinions promote an expanded view of who may be considered a protected person, one Trial Chamber writing that the "protections should be applied to as broad a category of persons as possible."[243]

Imagine that, in the midst of a conflict in which Arcadia has invaded Blueland, a common Article 2 conflict, a senior civilian diplomat of Blueland is detained by invading Arcadia. The Blueland diplomat is not a POW. Nor is he an unlawful combatant. He is a civilian who finds himself in the hands of a party to the conflict of which he is not a national/citizen – a citizen of one side in the hands of the other side. He is the Article 4 definition of a protected person.

Change that scenario: During the Arcadian invasion, a Blueland civilian is captured while engaged in a firefight with Arcadian forces. Is she still a civilian, is she part of a *levée en masse*, or is she an unlawful combatant with a continuous combat function? In any of those cases she is in the hands of the other side and is a protected person. Her presumed POW status was negated by the fact that she is a civilian who took a direct part in hostilities. There being no doubt as to her unlawful combatant status, she need not be given an Article 5 hearing . . . unless she might have been part of a *levée en masse*.

Change the scenario again: The Arcadian invasion has defeated Blueland armed forces, and Arcadian forces occupy all of Blueland. A Blueland civilian has been detained on suspicion of supporting an insurgency that has arisen. He is not part of a *levée en masse*, not a POW, and not shown to be an unlawful combatant. He is suspected of violation of Blueland domestic law, which is still operative. There is no doubt as to

[243] *Prosecutor v. Delalić*, supra, note 68, at para. 263.

his status, so an Article 5 hearing is unnecessary. Under Article 4, he is a protected person.[244]

Change the situation: Blueland is beset by an armed internal rebellion. The rebel group, *Unido Azul* (UA), has strongholds around the country but does not actually control any portion of Blueland. UA's leader, Commander Macho, has been captured by Blueland soldiers. What is his status? Initially one might consider Macho a protected person. But this is a common Article 3 non-international internal armed conflict. The sole applicable portion of the Geneva Conventions is common Article 3 itself. No other portion of the Conventions applies. Protected persons are a construct of Convention IV. Blueland domestic law and human rights law apply. Commander Macho is a prisoner of Blueland authorities, to be charged and tried under Blueland's domestic criminal laws or, perhaps, a military commission.

POWs are *not* protected persons. In a common Article 2 international armed conflict, POWs are considerably more than that, having the entire panoply of rights and protections of Convention III, which go far beyond the protections of a protected person. "But, if for some reason, prisoner of war status . . . were denied to them, they would become protected persons under the present [fourth] Convention."[245] U.S. air crews shot down and captured in North Vietnam, who were denied POW status under Convention III, were, and should have been treated as, protected persons under Convention IV. It bears repeating that "[e]very person in enemy hands must have some status under international law . . . *There is no* intermediate status; nobody in enemy hands can be outside the law."[246]

There are limitations on the application of Convention IV's Article 4. Protected person status does not attach to nationals of a state that has not ratified the Geneva Conventions. There is no such state today, but in the future a new state could be recognized and it could decline to ratify the Conventions. Although significant portions of the Conventions are customary law that would bind the new state regardless of nonratification, the nationals of such a state would not be covered by Article 4.

There is another limitation on the application of Article 4. During a common Article 2 international armed conflict, Article 4 applies to all detained persons of a foreign nationality and to persons without any nationality. In other words, protected person status applies to detained persons whose nationality is different than that of their captors. This is the "nationality requirement" of Article 4. The Conventions' framers, concerned that they not interfere with a state and its citizens, considered that fellow nationals of the detaining state, neutrals,* and co-belligerents, could resolve their detention problems through the available diplomatic offices of the detainee's own state.[247] The nationality requirement was included in Article 4 to ensure that non-interference.

Again, LOAC/IHL may be evolving, portending change in the nationality requirement. "[T]imes have changed since the Geneva Conventions were adopted in 1949,

[244] FM 27–10, *The Law of Land Warfare*, supra, note 15, at 98, para. 247.b. "[T]hose protected by the Geneva Conventions also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war."

[245] Pictet, *Commentary, IV Geneva Convention*, supra, note 1, at 50.

[246] Id., at 51. Emphasis in original.

* Swiss citizens may not be protected persons because Switzerland remains a neutral state with diplomatic relations with every country.

[247] Pictet, *Commentary, IV Geneva Convention*, supra, note 1, at 48–9.

the [ICTY] Appeals Chamber has said, and Article 4 . . . 'may [now] be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors.'"[248] Given repeated ICTY holdings that an individual's protected status should not depend on a strict interpretation of Article 4, domestic laws regarding nationality may not necessarily be determinative.[249] Not in ICTY cases, at least. The ICTY's protected person opinions have been in relation to the confusing issue of nationality in the former Yugoslavian conflict, and not all authorities agree with the tribunal. Time will tell if the tribunal's view will become state practice. For now, the ICTY's position remains a minority view, authoritative but not binding other courts and tribunals.

Accepting the traditional view that a prisoner must be of a different nationality than the detaining state, what if the prisoner is *not* of a different nationality? In the U.S.-Iraqi conflict, what if an insurgent is captured by Iraqi forces while she is directly participating in hostilities and she turns out to be an Iraqi citizen, just as her captors? She is not a POW, not a civilian, and (ICTY jurisprudence aside) not a protected person because she does not meet the nationality requirement. Such individuals are simply prisoners, subject to trial under Iraqi domestic law or military commission for their unlawful combatant-like acts.

A third limitation on protected person status is uncontested. Article 4 does not apply to nationals of a neutral or a co-belligerent state, as long as that state has normal diplomatic relations in the state in whose territory they are. In other words, if a detained person is a national of a state that is neutral in the conflict, or if the detained person is an ally of the detaining state – a co-belligerent – and if the state of which the detainee is a national has diplomatic relations with the detaining state, the detainee is not a protected person.

SIDEBAR. During the U.S.–Vietnam conflict, South Vietnam was a co-belligerent of the United States. Accordingly, the South Vietnamese inhabitants of My Lai (4) were allies of the United States. As co-belligerents, they were not protected persons. It is ironic that, on March 16, 1968, when approximately 345 inhabitants of My Lai were murdered by U.S. Army troops under Lieutenant William Calley's command, the victims were U.S. allies not covered by Geneva Convention IV's Article 4. Although the satisfaction their survivors might have obtained through South Vietnamese diplomatic offices is questionable, such are the terms of Geneva Convention IV, Article 4. The Army Court of Military Review's later appellate opinion in the Calley court-martial incorrectly held, "Although all charges could have been laid as war crimes, they were prosecuted under the Uniform Code of Military Justice." (*U.S. v Calley*, 46 CMR 1131, 1138 (ACMR, 1973).) Because the victims were allies, My Lai represents not a war crime, but a case of multiple murder, rape, aggravated assault, and maiming, triable as such concurrently under the domestic law of South Vietnam's then-functioning courts, or under the American Uniform Code of Military Justice.

[248] Mettraux, *International Crimes*, supra, note 242, at 68, quoting *Prosecutor v. Aleksovski*, IT-95–14/1-A, (24 March 2000), para. 151; and *Prosecutor v. Delalić*, IT-96–21-A (20 Feb. 2001), para. 58; and *Prosecutor v. Tadić*, IT-94–1-A (15 July 1999), paras. 164 and 169.

[249] Id., Mettraux, at 68.

Applying protected person status to individuals is not a sop to IHL. "The Fourth Convention has not been drafted by professional do-gooders or professors, but by experienced diplomats and military leaders fully taking into account the security needs of a state confronted with dangerous people."[250] The conflict in Iraq illustrates why protected person status, although often violated, remains important.

6.11. Minimum *jus in bello* Protections Due Captured Individuals

In a common Article 2 international armed conflict, captured combatants are protected by all of 1949 Geneva Convention III, the POW convention. Similarly protected are captured medical personnel and chaplains, as well as persons who accompany the armed forces without being members thereof, merchant marine and civilian aircraft crews, and members of *levées en masse*.

In a common Article 2 conflict, protected persons are due the protections of 1977 Additional Protocol I and Geneva Convention common Article 3. Although a plain reading of common Article 3 indicates it is applicable only in non-international armed conflicts, today common Article 3 is considered customary international law applicable in all armed conflicts, regardless of their nature.

In either common Article 2 or common Article 3 armed conflicts, civilians are also protected by a variety of human rights treaties. For the United States these include the UN International Covenant on Civil and Political Rights, and the UN Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment.[251]

Under LOAC and IHL, in a common Article 2 international armed conflict, what are the minimal protections to which captured unlawful combatants/unprivileged belligerents are entitled? "The minimum guarantees applicable to all persons in the power of a party to conflict are defined nowadays in Article 75 of PI [Additional Protocol I]."[252] Although not ratified by the United States, those guarantees, along with the humane treatment requirements of common Article 3, are basic rights which are due every prisoner, detainee, unlawful combatant, enemy combatant, unlawful enemy combatant, and high value detainee. That is not to say that the Geneva Conventions or Additional Protocol I in their entireties are always applicable to each of those categories, but the guarantees in Article 75 of Additional Protocol I, and common Article 3, both customary international law, are the minimum protections applicable to them.

What constitutes common Article 3's "humane treatment"? The *Commentary* to Geneva Convention I says:

> Lengthy definition of expressions such as "humane treatment" or "to treat humanely" is unnecessary, as they have entered sufficiently into current parlance to be understood. It would therefore be pointless and even dangerous to try to enumerate things with which a human being must be provided for his normal maintenance . . . or to lay down in detail the manner in which one must behave towards him . . . The details of such treatment may, moreover, vary according to circumstances . . . and to what is feasible.[253]

[250] Marco Sassòli, "The Status of Persons Held in Guantànamo under International Humanitarian Law," 2–1 *J. of Int'l Crim Justice* (March 2004), 96, 104.
[251] Elsea, *Treatment of "Battlefield Detainees,"* supra, note 19, at CRS-12–13.
[252] Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants,'" supra, note 94, at 67.
[253] Pictet, *Commentary, I Geneva Convention*, supra, note 23, at 53.

One hopes the *Commentary* is correct in saying that a definition of humane treatment is unnecessary.

6.12. Summary

Individual status is the second of the two critical questions to be answered when examining any armed conflict. We see that, as in any question of law, there are gray areas and unresolved issues.

An individual's status is most significant. Whether one is a combatant or a civilian (or a subset of either), individual status determines what one may lawfully do in armed conflict and, if captured by an enemy who respects LOAC/IHL, how one will be treated. In a conflict against terrorists showing no inclination to such observance, *jus in bello* individual status becomes all the more important to U.S. and coalition forces who *do* respect it. The international community rightly focuses on the treatment accorded captured terrorists and insurgents as a measure of the holding state's commitment to law.

Combatants, lawful or otherwise, are creatures of common Article 2 international armed conflicts; that status does not apply in common Article 3 non-international conflicts. Similarly, POWs and protected persons are aspects of common Article 2 conflicts only. Unlawful combatants/unprivileged belligerents are civilians in an international armed conflict who take a direct part in hostilities. They lose their civilian immunity and become lawful targets without POW entitlement.

Terrorists are criminals. In a common Article 2 international armed conflict, they are not entitled to POW status. Terrorists are not civilians as defined in Article 50.1 of Additional Protocol I because terrorists, by definition, engage in combat. In a common Article 2 conflict, terrorists are criminals who engage in combat, to be captured and tried under domestic law or military commission for their unlawful acts.

In a common Article 3 non-international armed conflict terrorists are no more than well-armed criminals.

When there is doubt as to a captive's status, his default status in an international armed conflict is POW. The question of his status, if any, is resolved through an Article 5 hearing. Such hearings are not called for when the captive's status is apparent or obvious, only when there is doubt. Even those determined by an Article 5 hearing to be terrorists, insurgents, or unlawful combatants are protected by LOAC/IHL.

In terms of LOAC, the "war on terrorism" is not a war nor, since the post-Saddam and post-Taliban governments of Iraq and Afghanistan were established, is it an international armed conflict. Neither the Taliban nor al Qaeda constitute states, and only states can be parties to a conflict in which the laws and customs of war apply. Nor do Taliban or al Qaeda fighters qualify as combatants under 1977 Additional Protocol I, and its CARs provisions. They and their opponents, the United States, Iraq, Afghanistan, and coalition forces, are engaged in common Article 3 non-international armed conflicts. Taliban and al Qaeda fighters are not combatants, lawful or unlawful. They are criminals who, upon capture, are subject to trial and punishment under the domestic law of the capturing state or by military commission. Meanwhile, we needlessly assign them designations such as "detainee," "enemy combatant," and "unlawful enemy combatant." Those designations are not universally accepted individual statuses but, with time and continued use may mature into internationally accepted *jus in bello* statuses. Or not.

The war on terrorism's uneasy blend of military and law enforcement models – soldiers fighting fighters who, if captured, may be prosecuted in domestic courts and military tribunals – presents unique battlefield issues. Today, combating terrorism involves a mix of LOAC/IHL with an injection of human rights law, overlaid with domestic criminal law.

The Geneva Conventions, and even the 1977 Additional Protocols, do not seamlessly fit this new blend. The Conventions and Protocols are like the expensive suit you bought several years ago. The suit is no longer comfortable, confining across the shoulders and a bit tight all over, but it is the only suit you have, so you have to wear it. If you could manage to acquire another suit of similar quality and workmanship you would do so, but, given your current situation, that is not a realistic option. So, wear it, use it, make it work. It is still a good suit with outstanding qualities. The most you can do is seek some tailoring here and there; arrange multinational treaties to alter its fit as best you can. There's a lot of life left in this suit.

CASES AND MATERIALS

IN RE BUCK AND OTHERS[254]

Wuppertal, Germany, British Military Court, May 10, 1946

Introduction. *After World War II, when the 1929 Geneva Convention regarding POWs was in effect, a British military commission considered the rights of POWs and resistance fighters to a trial before punishment, as well as the lawfulness of Hitler's Commando Order. The law of war that a common soldier may reasonably be expected to know is also discussed in this brief extract:*

The Facts: The accused Buck was in charge of a German prisoner of war camp. The other accused were subordinate members of the staff. They were charged with executing without trial, in May 1944, ten British and United States prisoners of war and four French nationals.

The accused pleaded that an Order of Hitler of October 18, 1942, provided that enemy airmen who landed by parachute behind the German front line were not to be treated as prisoners of war but were to be executed without trial. It was contended by the defence that the British prisoners of war belonged to the Special Air Service whose function it was to organize and support the French resistance movement, that all of the prisoners had been in possession of sabotage equipment and instructions on demolition, and that some of them were spies.

In his summing up, the Judge Advocate advised the Court that Article 2 of the Geneva Convention relative to the treatment of Prisoners of War of 1929 applied to the British and

[254] H. Lauterpacht, ed., *Annual Digest and Reports of Public International Law Cases: Year 1946* (London: Butterworth, 1951), 293. Footnotes omitted.

United States prisoners of war and that the French nationals, although not prisoners of war, were also protected by the laws and usages of war. He pointed out that under the Hague Regulations even spies were entitled to a trial; there seemed to him to be no evidence that the executed persons were tried before a Court. He said: "What did each of these accused know about the rights of a prisoner of war? That is a matter of fact upon which the Court has to make up its mind. The Court may well think that men are not lawyers: they may not have heard either of the Hague Convention or the Geneva Convention; they may not have seen any book of military law upon the subject; but the Court has to consider whether men who are serving either as soldiers or in proximity to soldiers know as a matter of the general facts of military life whether a prisoner of war has certain rights and whether one of those rights is not, when captured, to security for his person. . . . The position under international law is that it is contrary to rules of international law to murder a prisoner, and if this Court took the view that the shooting of these four French nationals was a murder of a prisoner held by the Germans and under the control of these accused, the Court would be entitled to convict these accused of the violation of the rules of international law." The Judge Advocate pointed out that in principle superior orders afforded no defence to a criminal charge . . . He expressed the view that a person would be guilty if he committed a war crime in pursuance of an order: if the order was obviously unlawful, if the accused knew that the order was unlawful, or if he ought to have known it to be unlawful had he considered the circumstances in which it was given.

Held: That Buck and nine other accused were guilty. One accused was acquitted. Buck and four other accused were sentenced to death. Five accused were sentenced to terms of imprisonment.

Conclusion. *The differences between a post–World War II military commission and military commissions related to the war on terrorism are apparent. Military commissions were initially held at or near the field of battle, their procedure based on familiar court-martial practice, charging familiar offenses, although with relaxed rules of procedure and evidence. The difficulties of implementing a new trial system, with new trial procedure, new rules of evidence, and new and novel offenses, are apparent in Guantanamo's version of military commissions.*

MILITARY PROSECUTOR V. OMAR MAHMUD KASSEM AND OTHERS

Israel, Military Court sitting in Ramallah. April 13, 1969

Introduction. *Before 1977 Additional Protocol I, the requirements to be a combatant and, upon capture, a POW, were well-known and clear. As we know, the various criteria for POW status are contained in 1949 Geneva Convention III, Article 4A (1) through (6). The* Kassem *trial illustrates that seemingly clear LOAC is not always so. Were this case tried in 1979, after the formation of the 1977 Additional Protocols, instead of 1969, would the result have been different? Of what legal impact is it that Israel has not ratified the Additional Protocols?*

The following is the judgment of the Court:

The first of the accused pleaded that he was a prisoner of war, and similar pleas were made by the remaining defendants. . . .

The second defendant . . . was prepared to testify on oath . . . He claimed that he belonged to the "Organization of the Popular Front for the Liberation of Palestine" and when captured was wearing military dress and had in his possession a military pass issued to him on behalf of the Popular Front, bearing the letters J.T.F. [Popular Front for the Liberation of Palestine], my name and my serial number.". . . .

[W]e hold that we are competent to examine and consider whether the defendants are entitled to prisoner-of-war status, and if we so decide, we shall then cease to deal with the charge. . . .

We shall now inquire into the kinds of combatants to whom the status of prisoners of war is accorded upon capture. . . .

The principles of the subject were finally formulated in the Geneva Convention [III] of 12 August 1949. . . . We proceed on the assumption that it applies to the State of Israel and its armed forces; Israel in fact acceded to the Convention on 6 July 1951, Jordan did so on 29 May 1951.

Article 4A of this Convention defines all those categories of person who, having fallen into enemy hands, are regarded as prisoners of war. . . .

Without a shadow of a doubt, the defendants are not, in the words of paragraph (1), "Members of the armed forces of a Party to the conflict" or "members of militias or volunteer corps forming part of such armed forces". . . .

. . . [T]he Convention applies to relations between States and not between a State and bodies which are not States and do not represent States. It is therefore the Kingdom of Jordan that is a party to the armed conflict that exists between us and not the Organization that calls itself the Front for the Liberation of Palestine, which is neither a State nor a Government and does not bear allegiance to the regime which existed in the West Bank before the occupation and which exists now within the borders of the Kingdom of Jordan. In so saying, we have in fact excluded the said Organization from the application of the provisions of paragraph (3) of Article 4 [of Geneva Convention III, regarding members of the armed forces with allegiance to an authority not recognized by the Detaining Power].

Paragraph (6) of Article 4 [*leveés en masse*] is also not pertinent, since the defendants are not 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 forces. . . .

Another category of persons mentioned in the Convention are irregular forces, i.e., militia and volunteer forces not forming part of the regular national army, but set up for the duration of the war or only for a particular assignment and including resistance movements belonging to a party to the armed conflict, which operates within or outside their own country, even if it is occupied. To be recognized as lawful combatants, such irregulars must, however, fulfil the following four conditions: (a) they must be under the command of a person responsible for his subordinates; (b) they must wear a fixed distinctive badge recognizable at a distance; (c) they must carry arms openly; (d) they must conduct their operations in accordance with the laws and customs of war.

Let us now examine whether these provisions of Article 4A, paragraph (2) [militias, other volunteer corps, and organized resistance movements], are applicable to the defendants and their Organization.

First, it must be said that, to be entitled to treatment as a prisoner of war, a member of an underground organization on capture by enemy forces must clearly fulfil all the four above

mentioned conditions and that the absence of any of them is sufficient to attach to him the character of a combatant not entitled to be regarded as a prisoner of war. . . .

For some reason, however, the literature on the subject overlooks the most basic condition of the right of combatants to be considered upon capture as prisoners of war, namely, the condition that the irregular forces must belong to a belligerent party. If they do not belong to the Government or State for which they fight, then it seems to us that, from the outset, under current International Law they do not possess the right to enjoy the status of prisoners of war upon capture. . . .

. . . If International Law indeed renders the conduct of war subject to binding rules, then infringement of these rules are offenses, the most serious of which are war crimes. It is the implementation of the rules of war that confers both rights and duties, and consequently an opposite party must exist to bear responsibility for the acts of its forces, regular and irregular. We agree that the Convention applies to military forces (in the wide sense of the term) which, as regards responsibility under International Law, belong to a State engaged in armed conflict with another State, but it excludes those forces – even regular armed units – which do not yield to the authority of the State and its organs of government. The Convention does not apply to those at all. They are to be regarded as combatants not protected by the International Law dealing with prisoners of war, and the occupying Power may consider them as criminals for all purposes.

The importance of allegiance of irregular troops to a central Government made it necessary during the Second World War for States and Governments-in-exile to issue declarations as to the relationship between them and popular resistance forces (see, e.g., the Dutch Royal Emergency Decree of September 1944). In fact, the matter of allegiance of irregular combatants first arose in connection with the Geneva Convention. The Hague Convention of 18 October 1907 did not mention such allegiance, perhaps because of the unimportance of the matter, little use being made of combat units known as irregular forces, guerrillas, etc., at the beginning of the century. In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.

In the present case, the picture is otherwise. No Government with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The organization itself, so far as we know, is not prepared to take orders from the Jordan Government, witness the fact that it is illegal in Jordan and has been repeatedly harassed by the Jordan authorities. The measures that Jordan has adopted against it have included the use of arms. This type of underground activity is unknown in the international community, and for this reason, as has been pointed out, we have found no direct reference in the relevant available literature to irregular forces being treated as illegal by the authorities to whom by the nature of things they should be subject. If these authorities look upon a body such as the Popular Front for the Liberation of Palestine as an illegal organization, why must we have to regard it as a body to which international rules relating to lawful bodies are applicable?. . . .

Not every combatant is entitled to the treatment which, by a succession of increasingly humane conventions, have ameliorated the position of wounded members of armed forces. Civilians who do not comply with the rules governing "*levée en masse*" and have taken an active part in fighting are in the same position as spies. Similarly, combatants who are members of the armed forces, but do not comply with the minimum qualifications of belligerents or are proven to have broken other rules of warfare, are war criminals and as such are liable to any treatment and punishment that is compatible with the claim of a captor State to be civilised.

By the introduction of additional distinctions between lawful and unlawful combatants, and combined application of the test of combatant and non-combatant character and of civilian and military status, it becomes possible to give far-reaching protection to the overwhelming majority of the civilian population of occupied territories and captured members of the armed forces.

Within narrower limits even those categories of prisoners who are excluded from such privileged treatment enjoy the benefits of the standard of civilization. At least they are entitled to have the decisive facts relating to their character as non-privileged prisoners established in . . . judicial proceedings. Moreover, any punishment inflicted on them must keep within the bounds of the standard of civilization.

From all the foregoing, it is not difficult to answer the submission of counsel for the defence that a handful of persons operating alone and themselves fulfilling the conditions of Article 4A(2) of the Convention may also be accorded the status of prisoners of war. Our answer does not follow the line of reasoning of learned counsel.

. . . [A] person or body of persons not fulfilling the conditions of Article 4A(2) of the Convention can never be regarded as lawful combatants even if they proclaim their readiness to fight in accordance with its terms. He who adorns himself with peacock's feathers does not therefore become a peacock.

What is the legal status of these unlawful combatants under international law? The reply . . . If an armed band operates against the forces of an occupant in disregard of the accepted laws of war . . . then common sense and logic should counsel the retention of its illegal status. If an armed band operates in search of loot rather than on behalf of the legitimate sovereign of the occupied territory, then no combatant or prisoner of war rights can be or should be claimed by its members.

If we now consider the facts we have found on the evidence of the witnesses for the prosecution . . . we see that the body which calls itself the Popular Front for the Liberation of Palestine acts in complete disregard of customary International Law accepted by civilized nations.

The attack upon civilian objectives and the murder of civilians in Mahne Yehuda Market, Jerusalem, the Night of the Grenades in Jerusalem, the placing of grenades and destructive charges in Tel Aviv Central Bus Station, etc., were all wanton acts of terrorism aimed at men, women and children who were certainly not lawful military objectives. . . . Immunity of non-combatants from direct attack is one of the basic rules of the international law of war.

The presence of civilian clothes among the effects of the defendants is, in the absence of any reasonable explanation, indicative of their intent to switch from the role of unprotected combatants to that of common criminals. Acts involving the murder of innocent people, such as the attack on the aircraft at Athens and Zurich airports, are abundant testimony of this.

International Law is not designed to protect and grant rights to saboteurs and criminals. The defendants have no right except to stand trial in court and to be tried in accordance with the law and with the facts established by the evidence, in proceedings consonant with the requirements of ethics and International Law.

We therefore reject the plea of the defendants as to their right to be treated as prisoners of war and hold that we are competent to hear the case in accordance with the charge-sheet. . . .

Conclusion. *Do you agree with the court's holding that a prisoner must belong to a party to the conflict to merit POW status? In answering, consider Geneva Convention III, Article 4A(2).*

"THE ĈELEBIĆI CASE," PROSECUTOR V. DELALIĆ, ET AL.

IT-96-21-T (16 November 1998). Footnotes omitted.

Introduction. *Thirty years after the* Kassem *decision, the ICTY also examined the criteria for several varieties of POW status. The Tribunal systematically examines the possible categories of POW in determining if any of the victims of the accused were other than civilians. Might their victims have been eligible for POW status?*

267. Article 4(A) of the Third Geneva Convention sets the rather stringent requirements for the achievement of prisoner of war status. Once again, this provision was drafted in light of the experience of the Second World War and reflects the conception of an international armed conflict current at that time. Thus, the various categories of persons who may be considered prisoners of war are narrowly framed.

268. In the present case, it does not appear to be contended that the victims of the acts alleged were members of the regular armed forces of one of the parties to the conflict, as defined in sub-paragraph 1 of the Article. Neither, clearly, are sub-paragraphs 3, 4 or 5 applicable. Attention must, therefore, be focused on whether they were members of militias or volunteer corps belonging to a party which: (a) were commanded by a person responsible for his subordinates; (b) had a fixed distinctive sign recognizable at a distance; (c) carried arms openly; and (d) conducted their operations in accordance with the laws and customs of war. Alternatively, they could have constituted a *levée en masse*, that is, being inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously took up arms to resist the invading forces, without having had time to form themselves into regular armed units, and at all times they carried arms openly and respected the laws and customs of war.

269. The Prosecution seeks to invoke the provisions of Additional Protocol I to interpret and clarify those of Article 4(A) (2) and wishes to take a liberal approach to the detailed requirements that the sub-paragraph contains. Even should this be accepted, and despite the discussion above of the need to take a broad and flexible approach to the interpretation of the Geneva Conventions, the Trial Chamber finds it difficult, on the evidence presented to it, to conclude that any of the victims of the acts alleged in the Indictment satisfied these requirements. While it is apparent that some of the persons detained in the Ĉelebići prison-camp had been in possession of weapons and may be considered to have participated in some degree in 'hostilities', this is not sufficient to render them entitled to prisoner of war status. There was clearly a Military Investigating Commission established in Konjic, tasked with categorising the Ĉelebići detainees, but this can be regarded as related to the question of exactly what activities each detainee had been engaged in prior to arrest and whether they posed a particular threat to the security of the Bosnian authorities. Having reached this conclusion, it is not even necessary to discuss the issue of whether the Bosnian Serbs detained in Ĉelebići "belonged" to the forces of one of the parties to the conflict.

270. Similarly, the Trial Chamber is not convinced that the Bosnian Serb detainees constituted a *levée en masse*. This concept refers to a situation where territory has not yet been occupied, but is being invaded by an external force, and the local inhabitants of the areas in the line of this invasion take up arms to resist and defend their homes. It is difficult to fit the circumstances of the present case . . . into this categorisation. The authorities in the Konjic municipality were clearly not an invading force from which the residents of certain

towns and villages were compelled to resist and defend themselves. In addition, the evidence provided to the Trial Chamber does not indicate that the Bosnian Serbs who were detained were, as a group, at all times carrying their arms openly and observing the laws and customs of war. Article 4(A) (6) undoubtedly places a somewhat high burden on local populations to behave as if they were professional soldiers and the Trial Chamber, therefore, considers it more appropriate to treat all such persons in the present case as civilians.

271. It is important, however, to note that this finding is predicated on the view that there is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its Article 4 [protected person] requirements are satisfied. . . .

273. The Prosecution has further argued that Article 5 of the Third Geneva Convention required that, where there was some doubt about the status of the Ĉelebići detainees, they had to be granted the protections of the Convention until that status was determined by a competent tribunal. On this basis they were "protected persons" and subject to the grave breaches provisions of the Third Convention. While there may, on the basis of this Article, have been a duty upon the Bosnian forces controlling the Ĉelebići prison-camp to treat some of the detainees as protected by the Third Geneva Convention until their status was properly determined and thus treat them with appropriate humanity, the Trial Chamber has found that they were not, in fact, prisoners of war. They were, instead, all protected civilians under the Fourth Geneva Convention and the Trial Chamber thus bases its consideration of the existence of "grave breaches of the Geneva Conventions" on this latter Convention. . . .

Conclusion. *The accused Delalić was acquitted of all charges. His three co-accused were convicted of various violations of the ICTY Statute and sentenced to seven, twenty, and fifteen years confinement, respectively.*

Theodor Meron writes, "The literal application of Article 4 in the Yugoslav context was unacceptably legalistic. This would also be true of other cases involving conflicts among contesting ethnic or religious groups. In many contemporary conflicts, the disintegration of States and the quest to establish new ones make nationality too impractical a concept on which to base the application of international humanitarian law. In light of the protective goals of the Geneva Conventions, in situations like the one in the former Yugoslavia, Article 4's requirement of different nationality should be construed as referring to persons in the hands of an adversary . . . In the Ĉelebići *case, an ICTY Trial Chamber moved in this direction."*[255] *Do you agree that there should be a relaxation of Article 4A's requirements in some cases? Can you say why?*

GENEVA CONVENTION III, ARTICLE 5 HEARING: A GUIDE[256]

Introduction. *In U.S. military practice there is no Armed Forces-wide order or regulation that directs how an Article 5 hearing should be conducted. Nor does 1949 Geneva Convention III, which requires the hearing, offer guidance. The Commentary to Geneva Convention III is*

[255] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006), 34–5.
[256] Available at: https://www.mpf.usmc.mil/TermApp/SJA/Topics/20051102113719/LOWW%20Master%20Document.pdf.

likewise silent on how to conduct a "competent tribunal." Although more than 1,000 Article 5 hearings were conducted during the first Gulf War, virtually all by the Army, their procedure was left to the headquarters of the major Army units that captured individuals whose status was often in doubt. In its entirety, this is the guidance provided by Central Command Headquarters:

R 27–13

UNITED STATES CENTRAL COMMAND
7115 South Boundary Boulevard
MacDill Air Force Base, Florida 33621-5101

REGULATION 07 FEB 1995
NUMBER 27-13

Legal Services
CAPTURED PERSONS. DETERMINATION OF ELIGIBILITY
FOR ENEMY PRISONER OF WAR STATUS

1. PURPOSE. This regulation prescribes policies and procedures for determining whether persons who have committed belligerent acts and come into the power of the United States Forces are entitled to enemy prisoner of war (EPW) status under the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (GPW).

2. APPLICABILITY. This regulation is applicable to all members of United States Forces deployed to or operating in support of operations in the US CENTCOM AOR.

3. REFERENCES.
a. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.
b. DA Pamphlet 27-1, Treaties Governing Land Warfare, December 19956.
c. FM 27-10, the Law of Land Warfare, July 1956.
d. J. Pictet, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, International Committee of the Red Cross.

4. GENERAL.
a. Persons who have committed belligerent acts and are captured or otherwise come into the power of the United States Forces shall be treated as EPWs if they fall into any of the classes of persons described in Article 4 of the GPW (Annex A).
b. Should any doubt arise as to whether a person who has committed a belligerent act falls into one of the classes of persons entitled to EPW status under GPW Article 4, he shall be treated as an EPW until such time as his status has been determined by a Tribunal convened under this regulation.
c. No person whose status is in doubt shall be transferred from the power of the United States to another detaining power until his status has been determined by a Tribunal convened under GPW Article 5 and this regulation.

5. DEFINITIONS.
a. Belligerent Act. Bearing arms against or engaging in other conduct hostile to United States' persons or property or to the persons or property of other nations participating as Friendly Forces in operations in the USCENTCOM AOR. ...

b. Detainee. A person, not a member of the US Forces, in the custody of the United States Forces who is not free to voluntarily terminate that custody.

c. Enemy Prisoner of War (EPW). A detainee who has committed a belligerent act and falls within one of the classes of persons described in GPW Article 4. . . .

d. Person Whose Status is in Doubt. A detainee who has committed a belligerent act, but whose entitlement to status as an EPW under GPW Article 4 is in doubt.

e. President of the Tribunal. The senior Voting member of each Tribunal. The President shall be a commissioned officer serving in the grade of 04 [major] or above.

f. Recorder. A commissioned officer detailed to obtain and present evidence to a Tribunal convened under this regulation and to make a record of the proceedings thereof. . . .

g. Screening officer. Any US military or civilian employee of the Department of Defense who conducts an initial screening or interrogation of persons coming into the power of the United States Forces.

h. Tribunal. A panel of three commissioned officers, at least one of whom must be a judge advocate, convened to make determinations of fact pursuant to GPW Article 5 and this regulation.

6. BACKGROUND.

a. The United States is a state party to the four Geneva Conventions of 12 August 1949. One of these conventions is the Geneva Convention Relative to the Treatment of Prisoners of War. The text of this convention may be found in DA Pamphlet 27-1.

b. By its terms, the GPW would apply to an armed conflict between the United States and any country.

c. The GPW provides that any person who has committed a belligerent act and thereafter comes into the power of the enemy will be treated as an EPW unless a competent Tribunal determines that the person does not fall within a class of persons described in GPW Article 4.

d. Some detainees are obviously entitled to EPW status, and their cases should not be referred to a Tribunal. These include personnel of enemy armed forces taken into custody on the battlefield. . . .

e. When a competent Tribunal determines that a detained person has committed a belligerent act as defined in this regulation, but the person does not fall into one of the classes of persons described in GPW Article 4, that person will be delivered to the Provost Marshal for disposition as follows:

(1) If captured in enemy territory. In accordance with the rights and obligations of an occupying power under the Law of Armed Conflict (see references at paragraph 3).

(2) If captured in territory of another friendly state. For delivery to the civil authorities unless otherwise directed by competent US authority.

7 RESPONSIBILITIES.

a. All US military and civilian personnel of the Department of Defense (DoD) who take or have custody of a detainee will:

(1) Treat each detainee humanely and with respect.

(2) Apply the protections of the GPW to each EPW and to each detainee whose status has not yet been determined by a Tribunal convened under this regulation.

b. Any US military or civilian employee of the Department of Defense who fails to treat any detainee humanely, respectfully or otherwise in accordance with the GPW, may be subject to punishment under the UCMJ or as otherwise directed by competent authority.

c. Commanders will:

(1) Ensure that personnel of their commands know and comply with the responsibilities set forth above.

(2) Ensure that all detainees in the custody of their forces are promptly evacuated, processed, and accounted for.

(3) Ensure that all sick or wounded detainees are provided prompt medical care. Only urgent medical reasons will determine the priority in the order of medical treatment to be administered.

(4) Ensure that detainees determined not to be entitled to EPW status are segregated from EPWs prior to any transfer to other authorities.

d. The Screening Officer will:

(1) Determine whether or not each detainee has committed a belligerent act as defined in this regulation.

(2) Refer the cases of detainees who have committed a belligerent act and who may not fall within one of the classes of persons entitled to EPW status under GPW Article 4 to a Tribunal convened under this regulation.

(3) Refer the cases of detainees who have not committed a belligerent act, but who may have committed an ordinary crime, to the Provost Marshal.

(4) Seek the advice of the unit's servicing judge advocate when needed.

(5) Ensure that all detainees are delivered to the appropriate US authority, e.g. Provost Marshal, for evacuation, transfer or release as appropriate.

e. The USCENTCOM SJA will:

(1) Provide legal guidance, as required, to subordinate units concerning the conduct of Article 5 Tribunals.

(2) Provide judge advocates to serve on Article 5 Tribunals as required.

(3) Determine the legal sufficiency of each hearing in which a detainee who committed a belligerent act was not granted EPW status. Where a Tribunal's decision is determined not to be legally sufficient, a new hearing will be ordered.

(4) Retain the records of all Article 5 Tribunals conducted. Promulgate a Tribunal Appointment Order IAW Annex B of this regulation.

f. Tribunals will:

(1) Following substantially the procedures set forth at Annex C of this regulation, determine whether each detainee referred to that Tribunal:

(a) did or did not commit a belligerent act as defined in this regulation and, if so, whether the detainee

(b) Falls or does not fall within one of the classes of persons entitled to EPW status under Article 4 of the GPW.

(2) Promptly report their decision to the convening authority in writing.

g. The servicing judge advocate for each unit capturing or otherwise coming into possession of new detainees will provide legal guidance to Screening Officers and others concerning the determination of EPW status as required.

8. PROPONENT. The proponent of this regulation is the Office of the Staff Judge Advocate, CCJA. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank

Forms) directly to United States Central Command, CCJA, 7115 South Boundary Boulevard, MacDill Air Force Bas, Florida 33621-5101.

FOR THE COMMANDER IN CHIEF

OFFICIAL: R. I. NEAL
LtGen, USMC
Deputy Commander in Chief
/s/
ROBERT L. Henderson
LTC, USA
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DISTRIBUTION:

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Conclusion. *Compared to detainee-related procedures employed after 9/11, this regulation is quaint and simplistic. It is also clear, concise, effective, and in compliance with the requirements of LOAC/IHL. It leaves little doubt as to what is required of U.S. combatant forces. During and after Operation Desert Shield/Desert Storm, when this regulation was in effect, there were virtually no complaints raised, domestically, internationally, or in the media, regarding the handling or treatment of enemy prisoners, most of whom were anticipated to be POWs.*

Granted, most of those captured post-9/11 were Taliban and al Qaeda members or adherents whose capture presented issues greatly more complex than the Iraqi combatants captured during and after the very brief period of armed conflict in Kuwait and Iraq. Still, the straightforward approach taken by Central Command, giving clear guidance to subordinate combatants in the field and leaving matters of interrogation and intelligence gathering to those traditionally tasked with those matters, has much to recommend it.