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Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy

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SUMMARY

Combatancy has throughout the history of organized warfare been an exclusionary concept. Distinguishing between combatants and civilians has long represented an important aspect of warfare and has been recognized as the indispensable means by which humanitarian principles are injected into the rules governing conduct in war. Yet the protection of participants in warfare under international humanitarian law remains characterized by a certain level of uncertainty as regards the codified provisions for combatants and civilians. Who qualifies as a combatant is a question that has plagued those seeking to establish a comprehensive normative regime governing participation in hostilities.

Acting on behalf of a state has constituted the primary means of attaining combatant, and therefore legitimate, status. As a result, a significant number of participants in warfare do not meet the established criteria and are, consequently, considered 'illegitimate' or 'unlawful.' This includes those fighting in international armed conflict as well as groups engaged in armed conflict not of an international character. The uncertain status of these 'illegitimate' warriors is evidenced by the variety of terms used to describe them. The traditional dual privileged status approach of dividing a population into combatants and civilians is only as effective as the accuracy with which the definition of 'combatant' is established and to the extent there is a clear understanding of when civilians lose the protection of their status by participating in hostilities.

Recently, the question of combatancy and the protection of captured enemy personnel has gained prominence due to the decision of the United States government in 2002 to deny prisoner of war status to the Taliban and Al Qaeda fighters. Similarly, there is considerable controversy as to the standard of treatment to be applied to captured unlawful combatants. Historically, a consistent result of being determined to be an unauthorized participant in hostilities has been harsh treatment at the hands of the captor. Questions are asked whether civilian participants in combat are a type of 'illegal' combatant, fall under civilian status, or merit their own status under international humanitarian law. The idea of an intermediate status is rejected by many analysts.

In order to address warfare comprehensively, international humanitarian law must tackle both its direct and indirect manifestations. Efforts to advance humanitarian law in the twentieth century have not provided a simple solution to this complex problem. In defining lawful combatancy, international humanitarian law has created an excluded group of participants in combat about whom many questions remain unresolved. The law surrounding the assessment of combatancy has not yet attained the level of certainty that should be demanded of it to be considered properly to encompass all aspects of warfare and those who participate in it. It is perhaps inevitable that the increasingly complex nature of modern conflict will bring further pressure to advance this area of the law in the twenty-first century.

A primary problem has been the linkage of the treatment of detainees to the concept of legitimacy. The highest level of protection associated with prisoners of war remains tied to the concept of lawful combatancy. However, the imprecise criteria for attaining combatant status and the fact that the determination of legitimacy rests largely with the detaining power can mean that any claim to be a lawful combatant is subject to considerable uncertainty. The issue of whether 'unpriviledged belligerents' are entitled to the protection associated with internment was decided over fifty years ago. The remaining question is why that protection is not extended to those belligerents who technically may be outside the reach of the 1949 Civilian Convention. This would ensure a consistent application of international humanitarian law protection based on the treatment standards associated with prisoners of war without introducing the emotive and often divisive issue of legitimacy.

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> Article 65 [now 75] envisaged covering all the grey area which would always exist whatever might be done, between combatants in a strict sense, as defined in Article 4 of the third Geneva Convention of 1949 and …[the] draft Protocol I, and the peaceful civilian population. An important detail should be emphasized here, namely that the new categories of persons thus protected would be protected within the framework of Article [75] only.
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> Mr. Surbeck (International Committee of the Red Cross), 1976.[1]

This statement by the International Committee of Red Cross representative during the development of Additional Protocol I [2] concerning the "grey area" between the codified provisions for combatants and civilians highlights the uncertainty that has pervaded a fundamental aspect of international humanitarian law: the protection of participants in warfare. Additional Protocol I represents a significant advancement over 1907 Regulations Respecting the Laws and Customs of War on Land[3] in terms of extending humanitarian protection. As James Spaight stated in 1911, the delegates to the 1907 Conference had "almost shirked their task — a task of great difficulty, it must be admitted" [4] in attempting to define combatant status. However, the

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[1] Official Records of the Diplomatic Conference of the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts, CDDH/III/SR. 43, p. 25 (1977) [hereinafter the Official Record].

[2] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature December 12, 1977 1125 UNTS 3 [hereinafter Additional Protocol I - AP I].

[3] Regulations Respecting the Laws and Customs of War on Land, annex to Hague Convention Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

[4] J.M. Spaight, *War Rights on Land* 55 (photo. reprint 1975) (1911).

definition of combatancy and the standards of treatment to be applied to captured personnel continue to dominate contemporary discussions. This occurs despite the fact that Article 75 of Additional Protocol I, which has been recognized as reflecting customary international law,[5] extends human rights protections to every detained belligerent.

The question of combatancy and the protection of captured enemy personnel have gained prominence recently due to the United States decision in 2002 to deny prisoner of war status to the Taliban and Al Qaeda fighters.[6] However, the issue of who can be part of the privileged class of warriors, known as "combatants," [7] and which

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[5] See Michael J. Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions," *American University Journal of Law and Policy* 2, (1987), pp. 427-428. ("We support in particular the fundamental guarantees contained in Article 75, such as the principle that all persons who are in the power of a party to a conflict who do not benefit from more favorable treatment under the Conventions be treated humanely"); George S. Prugh, "American Issues and Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions," *Military Law and Law of War Review* 31 (1992), p. 232.; Adam Roberts, "Counter-terrorism, Armed Force, and the Laws of War," *Survival* 44 (2002), p. 23, quoting the U.S. Army, *Operational Law Handbook*, JA 422 (2003), pp. 18-20; and Knut Dormann, "The Legal Situation of 'Unlawful/Unprivileged Combatants," *International Review of the Red Cross* 85 (2003), p. 70.

[6] See statement by Secretary of Defense Donald Rumsfeld, Press Conference, Department of Defense, February 8, 2002, www.defenselink.mil/news/dodnews.html; White House Press Briefing, February 7, 2002, www.whitehouse.gov/news/releases/2002/02/20020207-6.html; and Joseph P. Bialke, "Al-Qaeda and Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict," *Air Force Law Review* 55, (2004), pp. 16-49.

[7] The term 'warrior' can have many meanings. In *A History of Warfare* (Vintage Books, 1993) John Keegan notes that there are six main forms of military organization: "warrior, mercenary, slave, regular, conscript, and militia" (pp. 227-228), with 'warrior' endowed almost with a tribal connection. Elsewhere, 'warrior' has also been defined as a person "whose occupation is warfare: a fighting man, whether soldier, sailor or (latterly) airman"; a fighter "of the ages celebrated in epic and romance"; as well as a fighter "of uncivilized peoples for whom the designation soldier would be inappropriate." See *The Compact Edition of the Oxford English Dictionary*, Volume II, pp. 120-121 (Oxford University Press 1971). As is noted in Richard Baxter, "The Duties of Combatants and the Conduct of Hostilities," in *International Dimensions of Humanitarian Law* (Henry Dunant Institute/UNESCO/Martinus Nijhoff Publishers, 1988), p. 104, in the past, the term 'combatant' was not a technical treaty term and had been used "in a general sense to describe any member of the 'fighting' armed forces, (other than medical personnel and chaplains and service and support personnel), or any civilian who engages in combat," although in respect to belligerency the Hague Regulations referred to combatants and non-combatants without making a distinction between the two. In AP I, Art. 43 'combatant' takes on a broader meaning to include both fighting and support personnel.

persons do not qualify has long plagued those seeking to establish a comprehensive normative regime governing participation in hostilities. Much of the debate about combatant status over the past century has centered on the issue of legitimacy. In this regard, acting on behalf of a state has constituted the primary means of attaining combatant, and therefore legitimate, status.[8] As a result, a significant number of participants in warfare do not meet the established criteria and therefore are considered "illegitimate" or "unlawful." This includes not only those fighting in international armed conflict, but also groups engaged in armed conflict not of an international character.[9] The uncertain status of these "illegitimate" warriors is evidenced by the variety of terms used to describe them such as unlawful combatants,[10] unprivileged belligerents,[11] enemy combatants,[12] terrorists[13] or

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[8] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Art. 4. A. (2) "[B]elonging to a Party to the conflict" is one of six criteria for lawful combatant status [hereinafter Geneva Convention III].

[9] It is widely recognized that insurgent groups involved in non-international armed conflict do not have lawful combatant status. See Waldemar A. Solf, "The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice," *American University Law Review* 33, (1983), pp. 58-59; Michael Bothe *et al.*, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff Publishers, 1982), p. 244; and Robert K. Goldman and Brian D. Tittemore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law," *The American Society of International Law Task Force on Terrorism* (2003), pp. 5-6.

[10] *Ex Parte Quirin*, 317 U.S. 1 (1942) makes reference to both 'unlawful combatants' and 'unlawful belligerents.' Similarly, in the Nuremburg Tribunal case, The Hostages Case, Trials of War Criminals (Washington: Government Printing Office 1950) [hereinafter the *Hostages Case*], members of resistance movements not having lawful combatant status were referred to as "unlawful belligerents."

[11] See Richard R. Baxter, "So-called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs," *British Yearbook of International Law* (1951), p. 328. (Unprivileged belligerents are defined as "persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949"). See also United Kingdom Ministry of Defence, *The Manual of The Law of Armed Conflict*, (Oxford 2004), p. 279, para. 11.4 [hereinafter the UK Manual].

[12] See Hamdi v. Donald H. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) where reference is made to "enemy combatants," "lawful combatants," and "unlawful combatants."

[13] The link to 'terrorism' is evident in the reasons put forward by the United States for not ratifying AP I. President Ronald Reagan remarked that the perceived legitimization of "wars of national liberation" and the granting of combatant status to irregular forces that do not satisfy the traditional criteria for combatancy "would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves." See "Letter of Transmittal, Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims," *American Journal of International Law* 81 (1987), p. 911.

insurgents.[14] Often these participants in conflict are referred to simply as criminals.

Not everyone considers these participants to be 'illegal.' They are often provided an aura of legitimacy as participants in a "people's war" [15] or "freedom fighters." [16] These participants in conflict are also categorized as "civilians" who lose momentarily the protection of that status, "unless and for such time as they take a direct part in hostilities." [17] However, this civilian categorization can be problematic conceptually in dealing with "unlawful" participants in warfare since the term "civilian" carries with it an aspect of legitimacy. Immediately following the September 11, 2001 attacks on the United States, there was even a denial that "unlawful combatants" exist as a legal category at all.[18] However, increasingly there have been acknowledgments that these participants in hostilities "have frequently been used at least since the beginning of the last century in legal literature, military manuals, and case law."[19]

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[14] 'Insurgent' is defined as "[o]ne who rises in revolt against constituted authority; a rebel who is not recognized as a belligerent 1765." See *The Shorter Oxford English Dictionary on Historical Principles* 1088 (third edition 1973). See also Lindsay Moir, "The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949," *International and Comparative Law Quarterly* 47, 2 (1998), pp. 338-339.

[15] See I.P. Trainin, "Questions of Guerrilla Warfare in the Law of War," *American Journal of International Law* 40 (1946), p. 554.

[16] See R. R. Baxter, "A Skeptical Look at the Concept of Terrorism," *Akron Law Review* 7 (1974), p. 380. ("International law is that body of law which creates rights for me and duties for you. I fight wars of self-defence. You fight imperialistic wars of aggression. I am a patriotic soldier. You are a war criminal. I am a freedom fighter. You are a terrorist."). See also Jan Klabbers, "Rebel With a Cause? Terrorists and Humanitarian Law," *European Journal of International Law* 14 (2003), p. 302.

[17] AP I, Art. 50(3) and Dormann, *supra* note 5, p. 72.

[18] See Adam Roberts, Appendix 9 Supplementary Memorandum 26 (2002), www.parliament.the-stationeryoffice.co.uk/pa/cm200203/cmselect/cmdfence/93/93ap10.htm where Adam Roberts notes that the ICRC altered their initial position that there was no legal category of unprivileged or illegal combatant.

[19] See Dormann, *supra* note 5, p. 46. See also Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'," *The Fletcher Forum of World Affairs* 27, 2 (2003), p. 68. See also Kirby Abbott, "Terrorists: Criminals, Combatants or….? The Question of Combatancy," in *The Measures of International Law: Effectiveness, Fairness and Validity*, (London: Kluwer Law International, 2004), p. 381, for a Canadian government acknowledgement of the concept of unlawful combatant in a statement presented by the Associate Deputy Minister James Wright before the Parliamentary Standing Committee on Foreign Affairs and International Trade.

Similarly, there is considerable controversy as to the standard of treatment to be applied to captured unlawful combatants. Perhaps the clearest example of that controversy is found in the allegations that detainees in the Guantanamo Bay camps are in a legal 'black hole' for which the international legal regime protecting persons who are *hors de combat* had no reach.[20] Clearly, efforts to advance humanitarian law in the twentieth century have not provided a simple solution to this complex problem. In defining lawful combatancy, international humanitarian law has created an excluded group of participants in combat about whom many questions remain unresolved. Perhaps more difficult to understand is why after a century of attempting to regulate and codify international humanitarian law there remains so much confusion and controversy over how these participants in warfare should be treated.

The following exploration of 'combatancy' and 'unprivileged belligerency' seeks to clarify the law concerning these participants in hostilities. This analysis is divided into five parts with the first and second parts focusing on lawful combatancy. First, the principle of distinction will be outlined in order to highlight the importance that combatant status has on this fundamental tenet of international humanitarian law. Second, the history of lawful combatancy; how membership in this privileged warrior class is attained; and the import of attaining combatant status will be assessed. This section will also set out the criteria for establishing lawful combatant status in order to highlight the lack of clarity in the existing standards. These criteria will be assessed in terms of continuing impact the *jus ad bellum* principle of the 'right authority' has on *jus in bello* assessment of combatancy; the nature and scope of warfare; and the role that both dominant and less

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[20] The phrase "black hole" was perhaps most famously used in the United Kingdom Court judgement of Abassi and Anor. v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department, 2002, available at www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2002/1598.html ("Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'."). See also Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 27th F.A. Mann Lecture, November 25, 2003, www.biicl.org/admin/files/F%20A%20MANN.doc ("The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the United States naval base at Guantanamo Bay, where they await trial on capital charges by military tribunals."). For a defense of the standards of treatment, see Bialke, *supra* note 6, pp. 55-59.

powerful states have played in shaping the law. Further, this assessment will explore the unique cases of special forces and 'organized resistance movements' to demonstrate how the law has struggled to adequately address all aspects of warfare.

The third and fourth parts will focus on those who are excluded: the 'illegitimate' participants in warfare. The third section explores the history of unlawful combatancy; outlines the diverse types of unlawful combatants; and assesses the impact of changing attitudes towards "legitimacy" following World War II. This analysis will also look at the effect Additional Protocol I has had on the normative framework governing the treatment of unprivileged participants and the use of special forces. Finally, the paper discusses the human rights/humanitarian law interface to assess whether there remain gaps in the treatment of detained unprivileged belligerents. Ultimately, this essay argues that the law surrounding the assessment of combatancy has not yet attained the level of certainty that should be demanded of it to be considered properly to encompass all aspects of warfare and those who participate in it. A primary problem has been the linkage of the treatment of detainees to the concept of legitimacy. As a result there remains an uneven patchwork of statuses for participants in conflict that impact directly on the treatment provided to them when they are detained. Ultimately, it is suggested that the standard of treatment to be applied should not be based on whether captured persons are 'legitimate' combatants, but rather on their status as human beings and whether they have in fact committed a criminal act.

The principle of distinction

Turning first to the link between combatancy and distinction, international humanitarian law is based on two fundamental principles: the requirement to distinguish between combatants and civilians, and the right of belligerents to adopt means of injuring the enemy are not unlimited.[21] Distinguishing between combatants and

[21] See Nicholas Rengger, "On the Just War Tradition in the 21st Century," *International Affairs* 78, 2 (2002), p. 358. ("The *jus in bello*…had come to revolve around two central principles: proportionality of means and non-combatant immunity.") and James Turner Johnson, *Morality and Contemporary Warfare*, (Yale University Press, 1999), p. 36. The

civilians has been, historically and culturally, an important aspect of warfare and has long been recognized as the indispensable means by which humanitarian principles are injected into the rules governing conduct in war.[22]

The principle of distinction formed the basis of early codification efforts resulting in the 1907 Hague Regulations. Notwithstanding the view that, as a result of the total war practices followed during World War II, "the distinction has been so whittled down by the demands of military necessity that it has become more apparent than real,"[23] the principle continued to be seen as the primary vehicle for the humanizing of war.[24] Contemporary reinforcement of the principle of distinction is reflected in Article 48 of Additional Protocol I[25] and the Nuclear Weapons Advisory Opinion.[26]

However, the traditional dual privileged status approach of dividing a population into combatants and civilians is only as effective as the accuracy with which the definition of 'combatant' is established and to the extent there is a clear understanding of when civilians lose the protection of their status by participating in hostilities. In this regard, if the line between combatant and civilian is drawn improperly, or more

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principle of distinction impacts directly on the second fundamental humanitarian law principle that means of warfare are not unlimited. Weapons with indiscriminate effects, such as land mines and potentially booby traps, "make havoc of the distinction of older law of war between civilian non-combatant and combatants…." G.I.A.D. Draper, "The Emerging Law of Weapons Restraint," in Micheal Meyer and Hilaire McCoubrey, eds., *Reflections on Law and Armed Conflicts*, (London: Kluwer Law International, 1998), p. 64.

[22] The principle of distinction can be found in the practices of the Aztec society, Hinduism, in ancient China, the Japanese Code of bushido, and Islamic law. See Johnson, *supra* note 21, p. 125. See also Leslie Green, *The Contemporary Law of Armed Conflict*, (New York: Manchester University Press, 1996), pp. 20-23.

[23] Lester Nurick, "The Distinction Between Combatant and Noncombatant in the Law of War," *American Journal of International Law* 39, 4 (1945), p. 680.

[24] See J.M. Spaight, *Air Power and War Rights*, (London: Longmans, Green and Co, 1947), p. 76.

[25] AP I, Art. 48 states "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

[26] *Legality of the Threat on Use of Nuclear Weapons, Advisory Opinion*, *International Law Reports* 100 (1996), p. 163. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge University Press, 2004), p. 82, where the principle of distinction is described as a "fundamental and 'intransgressible' principle of customary international law."

porous than the 'black letter' law indicates, "then the ability of the law to regulate the conduct of hostilities can be adversely impacted."[27]

Inevitably, questions are asked whether civilian participants in combat are a type of "illegal" combatant, fall under civilian status, or merit their own status under international humanitarian law. The idea of an intermediate status is rejected by many commentators.[28] There is a particular concern that the concept of "quasi-combatant" will be re-introduced into the humanitarian law lexicon.[29] It was the categorization of factory workers as "quasi-combatants" which was used to justify direct attacks on the civilian population in World War II. This outcome resulted in a significantly more restricted idea of combatant status following that conflict.[30] The reality of armed conflict between nation states is that portions of the population, including its leadership, are often integrated intimately into a nation's capacity to wage war. When civilians cross the line to take a direct part in hostilities then their participation turns 'combatant-like.'[31]

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[27] See Kenneth Watkin, "Combatants, Unprivileged Belligerents and Conflict in the 21st Century," *Israel Defense Forces Law Review* 69, (2003), p. 73, first produced as a policy brief for the Harvard Program on Humanitarian Policy and Conflict Research, www.ihlresearch.org/ihl/pdfs/Session2.pdf. See id., pp. 73-74 for a general discussion on the categorization of belligerents.

[28] See A.P.V. Rogers, *Law on the Battlefield*, (Manchester University Press, 1996), p. 8; and Antonio Cassese, *Expert Opinion On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law*, Public Committee Against Torture in Israel, p. 14, www.stoptorture.org/il/eng/images/uploaded/publications/64.pdf. The ICRC Commentary, Geneva Convention IV, Art. 4, identifies three categories: prisoners of war (GC III), civilians (GC IV), and medical and religious personnel (Geneva Convention I), www.icrc.org.

[29] See Marco Sassoli, "Targeting: The Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts," in David Wippman and Matthew Evangelista eds., *New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts* (2005), pp.201-202.

[30] See J.M. Spaight, "Non-combatants and Air Attack," *Air Law Review* 372, 375 (1938) ("International law should…classify such [armament] workers as *quasi-combatants*. Unless they are clearly separated from ordinary non-combatants their treatment may set the pace for the treatment of all non-combatants."). However for a contemporary assessment see Louise Doswald-Beck, "The San Remo Manual on International Law Applicable to Armed Conflicts at Sea," *American Journal of International Law* 89, (1995), p. 199, where it is noted that resistance to the United States Navy definition of military objectives, which includes "war-sustaining capability," was based in part on a concern it would justify "attacks on civilians, who were said to be 'quasi-combatants' because of the general economic support they gave to the enemy."

[31] See ICRC Commentary, AP I, Art. 51, para. 1944, www.icrc.org ("direct participation" for

Consistent with the Additional Protocol I framework that civilians taking a direct part in hostilities lose the protection of 'civilian' status but not the status itself, one approach has been to view these participants as a subset of the 'civilian' class.[32] A drawback to this interpretation is that by categorizing these belligerents as civilians there is a significant danger that the protection afforded to non-involved civilians may be undermined. [33] An alternate approach has been to divide combatants into two sub-categories: lawful and unlawful combatants. [34] However, this view requires a reassessment of the association of the term "combatant" with legitimate participation in hostilities. [35] The inclusion of unlawful combatants within the category of combatants appears *prima facie* to be inconsistent with the historical linkage between legitimacy and combatant status.

Regardless of whether these participants are viewed as 'unique' civilians or unlawful combatants, their categorization, and, ultimately, how they are treated depends on a comparison against the established standards of lawful combatancy. The analysis will, thus, turn to assessing the law governing lawful combatancy and the impact that law has on the ongoing debate regarding combatant status.

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civilians is most closely associated with acting like a combatant. Therefore, civilians who present an immediate threat are liable to be attacked "to the same extent as combatants.").

[32] Watkin, *supra* note 27, pp. 74-75. See Cassese, *supra* note 28, p. 14. See also the ICRC Commentaries, GC IV, Art 4, *supra* note 28 p. 30 where members of organized resistance movements who do not qualify for prisoner of war status are considered to be protected persons under the Civilian Convention. A contrary view is taken by Yoram Dinstein who states "civilians are not allowed to participate actively in the fighting: if they do they lose their status as civilians." See Dinstein, *supra* note 26, p. 27.

[33] See Kenneth Watkin, "Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict ," in Wippman and Evangelista, eds., *New Wars, New Laws?*, p. 167.

[34] See Dinstein, *supra* note 26, p. 29 where he categorizes an enemy civilian who takes up arms as an unlawful combatant and explains 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."

[35] See AP I, Art. 48.

Combatant status

The following analysis of combatant status highlights the complexities and deficiencies of international humanitarian law regarding the identification of who may lawfully participate in combat. Combatancy is assessed in terms of the exclusive nature of the membership test, its intimate and continuing link to legitimacy, the sufficiency of criteria for determining combatant status, and the struggle to address all types of fighters including those who engage in unconventional warfare.

The privileged class of warriors

The idea that there is a privileged class of warriors who are bound by and benefit from the law of war finds its roots in the Codes of Chivalry of the Middle Ages (the *jus militaire*).[36] This body of law was linked to Just War theory as it developed in the fourteenth and fifteenth centuries. The conduct of war not only had to be 'public' but also 'open.' The open nature of public war is related to perfidy (treachery). Openness "was seen partly as evidence of its 'public' nature and partly as the antithesis of perfidy and cowardly assassination, actions repugnant…to chivalry and the membership of the various knightly orders."[37] This law was not necessarily humanitarian in character, being concerned more with the loss of personal honor or valuable ransom. However, it did carry a separation of military forces from the civilian population and in "humane terms the civilian stands outside the lawful ambit of attack and capture."[38] Acts performed outside these 'public' and 'open' criteria were considered murders and brigandage.[39]

Combatants therefore have a special status. They have the right to participate in hostilities and receive immunity from prosecution

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[36] This, in turn, was derived from Roman law where "by the Roman Fetail Law (*jus fetaile*) no person could lawfully engage in battle with the public enemy without being regularly enrolled and taking the military oaths." A quote from Cicero found in the works of the Henry Wheaton, *Elements of International Law,* and restated in Colonel G.I.A.D. Draper, "Combatant Status: A Historical Perspective," *The Military Law and Law of War Review* 11 (1972), p. 140.

[37] See G.I.A.D. Draper, "The Status of Combatants and the Question of Guerrilla Warfare," *British Year Book of International Law* 45 (1971), pp. 173-174.

[38] Id., p. 177.

[39] Id., p. 173.

("combat immunity") for killing carried out in accordance with the law.[40] Further, combatants have a right to prisoner of war status.[41] Combatant status has not been designed or historically applied as an inclusive concept. In a system designed to provide order and outline standards of conduct, this status is ultimately linked to legitimacy. As will be outlined below, the link to legitimacy is found in the relationship between the fighters and a Party to the conflict. It is also evident in the obligation to comply with the laws and customs of warfare. Further, participation in warfare is not viewed as the act of an individual, but rather combatants are 'instruments' of the state. [42]

Legitimacy and the jus ad bellum controversy

The impact of history on the development of combatant status is not limited to notions of chivalry or the separation of combatants from the civilian population. There continues a fundamental but rarely acknowledged connection to Just War theory. In particular, claims to be a lawful combatant rest fundamentally on an association with the right authority.

(i) The interaction between *jus ad bellum* and *jus in bello*

Contemporary legal thinking includes interpretations that pre-existing bases for the recourse to war have not survived the Kellogg Briand Pact of 1928 and United Nations Charter, although it has been noted in contemporary political thought that there has been "a veritable renaissance of writing and thinking about the just war tradition." [43]

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[40] AP I, Art. 43. See also Dormann, *supra* note 5 p. 45, Yoram Dinstein, "The Distinction Between Unlawful Combatants and War Criminals ," in Yoram Dinstein and Mala Tabory, eds., *International Law at a Time of Perplexity*, (1989), pp. 104-105. Solis, *supra* note 9 p. 58 n. 31 (referring to Arce v. State, 83 Tex. Crim. 292, 202 S.W. 951 (1918) and Kenneth Anderson, "What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base," *Harvard Journal of Law and Public Policy* 25, (2002), p. 614.

[41] See AP I, Art. 44(1) ("[a]ny combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.").

[42] Emmerich de Vattel, *The Law Of Nations*, bk. III, ch. II, para. 6, Joseph Chitty ed, (Gaunt reprint 2001). See also Jean-Jacques Rousseau, *The Social Contract* (Penguin Books reprint, 2004), p.10.

[43] See Rengger, *supra* note 21, p. 355. See also Ingrid Detter, *The Law of War* (2nd ed. 2000), pp. 62-64, for an outline of how the resort to war is governed by positive law set out in the 1928

However, the connection between legitimate fighters and a party to a conflict provides perhaps one of the most interesting and undoubtedly controversial aspects of combatant status since it exposes a continuing link between *jus ad bellum*[44] and *jus in bello*[45] principles. Despite their common origins, these two categorizations of legal principles are considered often to operate independently of one another. This latter view is reflected in the preamble to Additional Protocol I, which states that it "must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict."

Importing issues related to the justness of a cause when assessing *jus in bello* can indeed lead to an unequal application of international humanitarian law.[46] In this regard, concern over mixing *jus ad bellum* with *jus in bello* appears to have concentrated on the "just cause" principle. Notwithstanding the laudable goal of reinforcing the equal application of the law *in bello*, the idea that there is complete separation is coming under increasing scrutiny.[47] The view that *jus ad bellum*

Kellogg-Briand Pact and the United Nations Charter.

[44] The principle of *jus ad bellum* consists of seven principles on how to justify resorting to war: war must have a just cause, competent authority, the right intention, a reasonable hope of success, overall proportionality of good over harm, be a last resort and have the goal of peace. See Johnson, *supra* note 21, pp. 27-38 and Renggers, *supra* note 21, p. 358.

[45] *Jus in bello* relies on two principles: distinguishing between combatants and civilians and that means of warfare are not unlimited. See Johnson, *supra* note 21, p. 36.

[46] The classic example is that of the North Vietnamese decision during the Vietnam War to deny prisoner of war status to captured American military personnel on the basis that "they are guilty of making 'aggressive war' and are, therefore, 'war criminals'." See Howard Levie, "Prisoners of War in International Armed Conflict," *International Law Studies* 59, 1, (1977), p. 42. There is much to be said for Richard Baxter's view that: "[A] reversion to the theory of the 'just war' was fundamentally incompatible with the view that belligerents should be treated on a basis of equality and that the law should bring succor to the 'just' and 'unjust' alike. In the long run, there was probably more to be feared from this skewed operation of the law than from indifference and neglect."
See RR. Baxter, "Introduction," *Case Western Reserve Journal of International Law* 9, (1977), p. 7.

[47] As Adam Roberts indicates, in his analysis of counter-terrorism and the law of war, that both *jus ad bellum* and *jus in bello* continue to impact one another. *Jus in bello* can affect perceptions of the justness of the cause and contribute to public support within a coalition; violations of those standards could help the adversary forces in respect of justification; and in anti-terrorist campaigns the basis for using military forces is often a perception of a definite moral distinction between terrorist actions and those of legitimate forces. The *jus*

operates separately from *jus in bello* is open to challenge given the relatively modern genesis of the terms.[48] While the broader issues of the law governing the recourse to war (*jus ad bellum*) have been separated conceptually from the law governing the conduct of hostilities (*jus in bello*), the status of participants in conflict hinges ultimately on their association with "lawful" parties to a conflict.

(ii) The right authority

In respect of combatancy, the influence of *jus ad bellum* on *jus in bello* does not arise from the just war principle of just cause, but rather because of a connection between combatant status and the 'right' or 'competent' authority (*auctoritas principas*).[49] As James Turner Johnson points out, the *jus ad bellum* criteria are not of equal importance. The concepts of competent authority, just cause, and right intention have priority over the remaining four criteria: last resort, reasonable hope of success, overall proportionality, and a goal of peace.[50] Even among these three criteria the right authority appears to occupy a predominant position as the principle that "presupposes the rest of the just war criteria since it determines who is primarily responsible for judging whether the other criteria are met." [51]

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ad bellum rationale that armed hostilities have resulted form illegal activities (terrorism) can affect the *jus in bello* concepts of neutrality and the degree of responsibility to be attributed to those responsible for engaging in a terrorist campaign. See Roberts,*supra* note 5, p. 9.

[48] See Robert Kolb, "Origin of the Twin Terms Jus Ad Bellum/Jus in Bello," *International Review of the Red Cross* 320 (1997),pp. 560-562 , where he indicates that it is extremely rare to find the terms used before 1930. Robert Kolb indicates that it was at the time of the League of Nations that the two branches came to be considered on an equal footing. In effect the term *jus ad bellum* came into usage to reinforce the rules of *jus contra bellum*. He concludes "that up to the early 1930s the terms *jus ad bellum* and *jus in bello* had no currency" and in fact do not appear to have entered into widespread use until after the Second World War.

[49] See Bialke,*supra* note 6, p. 55, who identifies that "why" Al Qaeda engaged in an armed conflict would be a *jus ad bellum* issue, but appears to link their stateless status solely with *jus in bello* principles.

[50] Johnson,*supra* note 21, p. 41.

[51] See Roda Mushkat, "Who May Wage War? An Examination of an Old/New Question," *American University Journal of International Law and Policy* 2, (1987), p. 101. See also Ian Brownlie, *International Law and the Use of Force by States*, (Oxford University Press, 1963), p. 6 where St. Thomas of Aquinas (1225-74) is quoted as stating: "In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of the private individual to declare war, for he can seek for redress of his rights from the tribunal of his superior."

Perhaps the most obvious link between combatant status and acting for the 'right authority' is found in the constitutive requirement of international humanitarian law that the armed forces seeking to attain combatant status serve or belong to a Party to a conflict.[52] The parties to a conflict contemplated by the Geneva Conventions are states, while Additional Protocol I expands such parties to include national liberation movements.[53] This requirement of belonging to a Party to the conflict is also linked to the historical requirement for combatants to act in a public capacity.

Criteria for combatancy: An exclusive test

A particularly challenging aspect of assessing combatant status is the determination of what standards, in addition to belonging to a Party to a conflict, are to be applied to regulate entry into the privileged warrior class. The development of these standards has been impacted by both the nature of warfare and the power relationships between states. Further, there is a significant lack of consensus on the meaning of the criteria applied to determine lawful combatancy. This can lead to an uneven application of the law and arbitrary determinations of which participants in warfare are lawful and which are not. Ultimately, the question must be asked whether the criteria for attaining lawful combatant status adequately reflect the nature of warfare and fully account for those who participate in it.

(i) The nature of warfare

Private and public war – Although efforts have been made to limit and even eliminate 'war' in a *de jure* sense it can, in *de facto* terms, be an extremely broad concept.[54] Hugo Grotius defines war as "the condition

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[52] Roda Mushkat outlines the following sources of '*auctoritas principas*': action by United Nations organs under Chapter VII and VIII of the UN Charter, more limited claims to neutrality and states acting collectively in self-defense. See Roda Mushkat, *supra* note 51, pp. 133-150. All of these sources are ultimately state-based. See Johnson, *supra* note 21, pp. 58-70.

[53] See GC III, Arts. 4(1) and 4(2), and AP I, Art. 43(1). See also Green, *supra* note 22, pp. 55-56. ("[T]o some extent certain non-international conflicts have come under the aegis of international law since 1977 with the adoption of Article 1(4) of Protocol I and Protocol II additional to the 1949 Geneva Conventions ").

[54] See Christopher Greenwood, "The Concept of War in Modern International Law ,"

of those contending by force," with the root of the word *bellum* being found in the "old word *duellum*."[55] Carl Von Clausewitz notes that "[w]ar is thus an act of force to compel our enemy to do our will."[56] Such definitions of war are not dependent upon states being participants in a conflict and can include 'private' wars.[57] War, in this sense, encompasses conflict ranging from near anarchy to what has become the narrower *de jure* concept of 'public' inter-state conflict.[58]

However, these broad categorizations of 'private' and 'public' war have long been subjected to a regulating framework dominated by the nation-state. As order was established out of the chaos of the Middle Ages, the ultimate authority to suppress private war and engage in public war was placed in the hands of the state.[59] As a result, participation in inter-state or public war carried out by the 'right authority' was legitimate.

Similarly, actions taken by the state to maintain internal order was a lawful exercise of a state's monopoly on the use of force. Conflicts between private individuals or similar challenges to state authority

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International and Comparative Law Quarterly 283 (1987) for a discussion of the declining relevance of the *de jure* concept of war.

[55] Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres,* (Francis W. Kelsey trans., The Clarendon Press, 1925), p. 33. This in turn was based on Cicero's definition that war was a "contending by force." Vattel defines war as "that state in which we prosecute our right by force . See Vattel, *supra* note 42, p. 290.

[56] See Carl Von Clausewitz, *On War*, (Michael Howard and Peter Paret trans. and eds., 1986), p. 75.

[57] See Grotius, *supra* note 55, p. 33, where he emphasizes that private war is not excluded from his definition of war because "it is more ancient than public war and has incontestably, the same nature as public war; wherefore both should be designated by one and the same term."

[58] Vattel was of the view war can be either *public* or *private* with private war "being carried on between two private individuals." See Vattel, *supra* note 42, p. 290.

[59] As Vattel indicated in talking about the natural law right to use force "since the establishment of political societies, a right, so dangerous in its exercise, no longer remains with private persons." A particular concern was that a subject might want to use force against a foreign power and that it was "too dangerous to allow every citizen the liberty of doing himself justice against foreigners." Id., p. 292. See also Jean-Jacques Rousseau, *supra* note 42, p. 9 ("[P]rivate wars…were no more than an abuse of feudal government, an irrational system if ever there was one, and contrary to natural justice and to all sound policy."). See also Draper, *supra* note 37, p. 175 ("The older idea of knights, men-at-arms and mercenaries 'avowed' by a prince changed to that of armed forces in the service of a territorial, secular state.").

were not legitimate and, therefore, subject to suppression by the state.[60] This public and private categorization of war is reflected in the more modern terminology of international and non-international armed conflict. Further, it provides the basic framework for assessing the status of participants in conflict. Those acting on behalf of the state in international conflict, or employed to maintain internal order, have a legitimate status. Persons acting outside that authority are private actors who cannot ordinarily claim that status. The challenge presented by contemporary trans-national terrorists to this traditional means of categorizing conflict is their ability to project state-like violence beyond the borders of a single state. As a result, a conflict between states and private actors, which is traditionally viewed as an internal affair, is now being played out on an international scale.[61]

Direct and indirect warfare – A second challenge in regulating warfare arises from the manner in which it is waged. John Keegan assessed war on a cultural basis, in that it "antedates the state, diplomacy and strategy by many millennia."[62] In doing so he concluded "culture is…a prime determinant of the nature of warfare."[63] The methods of warfare can be divided into the *direct* and *indirect* ways of war.[64] For example, *indirect* war-making is associated with traits of evasion, delay, and indirectness. This method of conducting war has been used by both state and non-state actors throughout history and is linked to the concept of guerrilla warfare.[65] For example, the writings of Sun Tzu,[66]

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[60] Lindsay Moir, *The Law of Internal Armed Conflict: Cambridge Studies in International and Comparative Law Series* (Cambridge University Press, 2002), p. 60. ("Once rebels are captured, or otherwise rendered unable to continue fighting, . . . they become *hors de combat* and are entitled to the same level of humane treatment as civilians. Their legal status nevertheless remains unchanged, exposing them to the full force of the state's criminal law.").

[61] The issue of an international private war is not a new one. See F. Kalshoven, "The Position of Guerrilla Fighters Under the Law of War," *The Military Law and Law of War Review* 11 (1972), pp. 78-79, where he indicates the conflict between Israel and the Popular Front for the Liberation of Palestine (PFLP) is not an internal conflict and the states opposing Israel do not acknowledge (and even on occasion strongly deny) that the Popular Front is affiliated to them. However, Professor Kalshoven hesitated to characterize the operations of the PFLP and other Arab guerrilla groups as a "private war."

[62] Keegan, *supra* note 7, p. 3.

[63] Id., p. 387.

[64] Id., pp. 387-392. John Keegan describes these methods of warfare as the "western" (European) and "oriental" ways of war respectively.

[65] The term guerrilla entered the military lexicon directly as a result of the uprisings by the

influenced modern revolutionary guerrilla movements such as those developed by Mao Tse Tung.[67] Neither the *direct* nor *indirect* methods of warfare are necessarily employed in isolation as regular armies have "recruited irregulars to patrol, reconnoiter, and skirmish for them" [68] and guerrilla armies can be organized in battalions and regiments and operate with regular forces.[69] However, the *indirect* style of warfare ultimately had significant influence on the conduct of warfare in the twentieth century and is poised to dominate the twenty-first century "war against terrorism." [70]

In contrast, the *direct* way of war is based on moral, intellectual, and technological elements. The moral element has its genesis in the Greek phalanx style of face-to-face combat. It is the *direct* approach that is most closely associated with Von Clausewitz. This method of warfare "was to carry all before it" when it was directed towards the other military cultures. [71] However, during the twentieth century, when nations steeped in the Clausewitzian tradition turned on themselves in two major world wars it "brought disaster and threatened catastrophe."[72]

It remains a significant challenge for anyone attempting to regulate warfare to address all aspects of war in terms of its scope and cultural bases. As will be outlined in the next section, efforts at codification in the late nineteenth century were firmly grounded in Eurocentric ideas

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Spanish against Napoleon's forces during the Peninsular Campaign. It is the "diminutive of the Spanish word Guerra, war, and means petty war." See Francis Lieber, "Guerrilla Parties Considered with Reference to the Law and Usages of War," in Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Precedent Chicago 1983) p. 31. The dictionary of the Spanish academy provides the first meaning of the term 'guerrilla': "A party of light troops for reconnaissance, and opening of the first skirmishes." Id., p. 32.

[66] Sun Tzu, *The Art of War*, (Samuel B. Gritffith trans., 1963).

[67] See Samuel B. Griffith, "Introduction" to Sun Tzu, *supra* note 66, p. 62 and Keegan, *supra* note 7, p. 202.

[68] See Keegan, *supra* note 7, p. 5 ("during the eighteenth century the expansion of such forces — Cossacks, 'hunters', Highlanders, 'borderers', Hussars — had been one of the most noted contemporary military developments").

[69] See Mao Tse-tung, *On Guerrilla Warfare* (Samuel B. Griffith trans., 2000), ch. 5, pp. 71-87.

[70] See Steve Coll, *Ghost Wars* (Penguin Books, 2004), p. 116., where he notes the Afghan leader Massoud was a student of Mao Tse-tung and other revolutionaries in choosing to avoid conflict with Russian forces during their operations in Afghanistan in the 1980s.

[71] See Keegan, *supra* note 7, p. 391.

[72] Id.

of *direct* warfare carried out by states although there was limited recognition that warfare could be conducted by the "people in arms." [73] As a result, there has remained a bias in the law towards viewing uniformed forces acting on behalf of a state as the legitimate participants in conflict. This bias continues to have a significant impact on contemporary assessments of combatant status.

(ii) The dominant military power versus the 'patriotic' approach

As might be expected in an international system of governance dominated by states, the determination of lawful combatancy has been affected directly by the power relationships between nations. While a common starting point for assessing codified international humanitarian law is Francis Lieber's 1863 *Instructions for the Government of Armies of the United States in the Field*,[74] it is primarily in the discussions leading up to the 1907 Hague Regulations where the intractable struggle over the definition of combatant status gained a significant profile.

The Hague meetings were affected deeply by two contrasting approaches. The Prussians, who had dealt harshly with the *franc-tireurs* during the 1870 Franco-Prussian war, led one group which represented the interests of the dominant European military powers. [75] Their approach, mirroring their own status, was to require nations to channel the patriotic fervor of their inhabitants into the regular armed forces of the state. Part of their rationale was that service in a strong military organization "was not only a national, but a humane duty; for the more the war is conducted on both sides by regular and disciplined troops, the less will humanity suffer." [76] However, this preference for regular forces also reflected their overall military superiority. Those large and technologically advanced armed forces were well schooled in

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[73] The term 'people in arms' was used by Von Clausewitz to discuss 'war by means of popular uprisings' in 'the civilized parts of Europe.' See Von Clausewitz, *supra* note 56, p. 479.

[74] U.S. War Department, *Instructions for the Government of Armies of the United States in the Field*, General Orders No. 100, Arts. (April 24, 1863), reprinted in Dietrich Schindler and Jiri Toman, eds., *The Laws Of Armed Conflicts*, (1988).

[75] J.W. Spaight termed this group the "smaller Powers." See Spaight,*supra* note 4, p. 51.

[76] Quotation from M. Rolin-Jacquemyns, War in its Relations to International Law, adopted by Baron Jomini. Id.

the *direct* warfare philosophy of Clausewitz that was so popular with European nation states.[77]

The second group consisted primarily of less dominant military powers which sought to ensure recognition of the patriotic right of all citizens to repel an invader. They championed not only the traditional *levée en masse*,[78] but also the authority for individual citizens to reply invading forces.[79] This patriotic group included nations which had never invoked the *levée en masse*, but who undoubtedly saw it as a counterweight to more dominant military powers that might be potential occupiers.[80]

The result of the Hague deliberations was a limited compromise in which the Hague Regulations provided belligerent status to armies, and to militia that meet the four criteria: being under responsible command, having a fixed distinctive emblem recognizable at a distance, carrying arms openly and conducting their operations in accordance with the laws and customs of war.[81] In deference to the less dominant military powers, there was also provision of belligerent status to inhabitants of a territory which was not occupied, "who on the approach of the enemy, spontaneously take up arms to resist…without having time too organize themselves." [82] This *levée en masse* had to carry arms openly and respect the laws and customs of war.[83]

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[77] See Keegan, *supra* note 7, pp. 19-21 and B. H. Liddell Hart, *Strategy* (Plume Books, 1991), pp. 339-344.

[78] The *levée en masse* of 1870 Franco-Prussian war was diverse consisting of National Guards of the Second Levy (men under forty who had bought freedom from service in the regular army) and Franc-tireurs. The latter group consisted of two types: some authorized by the Government who wore uniforms and others who wore a badge "invisible at a distance and easily removable." See Spaight, *supra* note 4, p. 42.

[79] As James Spaight notes efforts were made to include "a man defending his house against the plunderers and stragglers of an army." See Spaight, *supra* note 4, p. 51. This highlights the narrow and often uncertain line between defense of hearth and home (a form of civil defense) and involvement in the larger conflict. *Id*. pp. 51-52.

[80] This group was described as the "secondary powers." Id, pp. 48-53. Colonel Draper refers to them as the "patriotic party." SeeColonel G.I.A.D. Draper, "The Legal Classification of Belligerent Individuals" in Michael A. Meyer and Hilaire McCoubrey, eds., *Reflections on Law and Armed Conflict*, (London: Kluwer Law International, 1998), p. 198.

[81] Hague Regulation, Art. 1.

[82] Hague Regulation, Art. 2.

[83] Id.

In the end, despite these concessions, the deep division between the two groups could not be resolved. The group advocating broader citizen participation did not view individual participants in unoccupied territory and the *levée en masse* in occupied territory as illegitimate. Rather, they "had not been legislated for and were left to the unwritten law," [84] although, subsequently, *levée en masse* has been interpreted to be limited to the brief period of time just prior to occupation.[85] It was the impasse between the dominant and patriotic powers that prompted James Spaight to comment it cannot be pretended the Conferences "have left the question of belligerent qualification in a very satisfactory state." [86]

The lack of a clear codified solution is best evidenced by the President of the Conference, Friedrich von Martens, who noted that the cases not dealt with would "remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience."[87] While this provision has since been more widely applied to all cases not covered by the codified provisions of international humanitarian law it was not born out of a magnanimous desire to extend humanitarian principles to all affected by warfare. Rather, it reflected the very uncertain, and in many respects unsatisfactory, state of affairs regarding belligerency upon which the juridical bedrock of contemporary notions of combatancy have been founded.

The effect of the belligerency provisions of the Hague Regulations on contemporary military operations cannot be overstated. In addition to being acknowledged as reflective of customary international law, they form the basis for determining prisoner of war status under the 1949 Geneva Conventions and continue to affect interpretations of Additional Protocol I. However, an interpretation of international

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[84] Spaight, *supra* note 4, p. 52.
[85] Dinstein, *supra* note 26, p. 42.
[86] Spaight, *supra* note 4, pp. 54-55.
[87] See Ministry of Foreign Affairs, *The International Peace Conference*, (Martinus Nijhoff, 1907), p. 548. The struggle to expand an interpretation of the Martens clause to all of humanitarian law is reflected in Antonio Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?," *European Journal of International Law* 11 (2000), p. 187.

humanitarian law that assumes the codified law has solved the fundamental impasse between the dominant and patriotic states, or has fully addressed *direct* and *indirect* warfare, will find itself challenged to claim it addresses all aspects of warfare.[88] Indeed, it is the inadequacies of the conventional law that is the basis of the present controversy regarding the treatment of unprivileged belligerents such as the Taliban and Al Qaeda.

(iii) The twentieth century concept of combatancy

Significant questions remain concerning whether advances to the codified law since 1907 fully address combatancy across the full spectrum of conflict. The following analysis of the conventional criteria for attaining combatant status looks at the degree to which the international community managed to bring clarity to this issue during the past century. As part of this assessment the unique cases of the *levée en masse*, organized resistance movements, and special forces will be reviewed.

Advances in the law? – The 1907 Hague Regulations governed the criteria used to determine combatancy during the two world wars of the past century. Unfortunately, the end of World War II saw little serious effort to address the controversies surrounding lawful combatancy. The criteria found in Article 4 (2) of the Third Geneva Convention mirror those of the 1907 regulations, although reference was made to militia and members of other volunteer corps "belonging to a Party to the conflict" and resistance movements being "organized." [89] There were now six stated conditions to be met for attaining lawful combatancy [90] although there has been debate about

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[88] However, see Cassese, *supra* note 87, p. 198 where an argument is suggested that there remained principles or customary rules granting the status of lawful combatants to nationals of an occupied country fighting against an occupying power "was belied by international law and the practice of states." Cassese appears to suggest the 1949 Geneva Convention provisions recognizing "organized resistance movements" as lawful combatants was not an acknowledgement of a customary rule.

[89] GC III, Art. 4 A. (2).

[90] The six criteria set out in Geneva Convention III to determine prisoner of war, and therefore lawful combatant, status: being organized, under responsible command, belonging to a Party to the conflict, wearing a fixed distinctive sign, carrying weapons openly and compliance with the customs and law of war.

which of the criteria are individual or collective in nature. [91]

After World War II, the paralysis brought on by the continuing threat of nuclear war, combined with the rise of movements seeking self-determination, resulted in an increased reliance on *indirect* guerrilla warfare both by state and non-state actors. In many ways such warfare came to define combat in the cold war era.[92] With the increased profile came efforts to regulate this type of warfare. The resulting normative framework is most tangibly represented by the two Additional Protocols to the 1949 Geneva Conventions.[93] While Additional Protocol I has not been accepted by a number of significant states it represents a unique attempt to regulate both *direct* and *indirect* warfare. Some of the most controversial aspects of the Protocol relate to the extension of combatant status to armed groups who are not acting on behalf of a state and requiring that "protections in all respects equivalent to those accorded to prisoners of war" be given to persons who fail to meet the relaxed requirements for combatancy established in the Protocol.[94]

Any assessment of combatant status under Additional Protocol I must be viewed from the perspective that the Protocol supplements the 1949 Geneva Conventions.[95] While the Protocol makes specific reference to the Martens principle,[96] the criteria for attaining combatant status remain largely those set out in the 1949 Geneva Conventions. Article 44(3) of Additional Protocol I simply removes in some circumstances the requirement to wear a fixed distinctive sign recognizable at a distance and prescribes when arms must be carried openly. As a result any contemporary assessment of combatant status requires an understanding of the criteria set out in the Third Geneva Convention

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[91] See Draper, *supra* note 37, p. 196 where it is suggested all six have group attributes while: wearing the distinctive sign, carrying weapons and compliance with the law also must be performed by combatants on an individual basis.
[92] See Liddell Hart, *supra* note 77, p. 367. ("In the past guerrilla warfare has been a weapon of the weaker side, and thus primarily defensive, but in the atomic age it may be increasingly developed as a form of aggression suited to exploit the nuclear stalemate.").
[93] Additional Protocol I and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, Art. 1, 1125 U.N.T.S. 609 [hereinafter Protocol II – APII].
[94] AP I, Art. 43(4).
[95] AP I, Art. 1(3).
[96] AP I, Art. 1(2).

as well as Additional Protocol I.

Criteria for Combatancy: Vaguely Familiar? – The following overview of the six criteria for attaining combatant status highlights the lack of precision in these terms. The existing lack of consensus on the meaning of these criteria can be problematic as the determination of status is left largely to the interpretation of the capturing state although questions of status may sometimes be brought before a court.[97] Further, as noted, a significant number of rights and humanitarian protections attach to having combatant status. A denial of that status can impact on both the treatment and possible trial of the person involved.

- *Belonging to a Party to the conflict*

As has been noted the requirement of belonging to a Party to the conflict reflects the *jus ad bellum* principle of acting under the right authority. Further, it confirms that lawful combatants act in a public capacity. While stated expressly in Article 4(2) of the Prisoner of War Convention in respect to members of a militia or volunteer corps, the disposition applies equally to regular armed forces, *levée en masse*, and any claim for such status by irregular forces. Conceptually, it is an integral part of the patriotic claim for belligerent status. The connection between the obligation to 'belong' to a Party to the conflict and governance (e.g., the state) is reflected in the International Committee of the Red Cross (ICRC) Commentary on Article 4(2) of the 1949 Prisoners of War Convention which "refutes the contention…that this provision amounts to a '*jus insurrectionis*' for the inhabitants of occupied territory." [98] If a group or individual fails to demonstrate an appropriate link to a Party to a conflict then they are excluded from

[97] For example, see Military Prosecutor v. Kassem 42 I.L.R. 470, 477 (1971). Further, see AP I, Art. 45(2) (A person denied prisoner of war status who is being tried for a hostilities related offence has the right to assert "his entitlement to prisoner-of-war status before a judicial tribunal.").

[98] ICRC Commentary, GC III Art. 4(2). However, see also W.Thomas Mallison and Sally V. Mallison, "The Juridical Status of Irregular Combatants under International Humanitarian Law of Armed Conflict," *Case Western Reserve Journal of International Law* 9, (1977), pp. 54-55, where it is argued that members of an organized resistance movement do not belong to a Party to a conflict, but attain legitimacy in their own right. This argument is not persuasive and ignores the historical link between the state and patriotic action.

being combatants.[99]

The development of Additional Protocol I prompted discussions regarding Just War theory and combatancy. The Protocol has been criticized as providing "the resurrection of the just war doctrine and effectively abolish[ing] the distinction between international and non-international armed conflicts.[100] The document has been viewed by some as a treaty that vindicated "the practices of terrorist organizations."[101] Notwithstanding, the question of whether a non-state actor could have the right authority under *jus ad bellum* theory is not a new one. The principle of the right of belligerency that was accepted in the nineteenth and early twentieth century was premised on a view that a non-state actor could acquire sufficient recognition to conduct warfare in a state-like fashion.[102]

The exclusionary nature of the combatancy test, even under Additional Protocol I, is highlighted by criticism that that Protocol leaves out certain non-state actors. A suggestion has been made that the Protocol "failed to provide a 'value-free' legal rationale for the proposed distinction between armed conflicts having similar properties" as it excluded certain types of internal struggles.[103] It was morally objectionable to give preference to struggles based on race rather than ideology because of the introduction of a discriminatory clause in the law.[104] This same issue viewed from a slightly different perspective led to criticism the Protocol was an attempt to provide advantageous treatment to causes favored by the Third World.[105] Regardless of the manner in which the 'national liberation' provisions of the Protocol have been regarded, the armed forces of certain non-state actors are

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[99] See Military Prosecutor v. Kassem 42 I.L.R. 470, 477 (1971) (the lack of a connection between the Organization of the Popular Front for the Liberation of Palestine with an government that accepted responsibility for their actions resulted in the Israeli court ruling that captured members were not entitled to prisoner of war status).

[100] D.J. Feith, "Protocol I: Moving Humanitarian Law Backwards," *Akron Law Review*, 19 (1986), p. 532.

[101] Id., p. 534.

[102] For a discussion of the test for engaging the 'right of belligerency' see Moir, *supra* note 14, pp. 344-350.

[103] Mushkat, *supra* note 51, pp. 115-116.

[104] Id., p. 116.

[105] Detter, *supra* note 43, pp. 101-102.

excluded from attaining combatant status even under Additional Protocol I.

Additional Protocol I does not legitimize terrorism or terrorist organizations. It extends international humanitarian law protection and obligations to a limited group of non-state actors whose ability to remain legitimate depends on their actions during the conflict. Regardless of how narrowly the scope of Additional Protocol I is interpreted, its provisions are not extended to all non-state actors. A non-state actor that does fall within the national liberation movement criteria or belongs to a state would not, as a matter of law, be eligible for combatant status. In effect, that group would be waging private war.[106] As a result, Additional Protocol I does not alter the fact that participants in hostilities may be excluded as a group from having combatant status by virtue of their illegitimate participation in the sense of not operating on behalf of a right authority.

It may be that the criticism of Additional Protocol I has focused excessively on a statist view that including non-state actors is an introduction of just war criteria. Looked at from a different perspective the objection to the Protocol signifies a reluctance to extend the status of being a 'right authority' to national liberation movements. As such, it appears primarily to be a fight to maintain the status quo of a state-based system of 'public' war. While this may represent an understandable preference by nations for state supremacy in a post-Westphalian system of governance, it does not make the issue any less *jus ad bellum* oriented.[107] In this regard the argument against expanding the scope of Additional Protocol I to non-state actors is fundamentally a right authority issue as it is based on protecting the existing

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[106] Bothe, *supra* note 9, p. 235.

[107] The role of the state has increasingly come under scrutiny with recognition of a broader group of non-state participants impacting on constitutive set-up of the international community. For example, see Christopher Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law," *European Journal of International Law* 4 (1993), p. 447., and Nico Schrijver, "The Changing Nature of State Sovereignty,"*British Year Book of International Law* 70 (1999), p. 65. However, in terms of the maintenance of international order in respect of the application of armed force it is the nation state which continues to play a pre-dominate role individually, collectively and through the United Nations. See also Johnson's *supra* note 21, pp. 60-61 where he notes the United Nations on its own lacks the attributes for "international statecraft."

privileged status of states.[108] Whatever perspective is applied, it remains that not all participants in hostilities – including those that may field considerable military capability – will attain combatant status because of who they fight for and not by virtue of their organization as a military force or compliance with the laws and customs of war.

- *Organization and responsible command*

The obligation to be organized and under responsible command is the least controversial of the six conditions for combatancy. It was originally suggested at the Hague meetings as a means of ensuring compliance with the law of armed conflict. This provision does not appear to require a formal command and rank structure,[109] though there must be sufficient discipline to ensure respect for international law.[110] This is systemically necessary as the maintenance of a disciplined armed force has always been one of the bulwarks against the commission of war crimes. However, the notion of command is itself a military concept that on its face precludes the individual based approach historically espoused by the patriotic group of states.

These criteria are reinforced in Additional Protocol I with specific reference that "armed forces shall be subject to an internal disciplinary system."[111] This represents an advance on prior law as it links responsible command to compliance with the rules of international humanitarian law. The obligations set out in Articles 86 and 87 of the Protocol for commanders to act to suppress breaches of international humanitarian law and to be liable for a failure to act reflects a view that greater effect is obtained by ensuring group compliance with the

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[108] See W. Thomas Mallison and Sally V. Mallison, "The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 concerning International Conflicts," *Duke University Law School* 42 (1978), p. 4., where the maintenance of the status quo is discussed in terms of international humanitarian law protected European warfare including to the point of recognizing the *levée en masse*. This analysis addresses the issue of a Eurocentric bias to international humanitarian law; however, it does not raise the issue of the fundamental divide that remained after the Hague meetings.

[109] Draper, *supra* note 37, p. 201.

[110] See ICRC Commentary, AP I, Art. 43 at para. 1672. See also Mallison, *supra* note 98, p. 55 and Levie, *supra* note 46, pp. 46-47.

[111] AP I, Art. 43. 1.

law.[112]

- *Fixed signs and the carriage of weapons*

Assessing the meaning of having a fixed distinctive sign and carrying arms openly has been the most problematic of the six criteria particularly because of the vagueness of the terms.[113] The purpose of these provisions appears twofold: to protect combatants from acts of perfidy and to distinguish civilians from combatants. [114]

Any discussion about the requirement of a distinguishing sign ultimately leads to questions about how fixed, how distinctive, and what is an appropriate sign. These issues arise when considering the guidance provided in contemporary military manuals [115] or in the ICRC commentaries.[116] The imprecise terminology and possible

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[112] As the ICRC Commentary, AP I, Art. 43, *supra* note 110, para.1675 indicates the requirement for an effective discipline system was reflected in the Hague Convention IV, Art. 1 requirement that states issue instructions to their armed forces that was in compliance with the Regulations.

[113] See Bialke, *supra* note 6, p. 24, quoting from Military Board, *Australian Edition of Manual of Military Law* 201-202 ("The distance at which the sign should be visible *is left vague*, but it is reasonable to expect that the silloutte of an irregular combatant in the position of standing against the skyline should be at once distinguishable from the outline of a peaceable inhabitant, and this by the naked eye of ordinary individuals") (emphasis added). German authorities had demanded in 1870 that French irregulars should be recognizable at rifle range. As rifles were sighted at 2000 yards this was seen as unreasonable. See Spaight, supra note 4, p. 57, for a discussion of the distinctive sign issue.

[114] Levie, supra note 46, pp. 46-47.

[115] For example, the *United States Army FM 27-10, Law of Land Warfare* somewhat self-evidently indicates the wearing of a military uniform would meet the requirements, "but less than the complete uniform will suffice." A helmet or headdress producing a silhouette making the individual "readily distinguishable" would provide a sufficient distinguishing mark. It is also clear, however, that such headdress would not have to be 'fixed' although any armband or brassard has to be "permanently affixed to his clothing." It is noted in the ICRC Commentary, GC IV Art. 4(2), *supra* note 28, that wearing a hat would be sufficient although "this may frequently be taken off and does not seem fully adequate." See also *The Hostages Case, Trials of War Criminals* (Washington: Government Printing Office 1950), p. 1244., where it was held by an American military court following World War II that the wearing of civilian clothes, although with parts of German, Italian and Serbian uniforms and even the Soviet star insignia was not enough to sustain it could be seen at a distance.

[116] The ICRC Commentaries, GC III, Art. 4, *supra* note 98 that the "drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be

contradictions of these provisions reflect the problems that have long been associated with this criterion. When the discussion shifts to camouflage, ambushes, and night operations it becomes even more difficult to articulate a universally agreeable standard, although it has been noted that camouflage and disguise as an "ordinary civilian going about his normal pacific activities are different." [117]

This criterion has also been regarded as resulting in "charge and countercharge."[118] It has been noted that making the "difference between life and death hang on the type of clothes worn by the individual can 'create' a clothes philosophy of a particularly dangerous character."[119] Further, the requirement may have been merely a relic of "the type of war fought by closely grouped ranks of soldiers." [120] Of course, this is a reference to *direct* warfare.

The codified law fails singularly to provide definitive criteria on what constitutes a fixed distinctive sign or what standard is to be applied. There is no provision requiring mutual notification. [121] The result is that the capturing state has significant freedom to determine the status of detained personnel by adopting a narrow interpretation of the criteria thereby making detainees, or a group of opponents, unprivileged belligerents. This issue can arise most directly in instances of internal armed conflicts that are internationalized by the insertion of conventional and special forces of another state. However, it has been noted perceptively that, in many civil wars, opponents are often capable of distinguishing themselves from one another by adopting some form of distinguishing feature that may not meet the more

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immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians."

[117] However see Draper, *supra* note 37, p. 202.

[118] See Levie, *supra* note 46, pp. 47-49. See also Mallison, *supra* note 98, pp. 56-57.

[119] See Baxter, *supra* note 11, p. 343.

[120] Id.

[121] See ICRC Commentary, GC III, Art. 4(2) *supra* note 98, where it is stated with respect to regular forces "[t]he Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt." This issue becomes even more problematic in respect of irregular forces.

stringent standards traditionally favored by dominant military powers.[122]

This question also impacts on organized resistance movements who are less likely to adopt a conventional style uniform. However, the lack of certainty leaves considerable room for states to employ personnel, such as special forces, wearing only a portion, or no parts of conventional uniforms and still claim the requirements of international humanitarian law are being met.[123] In either case the uncertainty has the potential to affect the efficacy and the credibility of the principle of distinction.

The carrying of arms openly is a less ambiguous phrase. The purpose of this provision was seen primarily as limiting the concealing of weapons.[124] However, both the requirement to carry arms openly and to wear a distinctive sign are linked inasmuch as their purpose is to distinguish enemy fighters from the general population.[125] A question that arises when applying the 1949 Geneva Conventions is whether it is necessary to carry arms openly at all times. To be certain, regular force combatants do not always carry weapons. When they do, those weapons are not necessarily visible even at a reasonably close distance

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[122] See Goldman and Tittemore, *supra* note 9, p. 28, for a discussion on the ability of the Taliban, the Northern Alliance and United States forces to distinguish one another during the conflict in Afghanistan. Interestingly, see also W. Hays Parks, "Special Forces' Wear of Non-Standard Uniforms," *Chicago Journal of International Law* 4 (2003), p. 497, where the ability of opposing irregular forces to identify one another is suggested as a justification for United States Special Forces personnel wearing indigenous attire.

[123] See Parks, *supra* note 122, p. 497, where he suggests the wearing of indigenous attire was not to appear as civilians but rather "to lower the visibility of US forces vis-à-vis the forces they supported." This clothing is referred to as a "non-standard uniform." While this clothing was civilian in character it is argued there is no law of war violation on the basis of lack of intent. *Id.* p. 498 n. 8.

[124] An American manual speaks of "concealed" weapons or the hiding of weapons when an enemy approaches. See FM 27-10, *supra*, note 115, chap 3, para. 64 c. Similarly, the ICRC Commentary focuses on a 'civilian' not being able to enter a military post on a false pretext thereby taking advantage of the enemy when he opens fire. See ICRC Commentary, GC IV, Art. 4(2), *supra,* note 28, p. 7. See also Mallison, *supra* note 98, pp. 58-59.

[125] See Draper, *supra* note 37, pp. 203-204. See "Military Prosecutor v. Kassem," *International Law Review* 42 (1971), pp. 478-479, where an Israeli court ruled in respect of Palestinian guerrillas that the carrying arms openly criteria was not met since the "the presence of arms in their possession was not established until they began to fire." This conclusion was reached despite the fact that the captured personnel were carrying assault rifles and there appears to have been no evidence provided the weapons were hidden.

(e.g., pistol, grenade, or machete).[126] In addition, participation in hostilities does not necessarily require the carrying of arms.[127] For example, the operation of a laser designator or even the delivery of ammunition to fighting positions can constitute direct participation in hostilities. The danger of relying too heavily on the carrying of arms as an indication of combatancy is that it may lead to a very narrow and unrealistic view of what actually constitutes taking an active part in hostilities.[128]

While Article 44(3) of Additional Protocol I makes specific reference to the principle of distinction, it also establishes that, in certain circumstances, a fixed distinctive sign does not have to be worn. An armed combatant retains combatant status if arms are carried openly during each military engagement and during the time the combatant is "engaged in a military deployment preceding the launching of an attack."[129] However, these unique provisions are only applicable, in effect, to "situations in armed conflicts where, owing to the nature of the hostilities an armed combatant" cannot apply the ordinary rules.[130]

Unfortunately, the additional wording regarding carrying arms during deployments and military engagements has not necessarily provided greater clarity than the provisions of the 1949 Geneva Conventions. In effect, it establishes the carrying of weapons as a distinctive sign that separates combatants from civilians however they are garbed. It is the removal of the fixed distinctive sign criterion which has generated particular controversy since it is seen as an erosion of the principle of distinction.[131] The question remains whether it is an acceptable

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[126] See ICRC Commentary, AP I, Art. 44, para. 1713, where it is suggested if weapons cannot be carried openly (e.g., bomb in a suitcase) then a distinctive sign should be worn. At the turn of the twentieth Century carrying a pistol was not considered to be carrying arms openly. See Spaight, *supra* note 4, p. 59.

[127] See Bothe, *supra* note 9, pp. 251-252.

[128] A weapon-based idea of participation in hostilities can create a 'revolving door' approach that would allow combatants control when they can be attacked simply by throwing away, or choosing not to carry, weapons. For a discussion of this issue see Watkin, *supra* note 33, pp. 156-157.

[129] AP I, Art. 44(3).

[130] Id.

[131] See Dinstein, *supra* note 40, p. 106.

compromise in the goal to encourage non-state actors to follow international humanitarian law. [132]

The requirement to carry arms while the combatant is visible raises many of the same issues that affected a consistent interpretation of the fixed distinctive sign. Is it visibility in terms of the naked eye, by night image intensification, or by binoculars? [133] The idea that the visibility requirement would be dependent upon the level of technological sophistication of the opponent appears problematic in terms of requiring a reciprocal application of the law.

What the "while engaged in a military deployment" criterion does introduce is a temporal element that was not present in the obligation to wear a fixed distinctive sign. This in turn raises questions such as whether it should be interpreted to mean while engaged in "logistical and administrative activities preparatory to an attack." [134] One interpretation has taken the narrow view that military deployment meant "the last step when the combatants were taking their firing positions just before the commencement of hostilities" and that the carrying of arms openly would only occur within "the natural vision of the adversary." [135] Conversely, "deployment" has also been interpreted as "any movement towards a place from which an attack was to be launched." [136]

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[132] See Official Record, *supra* note 1, CDDH/407/ Rev.1 p. 454 ("giving the guerrilla fighter an incentive to distinguish himself from the civilian population where he reasonably could be expected to do so).

[133] Bothe, *supra* note 9, pp. 254-255.

[134] Id., p. 252.

[135] Some countries interpreted "deployment" to only include "final movement to a firing position" or "only moments immediately prior to an attack." See Bothe, *supra* note 9, p. 254 quoting from the Official Record and Mallison, *supra* note 108, p. 23.

[136] See Mallison, *supra* note 108, p. 24 for the quote by United States Ambassador Aldrich. This is reflected in the understanding entered by the United States at the time of the signing of the Protocol. Canada and other nations (e.g. Italy, France, the United Kingdom, Germany, the Netherlands) entered such an understanding. See declarations made on signature or ratification, www.icrc.org.

- *Compliance with the laws and customs of war*

The final condition to be met for combatant status is to conduct operations in compliance with the laws and customs of war. On its face this would appear to be an obvious and non-controversial provision which should be applied equally to all those seeking to be treated as combatants. However, the nature of irregular combat leads inevitably to assessments of whether it is realistic for guerrilla forces to meet all requirements of humanitarian law, such as compliance with the rules governing the housing and treatment of prisoners of war. [137]

The danger of suggesting a different standard for irregular forces is that it erodes the principle of equality in application of international humanitarian law and is built upon a false premise. Such asymmetrical approach assumes that all combat by a developed nation will be carried out by regular armed forces. The use of guerrilla warfare and organized resistance movements during World War II and its aftermath highlight that is not the case. In addition, the law can be applied equally. Just as special operations forces are expected not to kill or abuse prisoners to the point of releasing them if they cannot be detained humanly, the same requirement should be imposed on irregular forces.

- *Group denial of combatant status*

The final issue to be addressed is whether exclusion from combatant status can occur because of the characteristics and actions of the group of participants. The controversial decision by the United States government to deny combatant status to the Taliban as a group brought this issue to the forefront. While the Taliban had a tenuous claim as the *de jure* government of Afghanistan [138] there was considerable reluctance to accept that the armed forces of a functioning state[139] could be denied combatant status on a group basis. This, in

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[137] See F. Kalshoven,*supra* note 61, pp. 81-82, Levie,*supra* note 46, pp. 50-52 and Mallison, *supra* note 98, pp. 58-63.

[138] See Christopher Greenwood, "International Law and the 'War Against Terrorism'," *International Affairs* 78 (2002), pp. 312-313, ("In the circumstances they constituted a de facto government and their actions should be treated as the actions of the state of Afghanistan.").

[139] In respect of the organization of the Taliban armed forces prior to the conflict with

turn, raises the question of whether such a group denial of combatant status is contemplated under the Third Geneva Convention.

Such exclusion is possible since group compliance is regarded as a constitutive condition for the recognition of such forces.[140] One suggested test has been that a group can be denied combatant status in respect of irregular forces based on "the general policy of the organization as is evidenced by its activities, or on the consistent practice of a significant part of its members."[141] For example, group exclusion was addressed directly in *The Hostages* case (United States v. List *et al*).[142] The Nuremberg Military Tribunal ruled that, while some partisan bands met the requirements of lawful belligerency, there had not been satisfactory evidence presented regarding the case in question. Therefore "captured members of these unlawful groups were not entitled to be treated as prisoners of war."[143]

The exclusion of a group from combatant status is easiest to justify in respect of organizations such as Al Qaeda that follows a systemic and

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Coalition forces in the fall of 2001 it is indicated in "The Taliban's Military Forces (Prior to Hostilities)" October 8, 2001, www.janes.com/defence/news/misc/jwa011008_2_n.shtml, that the Taliban's military forces consisted of some 45,000 men, one hundred main battle tanks and about two hundred operational artillery pieces and truck mounted multiple rocket launchers. While there was an army corps on paper "there is no evidence to suggest that any meaningful divisional structure has emerged in the provinces." However, the Taliban displayed an innovative approach to warfare "characterized by the use of surprise, mobility, speed, impressive logistics support and an efficient command, control, communications and intelligence (C3I) network."

[140] See ICRC Commentaries on Additional Protocol I, AP I, Art. 44, *supra* note 126 at para. 1688. The conclusion of the ICRC was: "However, this in no way detracts from the fact that armed forces as such must submit to the rules of international law applicable in armed conflict, this being a constitutive condition for the recognition of such force, within the meaning of Article 43."

See also Draper, *supra* note 37, p. 197, Green, supra note 22, p. 111, n.44, Levie, *supra* note 46, pp. 52-53 and Mallison, *supra* note 98, p. 62. See also H.P. Gasser, "Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims," *American Journal of International Law* 81 (1987), p. 919, ("they have to be under the control of [a party to an international armed conflict]. Groups that do not meet that requirement may not claim a privileged position under international law.").

[141] Kalshoven, *supra* note 61, p. 87. See also Allan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflict*, Helsinki, 1976, p. 335.

[142] *The Hostages Case, Trials of War Criminals* (Washington: Government Printing Office 1950).

[143] Id. p. 1244.

publicly acknowledged terror campaign targeting innocent civilians.[144] Another situation in which group exclusion occurs is where that group does not fight on behalf of a Party to the conflict (i.e., the right authority). Since non-state armed groups have long taken on the basic organization of military forces the result is that organized groups capable of applying significant violence cannot claim combatant or prisoner of war status.[145]

The effect of the decision that a group is not eligible to be considered combatants can impact on the status determination provisions of Article 5 of the Prisoner of War Convention and Article 45 of Additional Protocol I. Where it is concluded that a group is not eligible for combatant status, it is possible to take the view that there is no doubt as to the eligibility of individual members of the group for prisoner of war status. In this regard, the question becomes one of determining membership in the group rather than assessing if the individual members have met the criteria for combatancy. This result highlights a fundamental difference between assessing group attributes of combatancy under humanitarian law and the individual rights based approach of human rights law.

The decision to exclude a group from attaining combatant status should not be taken lightly.[146] Such a determination may undermine the incentive for the denied group to comply with international humanitarian law. It also means that individual members are treated adversely because of group characteristics and not because of their own actions. As a result, they could be subject to the death penalty if the national law of the capturing state provides for that punishment for the acts carried out by unlawful combatants.

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[144] This is an area where human rights organizations may find themselves unwillingly being drawn into this issue due to their recording the non-compliance by Parties to a conflict with international humanitarian law. See "Crisis of Impunity: The Role of Pakistan, Russia, and Iran in Fueling the Civil War," *Human Rights Watch Report* 13,3 C (2001), p. 6.

[145] See *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks on the United States* (2004), pp. 365-366, (International operations by transnational terrorist groups require planning and staff work, a command structure, recruiting, training, a logistics network, access to weapons, reliable communications and an opportunity to test the plan).

[146] See Bothe, *supra* note 9, p. 250 ("Allegations of collective or group violations of the law of war are easy to make, but difficult to prove.").

Probably more influential with a capturing state or even a non-state actor will be a concern over reciprocal treatment for their personnel. These concerns provide a powerful incentive to provide prisoner of war status even when the law might not require it technically. [147] Concerns over reciprocity of treatment may also influence non-state actors engaged in hostilities, such as civil wars, particularly where the organization is sensitive to international opinion or is influenced by hopes of gaining amnesty if hostilities are not entirely successfully concluded. Where there is no reasonable expectation on the part of a state that its own combatants will be provided with a basic level of humane treatment under international human rights, the decision to exclude the opposing forces from attaining combatant status may be easier to make on a policy level.

Unique cases

The twentieth century tested the view that the only legitimate combatants were the uniformed regular armed forces of the state. For example, World War II saw significant uses of armed forces to conduct irregular warfare. These forces included both special forces, acting on behalf of the states, and resistance movements, enjoying various degrees of connection to the Allied Powers. The reliance on such forces demonstrates two things. Firstly, they provide graphic evidence of the degree to which the dominant/patriotic state debate remained unresolved even after World War II. Secondly, their use occurred at the fault line between the "dominant" and "patriotic" schools of thought. As a result there has been significant debate on how best to categorize these armed forces. This debate was to impact directly on post-war efforts to clarify combatant status.

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[147] An example that is often provided is the decision of the United States government to extend POW protection to captured Viet Cong as well as captured regular force North Vietnamese Army personnel. Classification as POWs was not provided if the personnel were involved in terrorism, sabotage or spying. See "Annex A of Directive Number 381-46 of December 27, 1967,"*American Journal of International Law* 62 (1967), pp. 763-768. See also Mallison, *supra* note 98, pp. 72-74.

(i) Special forces

The history of special forces throughout the twentieth century illustrates the degree to which the nations of the 1907 Conference did not feel constrained by the combatancy criteria set out in the Hague Regulations. The ink was barely dry on those Regulations when, in World War I, British officer T.E. Lawrence was taking part in the coordination of guerrilla warfare in advancing Arab nationalist resistance against Turkish occupation.[148] Similarly, those experiences have been credited with influencing Churchill's policy of using guerrilla warfare during World War II. [149] The Allies made widespread use of guerrilla operations including providing significant support in the form of supplies, arms, and personnel. Such operations involved regular armed forces (commandos), agents dropped behind enemy lines, and the organized resistance of the occupied populations.[150] Unique organizations such as the Special Operations Executive (SOE), the Office of Strategic Services (OSS), and the Russian Central Staff of the Partisan Movement were developed to support and coordinate those activities.[151]

The effectiveness of World War II's irregular warfare has been questioned.[152] Further, it has been suggested that the widespread use of guerrilla forces led to irregular warfare being employed in the struggles for self-determination that followed World War II. [153] However, the use of regular armed forces and paramilitary forces

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[148] T. E. Lawrence, *Seven Pillars of Wisdom*, (Anchor Books, 1991) provides a classic outline of the oriental way of war based on the culture, conditions, and fight styles of its largely Bedouin actors. See also John Keegan, *Intelligence in War: Knowledge of the Enemy From Napoleon to Al-Qaeda* (Pimlico Random House, 2003), pp. 389-397, for the history of British involvement in irregular warfare traced back to the Peninsular War (1808-1814).

[149] Liddell Hart, *supra* note 77, p. 362 and Parks, *supra* note 122, pp. 525-526.

[150] See Henri Meyrowitz, "Les Opérations de Commando et Le Droit de La Guerre," *The Military Law and Law of War Review* 18 (1979), pp. 84-91.

[151] The creation in Britain of the Special Operations Executive (SOE) under the Ministry of Economic Warfare in 1940 and the Office of Strategic Studies (OSS) in 1942 institutionalized the use of guerrilla operations as a method of warfare by the Western allies in World War II. Similarly, by the spring of 1941 partisan movements were supported by the Central Staff of the Partisan Movement and other partisan sections within the NKVD and army headquarters. See Robert B. Asprey, *War in the Shadows*, chaps. 31-51 (Doubleday and Co. Inc., 1975).

[152] See Keegan, *supra* note 148, pp. 394-397. Liddell Hart, *supra* note 77 pp. 367-369.

[153] See Liddell Hart, *supra* note 77, p. 370 and Keegan, *supra* note 148, p. 397.

connected to intelligence agencies in support of irregular warfare lasted throughout the second half of the twentieth century, including during the Korean,[154] Vietnam,[155] and the 1991 Gulf conflicts.[156] There was a close connection between the CIA, including its Special Activities Division,[157] and the United States Special Operations Forces during operations in Afghanistan[158] and Iraq.[159] Similarly, special military units of the United Kingdom have operated closely with British Intelligence, MI6, and the Foreign Office throughout the post-World War II period.[160] As the dominant military states of the twenty-first century struggle with novel threats posed by transnational terrorist groups, there is every indication of an increased reliance on

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[154] See Michael E. Haas, *In the Devil's Shadow: U.N. Special Operations During the Korean War* (Naval Institute Press, 2000).

[155] The US Special Forces, the Green Berets, were developed with a goal of amalgamating the best features of the SOE/OSS. They were designed to "infiltrate into a target area and there contact and organize indigenous guerrilla forces." Similarly, the CIA continued the traditions of the OSS. By 1961, the CIA was operating in Laos, clandestinely arming and supporting Laotian forces in countering Pathet Laot guerrillas backed by North Vietnam. The CIA also began to infiltrate South Vietnamese Forces into southeastern Laos and infiltrated agents into North Vietnam. See Asprey, *supra* note 151, p. 1023.

[156] See Tom Clancy and General Carl Stiner, *Shadow Warriors: Inside the Special Forces* (G.P. Putnam Sons, 2002), p. 447.

[157] As was reported in Bob Woodward, "Secret CIA Units Playing a Central Combat Role," *Washington Post*, November 18, 2001, p. A1, the CIA units that mounted operations in Afghanistan following 9/11 "are part of a highly secret CIA capability, benignly named the Special Activities Division, that consists of teams of about half a dozen men who do not wear military uniforms." See also Douglas Jehl, "Two CIA Operatives Killed in an Ambush in Afghanistan," *The New York Times*, October 29, 2003.

[158] See Dana Priest, *The Mission* (WWW Norton and Co., Inc, 2003), p. 148, and Ronald Kessler, *The CIA at War: Inside the Secret Campaign Against Terror* (St. Martins Press, 2003), pp. 236-239.

[159] Dana Priest, "U.S. Teams Seek to Kill Iraqi Elite," *Washington Post*, March 29, 2003, p. A1 ("[t]he covert teams, from CIA's paramilitary division and the military's special operations group, include snipers and demolition experts schooled in setting house and car bombs. They have reportedly killed more than a handful of individuals…. The covert teams are just one feature of the largely invisible war being waged in Iraq by the CIA's and Pentagon's growing covert paramilitary and special operations divisions.").

[160] See Stephen Dorril, *MI6: Inside the Covert World of Her Majesty's Secret Intelligence Service,* (Touchstone, 2002), p. 729, ("[b]y the late sixties, the Special Air Service (SAS) had become the overt/covert special operations arm of MI6 and the Foreign Office, taking over the paramilitary role of the Special Operations Branch of the old War Planning Directorate which, in turn, had temporarily filled the gap left by the disbandment of the Special Operations Executive.").

military forces that do not operate uniquely within the confines of codified criteria of combatancy.[161]

Questions have been raised as to the status of special forces personnel operating out of uniform in the context of the 'campaign against terrorism' since September 11, 2001.[162] One approach has been to argue that the criteria for combatancy applicable to these regular armed forces are more relaxed than those demanded of the militia, volunteer corps, and organized resistance movements under Article 4(2) of the Third Geneva Convention.[163] Under that interpretation, special forces personnel would be entitled to prisoner of war status even if they did not wear a uniform or a fixed distinctive sign. Here, the claim to legitimacy is linked to their fighting for a nation-state and not necessarily on whether those personnel wear a traditional military uniform. However, both legal opinion [164] and case law[165] contradict

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[161] See Walter Pincus and Dana Priest, "Bush Orders the CIA to Hire More Spies," *The Washington Post*, November 24, 2004, p. A4., ("The Defense Department has been studying and experimenting with new ways to use military forces to collect intelligence and conduct other covert operations. This is controversial, in part because it would mean that if soldiers involved in covert operations are captured the government would not admit they are U.S. military personnel."). See also Sean Rayment, "Britain Forms New Special Forces Unit to Fight Al-Qaeda," *News Telegraph*, July 25, 2004, ('The Reconnaissance and Surveillance Regiment will work closely with the Special Air Service and the Special Boat Service. Its mission will be to penetrate groups, either directly or by "turning" terrorists into double agents.').

[162] See Harold Hongju Koh, "The Case Against Military Commissions, in Agora Military Commissions," *American Journal of International Law* 96 (April 2002), p. 340, where it is suggested that the decision to use military commissions: "seriously disserves the long term interests of the United States — whose nonuniformed intelligence and military personnel will conduct extensive armed activities abroad in the months ahead — to assert that any captive who can be labeled an "unlawful combatant" should be denied prisoner of war status under the Geneva Conventions, and hence subjected to trial for 'war crimes' before military commissions."

[163] For an overview of this issue see Parks, *supra* note 122, pp. 509-511. See also Goldman and Tittemore, *supra* note 9, pp. 9-10, George Aldrich, "The Taliban, Al Qaeda, and the Determination of Illegal Combatants," *American Journal of International Law* 96 (April 2002), p. 894; and Evan J. Wallach, "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander," *The Army Lawyer* 18 (November 2003), pp. 24-25, where this interpretation has been used to argue that members of the Taliban should have been granted POW status as they constituted the armed forces of the *de facto* government of Afghanistan. See also Toni Pfanner, "Military Uniforms and the Law of War," *International Review of the Red Cross* 853 (2004), p. 114.

[164] For example, see Levie, *supra* note 46, pp. 36-37, also Rosas, *supra* note 141, pp. 327-333 ("regular forces were assumed to fulfill the conditions anyway" although cannot *a priori* be

such exceptionalism. This is not to suggest that special forces have to wear uniforms or fixed distinctive signs at all times in order to claim combatant status. For those states that have ratified Additional Protocol I, Article 44(7) contemplates that "regular, uniformed armed units of a Party to the conflict" may conduct operations while meeting the more relaxed standards of combatancy although for many nations such a claim to lawful combatancy is limited to occupied territory or operations in respect of national liberation movements.[166]

(ii) Organized resistance movements

As is evident from the preceding analysis, the employment of special forces during the past century has been linked closely to *indirect* warfare and to organized resistance movements. Concerned mostly with large armies involved in *direct* warfare, Von Clausewitz also recorded the unique connection between the *levée en masse*, insurgents conducting warfare (particularly in occupied territories), and the involvement of regular armed forces.[167] While the *levée en masse*, or at least a form of it, received grudging legitimacy in the 1907 Hague deliberations the recognition of "people in arms" in occupied territories as lawful combatants was to follow a much more difficult path.

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assumed the four conditions are constitutive conditions for regular armed forces); Dinstein, *supra* note 40, p. 105, Mallison,*supra* note 108, pp. 25-26 (1978); Peter Rowe, "Special Forces and the Laws of War: Wearing the Uniform of the Enemy or Civilian Clothes and of Spying and Assassination," *The Military Law and Law of War Review* 33 (1994), pp. 213-214., Dinstein, *supra* note 26, p. 36 and Michael Schmitt et al., "Computers and War: The Legal Battlespace," HPCR Brief (June 2004), p. 12, www.ihlresearch.org/ihl/pdfs/schmittetal.pdf .

[165] For example see Mohammed Ali v. Public Prosecutor [1969] A.C. 430, pp. 449-450.

[166] See declarations made by Australia, Canada, France, the United Kingdom and Germany.

[167] Von Clausewitz's discussion of "people in arms" as part of war provides insight into how war was changing in Europe at the beginning of the nineteenth century and how indirect warfare was interfacing with its direct warfare counterpart. Clausewitz referred not just to the employment of militia as a result of universal conscription, but also the "calling out of the home guard and arming the people." He outlined insurgents operations with all the attributes of guerrilla warfare. See Von Clausewitz, *supra* note 56, p. 497. Clausewitz's discussion of insurgency included attacks in the rear areas of enemy forces, the provision of support with small regular force units and operating in the interior of the country "no matter how complete the defeat of the state." Id. , pp. 481-483. The fact that the Prussian military so readily embraced most of Clausewitz's ideology by the late nineteenth century makes it all the more interesting it would at that time also seek to outlaw the "people in arms" as a means of warfare.

Inclusion of *levée en masse* in the Hague regulations did not ipso facto guarantee its acceptance as a method of warfare. Rather than prolong the debate about the legitimacy of the *levée en masse*, it has become more common to suggest its demise or downplay its relevance.[168] Even in respect of Additional Protocol I with its provisions that extend combatant status to fighters in occupied territory, there is an awkward absence of any reference to the *levée en masse* in Articles 43 and 44.[169] Notwithstanding conclusions that the *levée en masse* was a historical anomaly, such form of warfare remained relevant in the twentieth century for countries confronted with a perceived threat of invasion.[170] There appear to have been at least two instances in which *levée* occurred during World War II.[171] Reference to such uprisings by Iraqis at the outset of the 2003 Iraq conflict suggests it remains a part of warfare.[172]

Despite the continued, if limited, reliance on this method of warfare *levée en masse* was treated almost dismissively during the deliberations regarding the Geneva Conventions following World War II. Discussion concentrated, instead, on the involvement of the population resisting not on the approach of the enemy but "in the presence of the enemy."[173] In that context, the deliberations were akin to those that

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[168] See Spaight, *supra* note 4, p. 41 and see Rosas, *supra* note 141, pp. 375-377.

[169] However, see ICRC Commentary, AP I, Art. 44, *supra* note 126, para. 1722 ("as nothing during the discussions could have given rise to the thought that the Conference had the intention of no longer recognizing the *levée en masse*, such an intention should not be presumed.").

[170] In the 1920s, the defense plans of Canada, Defence Scheme No. I, contemplated the mobilization of the *levée en masse* to counter a perceived threat of invasion from the United States. See James Eayrs, *In Defence of Canada: From the Great War to the Great Depression* (University of Toronto Press, 1964), p. 324.

[171] See Final Record of the Diplomatic Conference of Geneva of 1949, Vo. 11, section A, at 239 [hereinafter the Final Record]. Reference is made to a *levée en masse* occurring in France and during the German invasion of Crete during World War II.

[172] See Robert Goldman, *The Legal Status of Iraqi and Foreign Combatants Captured by Coalition Armed Forces*, www.crimesofwar.org/special/Iraq/news-iraq4.html, for a reference to the *levée en masse* and Iraq conflict. In the context of the Afghanistan conflict, it has been claimed in proceedings before a United States District Court that if any of the petitioners did take up arms in the Afghani struggle following the attacks of September 11, 2001 it was "only on the approach of the enemy, when they spontaneously took up arms to resist invading forces, without having the time to form themselves into regular armed units, and carrying all their arms openly and respecting all laws and customs of war." See "Rasul et. al. v. George Bush," *Memorandum Opinion* 8 (July 2002).

[173] See Final Record, *supra* note 171, p. 239.

resulted in the 1907 impasse. The issue of whether individual citizens could act in self-defense or had to be organized in groups dominated much of the discussion.[174] In addition, there was division between dominant states and those seeking to legitimize civilians "participating in the defense of their native land in the event of aggression or illegal occupation."[175]

There was, similarly, discussion of a Danish proposal that did not require members of organized resistance movements to continually wear a fixed distinctive sign "provided they wore the emblem when actually taking part in military operations."[176] Rejected at that time, the suggestion was eventually reflected in Article 44(3) of Additional Protocol I. At one point, the Russian delegate invoked the Martens provisions to ward off attempts to restrict the definition of combatant status.[177] Despite the experiences of World War II, organized resistance movements were required in the final text to meet the six conditions of combatancy set out for members of militia and other volunteer corps.[178]

These new provisions served to further institutionalize a narrow reading of belligerent status that resulted from the Hague meetings. They did not reflect the significant reliance placed upon guerrilla operations by the Allied Powers during World War II. There has been widespread recognition that the organized resistance movement provisions of the Third Geneva Convention are unrealistic.[179] In the words of one commentator "[i]f memory be short, so is gratitude."[180] The decision in the post-war period to deny prisoner of war status to unlawful combatants who formed part of a patriotic resistance resulted in their being considered under the Civilian Convention. This link between civilian status and unlawful combatancy predated significantly the Additional Protocol I provisions which divide, more

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[174] Id., pp. 239, 428-30, 478-481.
[175] Id., pp. 426-427, 561-562.
[176] Id., p. 424.
[177] Id., p. 429.
[178] GC III, Art. 4 A.(2).
[179] For example see Levie, *supra* note 46, p. 42 ("this attempted enlargement of the provisions of prior conventions accomplished little or nothing.").
[180] Draper, *supra* note 80, p. 101.

obviously, participants in warfare into the two classes: lawful combatants and civilians. [181]

The next codification of combatancy had to wait twenty-five years for adoption of the provisions of Article 44(3) of Additional Protocol I. Again, a dominant state view – this time presented most publicly by the United States – conflicted with the views of other states seeking to expand humanitarian law to more fully address *indirect* warfare. The reasons provided for not accepting Additional Protocol I included concerns about the politicization of humanitarian law and the relaxing of the criteria for combatancy. The United States position was framed largely in terms of not wanting to legitimize terrorist groups. [182] The unease over 'politicization' was prompted by language in the Protocol expanding its provisions to armed conflicts "fighting against colonial domination and alien occupation and against racist regimes." [183]

The focus on "national liberation" [184] masked more fundamental questions about whether the Protocol advanced humanitarian law in order to better address *indirect* warfare and provide protection to those who participate in it. It must be noted that, during the deliberations leading to the adoption of the Protocol, resistance to expanding combatant status was not limited to traditionally dominant nation states. A number of Third World states resisted an expansion of the relaxed standards for combatants beyond national liberation movements.[185]

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[181] AP I, Art. 50(1).

[182] See *Letter of Transmittal, supra* note 13, p. 911 (1987) and Abraham D. Sofaer, "Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)," *American Journal of International Law* 82 (1988), p. 786, See also Feith, *supra* note 100, p. 531.

[183] AP I, Art. 4(1).

[184] In this paper, groups engaged in fighting against colonial domination and alien occupation and against racist regimes activity pursuant to AP I, Art. 4(1) are called "national liberation movements."

[185] See Bothe, *supra* note 9, p. 247.

Unprivileged belligerents

A history of unlawful combatancy

We turn now to those combatants considered to be illegitimate participants in hostilities. 'Unlawful combatants' have long been present on the battlefield. In 1863, Francis Lieber identified the following irregular actors involved in warfare: the partisan and the free corps;[186] the freebooter, the marauder, the brigand and robbers;[187] the spy, the war-rebel,[188] the conspirator; and the rising en masse and the "arming of peasants." Partisans and free corps were lawful participants in warfare, while freebooters, [189] marauders, and brigands acted in a private capacity or otherwise without authority. [190] They remained subject to prosecution and, possibly, death sentence.[191] Spies, rebels, and conspirators operated in occupied territory and were similarly illegitimate. [192] As noted, those involved in *levée en masse* were lawful participants in hostilities. [193] Interestingly, Francis Lieber was ambivalent about the requirement to wear a uniform and only saw a problem if "the absence of the uniform [was] used for the purpose of

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[186] Both partisans and the free corps constitute bodies detached from the main army. The partisan as part of the army while a free corps consisted of troops independent of the army raised by persons *authorized* to do so by the government. Francis Lieber, "Guerrilla Parties Considered with Reference to the Law and Usages of War," in Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Precedent Chicago 1983), p. 34.

[187] The brigand was originally a soldier who commited crimes and was liable for punishment by his own forces. It was extended subsequently to mean a member of the armed forces who acts without the authority of the government. *Id* pp. 34-35.

[188] See Id., p. 37. ("This war-rebel, as we might term him, this renewer of war within an occupied territory, has been universally treated with the utmost rigor of the military law.").

[189] Freebooters included privateers who were subject to death because they were "nothing less than robbers of the most dangerous and criminal type." Even though they operated in the service of the government by letters of marque Francis Lieber was of the view they were not legitimate thanks to the more regular and efficient governments and to the more advanced state of the law of war. Id. p. 34.

[190] See also Rousseau, *supra* note 42, pp. 10-11.

[191] Lieber, *supra* note 186, pp. 34-35.

[192] *The Laws of Armed Conflicts,* Dietrich Schindler and Jiri Toman, eds., (1988), *supra* note 74. (A key element of the loss of status was their "intermittent returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of their character or appearance of soldiers.").

[193] Lieber, *supra* note 186, p. 39 ("so long as they openly oppose him in respectable numbers and have risen in yet uninvaded or unconquered portions of the hostile country.").

concealment or disguise."[194] However, he made "the wearing of the uniform of their army" by partisans a requirement in his Code. [195] Historically, a consistent result of being determined to be an unauthorized participant in hostilities has been harsh treatment at the hands of the captor. As Lieber indicated in 1863, "[t]he most disciplined soldiers will execute on the spot an armed and murderous prowler found where he could have no business as a peaceful citizen." [196] That armed prowler was equated to an assassin and when armed bands operated in occupied territory they were viewed as brigands and not prisoners of war. They "unite the fourfold character of the spy, the brigand, the assassin and the rebel" who were not to be treated as the "fair enemy of the regular war." [197] Such characterization reveals a more complex assessment of criminality than merely operating without authority since spies acted normally under the control of their government and have long been considered different than perfidious actors.[198] The requirement to be 'fair' or 'open' in the older *jus militaire* context also impacted on the assessment of legality.[199]

The punishment of captured guerrilla forces, including in some instances the awarding of the death sentence, was evidenced subsequently in the United States-Mexican War, the American Civil War, the Franco-Prussian War, the Philippine Insurrection, and the South African War.[200] However, the United States government objected to the trial and execution of Mexican guerrillas by Emperor Ferdinand

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[194] Id., p. 41.

[195] Lieber Code, Art. 81. In 1862, U.S. General Ulysses S. Grant had made organization and the wearing of a uniform to distinguish those engaged in guerrilla warfare from private citizens a requirement for treatment as prisoners of war. Similarly, in 1864, General William T. Sherman required regular enrollment, arming, and being officered by a recognized power, and "if detached from a main army, be in sufficient strength, with written orders from some army commander to do some military thing." See Lester Nurick and Roger W. Barrett, "Legality of Guerrilla Forces Under the Laws of War," *American Journal of International Law* 40 (1946), p. 572.

[196] Lieber, *supra* note 186, p. 40.

[197] *Id.* p. 43.

[198] See Draper, *supra* note 37, p. 176 n. 2 where it is noted Grotius distinguished spies from treacherous assassins and that "the use of the spy is quite different in that the sending of spies 'is beyond doubt permitted by the law of nations.'"

[199] See Klabbers, *supra* note 16, p. 302. After noting: "[w]e are caught…between two urges: either to treat irregular fighters as if they were regular fighters, or to treat them as common criminals," it is concluded the Lieber Code "relentlessly opted for the second possibility."

[200] Nurick and Barrett, *supra* note 195, pp. 570-579.

Maximillian in 1865.[201] The Prussian forces were particularly harsh in their treatment of the *franc-tireurs* during the Franco-Prussian.[202] The treatment of captured members of the Organized Resistance by German forces during World War II was exceedingly brutal.[203]

One of the most famous cases involving the trial of combatants operating out of uniform was the 1942 United States Supreme Court case of *Ex Parte Quirin*[204] in which eight Germans (two of whom were American citizens) landed by submarine in the United States in order to allegedly carry out sabotage operations. While they wore their uniforms during the landing, they discarded them in favor of civilian attire. The captured personnel were charged with espionage, aiding the enemy, and unlawful combatancy. The Court distinguished the lawful and unlawful combatant with the latter being "subject to capture and detention,… [and] trial and punishment by military tribunals for acts which render their belligerency unlawful."[205] All eight were subsequently executed. While the court equated unlawful combatants to spies who are not illegal under international law, it also indicated that such combatants were "offenders against the law of war."[206]

Post-World War II and changing concepts of legitimacy

Notwithstanding the illegitimate status of unlawful combatants, the widespread Allied support for organized resistance movements had a fundamental impact on how their participation in combat was viewed at the end of World War II. In the *Hostages Case*,[207] German personnel were put on trial for excesses performed against members of the resistance movements, acts of reprisal, and the killing of civilian

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[201] Id. p. 571. As a forerunner to the harsh treatment of French *franc-tireurs* by the Prussians the French had threatened to treat the German *landwehr* and *landstrum* (armed militia) as brigands at the turn of the nineteenth century. Lieber, *supra* note 186, p. 38.

[202] Spaight, *supra* note 4, pp. 43-44. The actions taken against *franc-tireurs* included shooting captured fighters, fining towns and areas in which they were captured and in one instance burning two towns to the ground in the vicinity that franc-tireurs were captured.

[203] See Nurick and Barrett, *supra* note 195, p. 581 for an incident involving the killing of hostages because of the activities of the French Forces of the Interior (FFI).

[204] *Ex Parte Quirin* 317 U.S. 1 (1942) [hereinfater the *Quirin* case].

[205] Id. p. 31.

[206] Id.

[207] *The Hostages Case, Trials of War Criminals* (Washington: Government Printing Office 1950).

hostages.[208] The court found that the occupying German forces were subjected to surprise attacks by bands that "would hastily retreat or conceal their arms and mingle with the population" and that captured "German soldiers were often tortured and killed." [209]

In attempting to address the problem of incorporating 'patriotic' action into the concept of 'belligerent,' the Military Tribunal, like the *Quirin*[210] court, equated a member of an organized guerrilla resistance movement to a spy. The Tribunal ruled that a person "may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such."[211] In so doing, the court opened the door to questioning whether participation in irregular warfare is an international crime or simply a crime during war. The equating of members of resistance movements to spies put into doubt the traditional view that such participation was a breach of international law. [212]

In a seminal article, Richard Baxter analyzed the *Quirin*[213] decision in respect of its reference to spies and concluded that to the extent it is interpreted to mean the law of nations forbids such activity "the view…fails to find support in contemporary doctrine regarding such activities in wartime. [214] It is the analogy between spies, saboteurs, and unprivileged belligerents that appears to be determinative of outcome in considering whether such belligerency is a breach of international law. While this mix of military and civilian participants in combat may

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[208] The counts charged included involvement in the execution of large numbers of civilians by hanging or shooting without trial; the terrorizing, torturing, and murdering of 'non-combatants' designated arbitrarily as partisans, bandits, and so forth, in retaliation for attacks; the issuance and distribution of orders for the execution of one hundred hostages for each soldier killed and fifty for each one wounded; the plundering and looting of private property; and illegal orders that enemy troops and regular members of the national armies of Greece, Yugoslavia and Italy be denied quarter, refused the status and rights of prisoners of war and that surrendered members be summarily executed. *Id.* pp. 1233-1234.
[209] Id. p. 1243.
[210] *Ex Parte Quirin.*
[211] Id., p. 1245.
[212] See commentary, *supra* note 199.
[213] *Ex Parte Quirin.*
[214] Baxter, *supra* note 11, p. 331.

be unique, it has been suggested that their patriotic motivation may provide a common basis for assessment.[215] The Hostages case is particularly important since any analysis that relies too heavily on the *Quirin*[216] case may restrict itself unduly to an interpretation of the law that does not fully take into account the shifting concept of legitimacy following World War II. [217]

While the *Quirin*[218] case referred to acts contrary to the laws of war, it is difficult to argue that the Court was attempting to render spying an international crime. Baxter highlights the lack of agreement during the Hague meetings and the extensive use of such forces by the Allies[219] and concludes that "[o]nly a rigid formalism could lead to the characterization of the resistance conduct against Germany, Italy, and Japan as a violation of international law." [220] He has noted that states on whose behalf 'secret warfare' is conducted have neither a responsibility to restrain, nor an obligation to punish, such conduct. In contrast, an international crime would create a duty "to punish war criminals amongst its own nationals as well, including the regular armed forces, civilians and unprivileged belligerents fighting on its behalf." [221] The act of participation in a resistance movement failing to meet the criteria of belligerency is not an international crime, but rather constitutes "acts with respect to which international law affords no protection." [222]

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[215] Id., p. 342 ("More often than not, patriotism or some sort of political allegiance lies at the root of such activities.").

[216] *Ex Parte Quirin*.

[217] See William H. Ferrell, "No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict," *Military Law Review* 178 (2003), pp. 131-136.

[218] *Ex Parte Quirin*.

[219] Baxter, *supra* note 11, pp. 334-335.

[220] *Id.* p. 335.

[221] R.R. Baxter, "Legal Basis of Jurisdiction Over War Crimes," *British Year Book of International Law* 28 (1951), p. 391.

[222] Baxter, *supra* note 11, p. 340. However, the detainee would remain liable under international law for the commission of a war crime. See Dinstein, *supra* note 26, p. 234.

The 'Civilian' Convention

(i) Protected and unprotected persons?

One of the controversies regarding the Civilian Convention is that, while it offers broad protection to civilians, it is not universal in scope. Protected persons are "those who, at any 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."[223] However, under the Convention the term 'protected persons' does not include nationals of a state not bound by the Convention, nationals of a neutral or co-belligerent state in the territory of belligerent states where there are normal diplomatic relations, or nationals of a co-belligerent state in occupied territory so long as the state has such relations. Persons protected under the other three 1949 Geneva Conventions also do not fall within the scope of the Civilian Convention, though they receive significant protection under those Conventions.[224] In the context of an armed conflict involving transnational terrorists and a broad coalition of states, a significant number of detained persons may not be protected under the Civilian Convention by virtue of their nationality as the detainees may be citizens of a co-belligerent state.[225] However, these detainees would remain unprivileged belligerents by virtue of their participation in the hostilities.

The Civilian Convention provides protection to those unprivileged belligerents who are 'protected persons.' While the delegates to the drafting conferences were of the view that saboteurs "should cease to be entitled to the treatment provided for law abiding citizens,"[226] there was also recognition that citizens should be treated humanely. This included protection against criminal treatment, torture, and the taking

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[223] GC IV, Art. 4.

[224] GC IV, Art. 4. See Dormann, *supra* note 5, pp. 48-49.

[225] See John Daly, "Revealed: The Nationalities of Guantanamo," *United Press International*, February 2, 2004, where it was estimated there are thirty-eight nationalities represented among the detainees at Guantanamo Bay.

[226] See Final Record, *supra* note 171, p. 621. However, see Klabbers, *supra* note 16, p. 303 where it is noted in respect of Common Article 3 of the 1949 Geneva Conventions "while governments saw the need to provide protection to unprivileged belligerents, they nonetheless were naturally inclined to regard them as "*vulgaires criminels*."

of hostages.[227] The Convention makes a distinction between the territory of a Party to the conflict and occupied territory. In the former, where a protected person[228] is "definitely suspected of or engaged in activities hostile to the security of the state that person is not entitled to the protections of the Convention that would be "prejudicial to the security of such state."[229] In occupied territory, "a spy, saboteur, or a person under definite suspicion of activity hostile to the security of the Occupying Power" is regarded as having forfeited the rights of communication "in those cases where absolute military security so requires."[230] In both cases, such persons have to be treated with humanity and in the case of trial be provided the rights of fair and regular trial provided in the Convention. Further, the detainees are to be provided the full rights and privileges of the Convention at the earliest opportunity.[231] Where the Civilian Convention is considered to not apply, it can be argued that such detainees are protected by the standards of humane treatment set out in the Civilian Convention as a matter of customary international law.[232]

In practical terms, in occupied territory, security detainees -- including unprivileged belligerents -- are provided a significant level of protection. The Convention provides that Occupying Powers may "for imperative reasons of security" take safety measures concerning protected persons and place them in assigned residences or

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[227] Id.

[228] See GC IV, Art. 4(1).

[229] GC IV, Art. 5.

[230] Id. However, this provision has been further restricted in AP I, Art. 45(3) ("In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.").

[231] Id.

[232] Almost all states are Parties to the Civilian Convention and the Fourth Convention is considered declaratory of customary law. However, there is ongoing debate, largely in the context of the Occupied Territories, as to whether the provisions in their entirety constitute such law. See David Kretzmer, *The Occupation of Justice* (State University of New York Press, 2002), pp. 32-34; and Micheal J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations* (London: Kluwer Law International, 1999), pp. 156-159. See also Adam Roberts, "What is Military Occupation? ," *British Yearbook of International Law* 55 (1984), p. 282, where he notes the majority of the international community, and of international legal opinion, has not accepted that Geneva Convention IV is not formally applicable in that case.

internment.[233] This form of administrative detention operates separately from "the penal action open to the occupant and the related processes of investigation, charging, prosecution, conviction, and sentencing of the suspect."[234] The procedures include a right of appeal with such an appeal being decided with the least possible delay. That decision is subject to a review, if possible every six months, by a competent body set up by the Occupying Power.[235]

The provisions governing internment in occupied territories apply equally in the territory of a Party to the conflict.[236] This internment framework mirrors that which applies to prisoners of war.[237] In this regard the Civilian Convention framework is a reflection of the approach applied to detained enemy aliens during both World Wars.[238] The true significance is that the internment regime under the Civilian Convention is more detailed than the general principles set out in international human rights law. Specific provision is made regarding standards of accommodation, hygiene, and medical attention, religious and physical activities, food and clothing, as well as administration and discipline.[239] Notably, internees can be detained until the end of the conflict although they shall be released as soon as the reasons for detention no longer exist.[240]

In respect of occupied territory, persons who are "accused of offences" should be detained separately from other detainees and must be kept under conditions "at least equal to those obtaining in prisons in

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[233] GC IV, Art. 78.
[234] GC IV, Art. 84. See also Kelly, *supra* note 232, pp. 206-209.
[235] GC IV, Art. 78
[236] GC IV, Art. 79.
[237] Prior to the creation of Geneva Convention IV there was no code governing the status of enemy civilians in the territory of the opposing state although in the nineteenth century it was common to have provisions in bilateral treaties covering their status. The practice in Great Britain during World War I was to treat enemy aliens as prisoners of war. The rationale was in part because "War at the present moment is not, as it was in olden times easily confined to easily ascertained limits." Quote of Judge Low in The King v. Superintendent of Vine Street Station 1 K.B. pp. 277-278 (1916) as set out in William E.S. Flory, *Prisoners of War* (American Council on Public Affairs 1942), pp. 25-26.
[238] See Baxter, *supra* note 11, p. 326.
[239] GC IV, section IV. Regulations for the Treatment of Internees.
[240] GC IV, Arts. 132 and 133.

occupied territories." [241] Perhaps not surprisingly, given the underlying tensions regarding the combatancy issue, it is the 'patriotic' motivation of persons resisting the occupation that has been suggested as the rationale for the separation from the regular criminal detainees. [242] The conditions of detention have to include food and hygiene sufficient to keep them in good health. These provisions reflect a criminal context rather than one simply involving internment and suggest human rights based standards of treatment. In a fashion similar to domestic jurisdictions, it allows for the pre-trial detention of persons accused of offenses. Such persons are distinct from those who are threats to security or who have participated in hostilities as unprivileged belligerents, but for whom no charges are contemplated at that stage.

However, these detainees may be held as internees prior to conviction. In some respects it might be easier to apply the internee standard and keep the detainees in the same facility, even if separated from others, should there be a significant number of internees. Further, it could facilitate keeping the detainees separate from other criminals in the occupied territory. [243] These detainees would have to be treated as internees in any event if they had not yet been accused of an offense. The provisions of the Civilian Convention regarding standards of treatment for detention in the context of criminal proceedings in the territory of a Party to the conflict are similarly brief indicating detainees shall be treated humanely.[244]

It is significant that, at the end of World War II, such effort was put into providing a legal framework designed specifically to address unprivileged belligerency in occupied territory. Traditionally, such activity was dealt with quickly and severely under customary international law. This framework reflects a concern by the delegates to

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[241] GC IV, Art. 76. See also the UK Manual,*supra* note 11, p. 11.74.

[242] See ICRC Commentary, GC IV, Art. 76, ("persons guilty of offences against the penal law of Occupying Powers have often acted for patriotic reasons and could not be considered as similar to ordinary criminals.").

[243] Similarly, see GC III, Art. 103 where it is contemplated that a prisoner of war could be confined while awaiting trial, however, not unless "a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security" although such confinement cannot exceed three months.

[244] GC IV, Art. 37.

the Diplomatic Conference that all civilians, including those who were unprivileged belligerents, be treated humanely. It appears that, while the states negotiating the Geneva Conventions could not bring themselves to recognize the legitimacy of the type of *indirect* warfare relied on during the war, they attempted to regulate more closely the effect of taking action to counter this form of 'patriotic' war. The harsh measures undertaken during the World War II occupation, including the killing of hostages,[245] had highlighted the tragic impact this form of warfare could have on innocent civilians.

(ii) Territorial limitation of occupation?

The problem of territorial limitation of the Civilian Convention hinges on the interpretation of what constitutes occupation for the purposes of the Convention. The ICRC uses an expansive interpretation of that term in its official Commentary stating that the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation as described by the Hague Regulations.[246] Those Regulations stated: "territory is considered occupied when it is actually placed under the authority of the hostile army." [247] Further, the occupation only extended to the territory where such authority has been established and could be exercised. This included the ability to carry out effective control such as being able to suppress an uprising by the population. It did not include the initial act of invasion or troops merely passing through a territory. An occupation did not require covering physically all of the territory but there had to be acquiescence by the occupied to the authority of the occupier. [248]

In the view of the ICRC, there is no intermediate position or 'invasion phase' in relations between the civilian population and armed forces

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[245] See Lord Wright, "The Killing of Hostages as a War Crime," *British Yearbook of International Law* 25 (1948), p. 298 ("the essence of the matter is that innocent non-combatants are shot in order to terrorize the inhabitants."). Id. p. 298. However, see also Ellen Hammer and Marina Salvin, "The Taking of Hostages in Theory and Practice," *American Journal of International Law* 38 (1944), p. 29, (hostages could be "legitimately taken and, if necessary, killed to maintain order."). The practice has since been prohibited. See GC IV, Art. 34.

[246] ICRC Commentary, *supra* note 28. See also Dormann, *supra* note 5, p. 62.

[247] 1907 (IV) Hague Convention, Art. 42.

[248] See Kelly, *supra* note 232, pp. 112-113

entering a territory. Therefore, "even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. When it withdraws, for example, it cannot take civilians with it" [249] as that would constitute a forcible transfer. The goal of avoiding a no man's land where civilians would fall through the cracks is important from both a humanitarian and military discipline perspective. As Adam Roberts remarks, military manuals have taken a similar view stating "that the rules which apply to occupied territory should also be observed as far as possible in areas through which troops are passing and even on the battlefield." [250] However, applying the rules as a matter of principle is different than requiring compliance as a matter of law. While the overall goal of acting in a humanitarian fashion is essential, it cannot and should not be extended to a position where legal obligations are created by analogy. This would put the military commander in the virtually impossible situation of having to figure out which of the rules designed for a regime where control was well established would be put in place in what is usually a fluid operational environment. [251]

In contrast, Richard Baxter and others have supported the position that there is an operational zone "where fighting is in progress outside occupied territory or the territory of the detaining state." [252] It has been

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[249] ICRC Commentary, *supra* note 28.

[250] Roberts, *supra* note 232, p. 257. It is also noted in the UK Manual, *supra* note 11, p. 275, para. 11.1.2 that occupation can take many forms. In addition, contemporary operations can include operating under a United Nations administration or in failed states. In these situations the "rules of international law applying to occupied territory should, so far as possible be applied by analogy until an agreement is concluded."

[251] Fritz Kalshoven looks at the extension by analogy of the provisions of Geneva Convention IV in a positive light, however, ultimately concludes "[a]dmittedly, however, an express provision of this purport would be vastly preferable." See Kalshoven, *supra* note 61, p. 71.

[252] See Baxter, *supra* note 11, p. 328 ("Individuals of this nature [unprivileged belligerents] taken into custody for hostile conduct in occupied territory are, of course, the beneficiaries of a considerable number of…safeguards. But their counterparts in other areas are less fortunately circumstanced."). See also the UK Manual, *supra* note 11, p. 275, para. 11.2., Draper, *supra* note 37, p. 197 ("If they were operating in neither type of territory [occupied territory or the territory of a state party to a conflict] their position is far from clear"); and Jason Callen, "Unlawful Combatants and the Geneva Conventions," *Virginia Journal of International Law* 44 (2004), pp. 1049-1054. For a view that does not accept Professor Baxter's interpretation of GC IV, see Derek Jinks, "The Declining Significance of POW Status,"

suggested that the Fedayeen Saddam detained during the 2003 Iraq Conflict were unlawful combatants captured prior to occupation being established.[253] In the 2001-2002 Afghanistan war, neither Al Qaeda nor Taliban detainees were captured in occupied territory as American and British forces did not occupy that country. Consequently, the Civilian Convention had no application. [254] Similarly, the Convention would not apply to situations where an unlawful participant is detained on the territory of a state where operations are being conducted at the invitation of that sovereign state.

The term 'battlefield unlawful combatants' has been used to describe unprivileged participants captured outside occupied territory. This separate treatment is justified on the basis that these belligerents pose "a greater danger to civilians than other types of unlawful combatants."[255] However, it is not clear why another term needs to be coined, adding to the existing definitional quagmire, since the record from World War II suggests that the threat posed to civilians in occupied territory may be indistinguishable from the zone of operations.[256] It seems more consistent with the Martens clause to extend 'internee'-type protections as established under the Fourth Geneva Convention to unprivileged belligerents captured outside occupied territory and use the same terminology in both situations.

Additional Protocol I

The question remains whether advances in the law since the adoption of the 1949 Geneva Conventions have clarified some of the unresolved issues regarding unprivileged belligerents. This issue will be explored

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Harvard International Law Journal 45 (2004), pp. 393-397.

[253] See Callen, *supra* note 252, p. 1066. (Such fighting lasted between "March and late-April 2003).

[254] Id. p. 1069.

[255] Id. p. 1064.

[256] See Id. where the danger to civilians in World War II is acknowledged to have been "most extreme." See also AP I, Art. 26, where in respect of medical aircraft, such a zone has been termed the "contact zone." "Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground. Such a zone includes "those areas the physical control of which is not clearly established."

in the context of the treatment of captured personnel and special forces operations.

(i) Treatment of captured personnel

Increased reliance on indirect warfare following World War II highlighted the question of the status and treatment of non-state actors involved in hostilities. Most conflicts of that period could be categorized as non-international armed conflict where there is no obligation to provide detainees prisoner of war status or treatment. [257] Equally, there was increasing recognition of the positive humanitarian impact that resulted if prisoner of war level of treatment was provided to other captured fighters. It is noteworthy that the importance of providing that standard of treatment to insurgents was recognized during the Algerian conflict [258] and by the United States armed forces in Vietnam.[259] In respect to the Vietnam conflict, "[i]t was evident that international law was inadequate to protect victims in wars of insurgency and counterinsurgency, civil war, and undeclared war. The efforts of the international community to codify the humanitarian law of war in 1949 drew upon examples from World War II which simply did not fit Vietnam." [260] Arguably, it was partly in response to these challenges that the international community developed Additional Protocol I, which, inter alia, extended the concept of

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[257] See commentary, *supra* note 10.

[258] See Roger Triquinier, *Modern Warfare: A French View of Counter-insurgency* (F.A. Praeger trans., 1964), p. 47. "Prisons, designed to accommodate offenders against the common law, will rapidly become inadequate and will not meet our needs. We will be compelled to intern the prisoners under improvised, often deplorable conditions, which will lead to justifiable criticism our adversaries will exploit. From the beginning of hostilities, prison camps should be set up according to the conditions laid down by the Geneva Convention. They should be sufficiently large to take care of all prisoners until the end of the war."

[259] See Major General George S. Prugh, *Vietnam Studies Law of War: Vietnam 1964-1973* Chap. IV pp. 3-4, available at www.army.mil/cmh-pg/books/Vietnam/Law-War/law-04.htm. Classification as POWs was not provided if the personnel were involved in terrorism, sabotage or spying. These 'unprivileged belligerents' were tried as civil defendants. However, as Major General Prugh stated: "it certainly is arguable that many Viet Cong did not meet the criteria of guerrillas entitled to prisoner of war status under Article 4, Geneva Prisoner of War Conventions." Id., p. 4. See also *Annex A of Directive Number 381-46 of December 27, 1967*, *supra* note 147, pp. 763-768.

[260] Prugh, *supra* note 259, p. 11. ("The hazy line between civilian and combatant became even vaguer in Vietnam.").

international armed conflict to include what had previously been considered internal conflict. [261]

In addressing indirect warfare, Additional Protocol I not only relaxed the criteria for combatancy it also established that a combatant who had forfeited the right to be a prisoner of war "shall nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention." [262] Such protections extended to the trial of the person for offenses committed.[263] On one level, this provision is consistent with the internment provisions of the Fourth Geneva Convention in providing prisoner of war-like treatment to unprivileged belligerents. However, the disposition must be contrasted with the separate reference in the Protocol to a civilian taking a direct part in hostilities. That person is not entitled to the same prisoner of war standards of treatment and if they do not otherwise fall within the provisions of the Civilian Convention they are protected by the human rights standards set out in Article 75 of the Protocol.

As was suggested by the International Committee of the Red Cross, Article 75 of Additional Protocol I was "designed to fill the gaps in treaty law in respect of persons not covered by such law."[264] Article 75 provides a list of fundamental human rights based guarantees[265] to persons who are in the power of a Party to the conflict as this provision was developed with the full understanding that its principles "were also contained in instruments relating to human rights, particularly the International Covenant on Civil and Political Rights." [266]

Additional Protocol I excludes specifically spies [267] and mercenaries[268] from gaining prisoner of war status, and introduces a distinction

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[261] See Richard Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law," *Harvard International Law Journal* 16 (1975), p. 3.
[262] AP I , Art. 44(4).
[263] Id.
[264] Official Records, *supra* note 1, p. 25.
[265] These guarantees include human rights based norms such as equality of treatment; freedom from violence to life, health or physical or mental well-being; reasons being provided for an arrest, detention or internment; specific guarantees related to a fair trial. See AP I, Art. 75.
[266] Official Records, *supra* note 1, p. 27.
[267] AP I, Art. 46.

between lawful combatants, combatants who do not meet the requirements of combatancy as set out in Article 44(3), and other persons who improperly take a direct part in hostilities. This distinction represents a departure from the notion that there are only two categories referred to in Article 50(1) of Protocol I, namely combatants and civilians.

Article 44 was a particularly difficult provision to negotiate with the Official Records of the Diplomatic Conference reflecting the ideologically charged debates of the 1970s.[269] Article 44(4) represents a compromise solution. However, in many respects, its scope may be limited. There are only a limited number of groups to whom Article 44(4) would apply by virtue of the 'right authority' link between lawful combatancy and a Party to the conflict. For example, a non-state actor who does not act on behalf of a national liberation movement or a state would not be considered a combatant under Article 43 of the Protocol. Therefore, Article 44 does not apply to that non-state actor. Indeed, a number of states have indicated that this provision is limited to situations where Article 1(4) of the Protocol applies or to occupied territories.[270] During the deliberations, the United States delegate was more restrictive suggesting that the disposition "could exist only in the circumstance of territory occupied by the adversary."[271] To the extent the provision is restricted to occupied territory, it represents a further, if incremental, advance on the efforts to provide protection to the members of organized resistance movements.

There remains the question of the non-state actor who attempts to claim that the relaxed criteria of combatancy found in Article 44(3) is applicable but circumstances of the conflict do not meet the "due to the nature of hostilities" criterion. It has been noted that "if an organized guerrilla group operates in an area where the fighting is taking place but which cannot be classified as occupied territory…[i]t is arguable a combatant does not qualify for retention of combatant status and

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[268] AP I, Art. 47.

[269] Official Records, *supra* note 1, pp. 115-122, 155-187, 401-404, 423, 451-455 (Geneva 1977).

[270] See commentary,*supra* note 169.

[271] Official Records, *supra* note 1, p. 179. See also the Declaration made by Italy at the time of signature, available at www.icrc.org.

therefore forfeits that status."[272] Further, "those states which have expressed understandings limiting the field of application of [Article 44(3)] intend to treat failure to distinguish oneself…as a cause for forfeiture of combatant status…as well as a basis for criminal prosecution…."[273] Although some fighters may qualify under *levée en masse*, if that status cannot be claimed then captured personnel would be unprivileged belligerents.[274]

Another interpretation is that, subject to the situation set out in the second sentence of Article 44 of Additional Protocol I, if individual members fail to distinguish themselves they do not lose their combatant or prisoner of war status although they do forfeit their combatant immunity. Here, only guerrillas who breach the relaxed standards of combatancy would lose both their combatant and therefore prisoner of war status, as is contemplated by Article 44(4).[275] This interpretation is inconsistent with the history of "unprivileged belligerency" and the case law[276] as it appears to set up a hierarchy of combatancy that distinguishes between those fighting in occupied territories or situations of national liberation from other combatants. This is inconsistent with the overall approach of Article 43 of Additional Protocol I. While the retention of combatant and prisoner

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[272] See Bothe, *supra* note 9, p. 256.

[273] Id., pp. 257-258. See also ICRC Commentary, AP I, Art. 44, *supra* note 126, para. 1696. ("Suffice it to say here that a combatant can lose his status just as easily when he fails to carry his arms openly in the exceptional situations referred to in the second sentence, as when he abusively assumes the existence of an exceptional situation and fails to wear a distinctive sign in combat.").

[274] See ICRC Commentary, Art. 44, *supra* note 126, paras. 1704 and 1705.

[275] See George Aldrich, "New Life for the Laws of War," *American Journal of International Law* 75 (1981), p. 773, ("any guerrilla who fails to distinguish himself during such military operations…can be punished only by applicable disciplinary or penal sanctions, not by forfeiture of his status as a lawful combatant or…as a prisoner of war."). See Draper, *supra* note 37, pp. 196-197 where it was suggested in 1972 that if a group generally meets all the criteria for combatancy an individual failure to carry arms openly, wear a fixed distinctive sign or comply with the law of armed conflict would not deprive that person of combatant or prisoner of war status. Colonel Draper appears to have based his analysis on the views of H. Meyrowicz, "Le Statut des Saboteurs dans le Droit de la Guerre," *Military Law and Law of War Review* 5 (1966), pp. 133-144.

[276] *The Hostages Case, Trials of War Criminals* (Washington: Government Printing Office 1950), Public Prosecutor v. Koi [1968] A.C. 829, "Military Prosecutor v. Kassem (1969)" *International Law Reports* 42 (1969), p. 470., and Mohammed Ali v. Public Prosecutor [1969] A.C. 430.

of war status is provided for in Article 44(2) for nearly all individual breaches of humanitarian law, a more consistent approach would be to apply the sanction for a failure to distinguish themselves during combat equally to all combatants whether they do so under the first or second sentence of Article 44(3).[277] These unprivileged belligerents lose their status and remain subject to prosecution under the domestic laws of the capturing state.

Although armed groups that do not belong to a Party to a conflict do not qualify as combatants, they are protected by the provisions of the Civilian Convention and Article 75 of Additional Protocol I. [278] However, as noted, there are oftentimes cogent operational and humanitarian reasons for extending the internment protections of the Civilian Convention to detained unprivileged belligerents within occupied territory, even if they may be accused of committing offenses. It may be administratively easier to keep detainees within one facility although those accused of offenses may be separated from the internee population. The same arguments could apply outside such territory. This is consistent with the presumption of providing prisoners of war treatment to detained persons, at least until status is determined finally. [279]

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[277] AP I, Art. 44(2) states combatants are not deprived of their right to be a combatant or prisoner of war "except as provided for in paras. 3 and 4." It appears that since Art. 44(4) only refers to combatants failing to meet the requirements of the second sentence of para. 3 losing their status, an interpretation had been developed that would allow other combatants to retain prisoner of war status while remaining subject to prosecution. This interpretation is inconsistent with the longstanding approach of not extending prisoner of war status to persons who illegitimately participate in hostilities. Further, it does not account for the breach of Art. 44(3) that occurs when the relaxed standards are applied in situations where they are not justified due to the "nature of the hostilities." See ICRC Commentary, AP I, Art. 44, *supra* note 126, para. 1696. After noting "with one exception, the sanction for a guerrilla fighter failing to comply with the obligation to distinguish himself from the civilian population in accordance with this provision, when required to do so, will be 'merely trial and punishment for violation of the laws of war, not loss of combatant or prisoner of war status'" [quoting from the Official Record, *supra* note 1, CDDH/407/Rev. 1, p. 453, para. 19] the Commentary goes on to state "[s]uffice it to say here that the combatant can lose his status just as easily when he fails to carry his arms openly in the exceptional situations referred to in the second sentence, as when he abusively assumes the existence of an exceptional situation and fails to wear a distinctive sign in combat."

[278] See AP I, Art. 72.

[279] See GC III, Art. 5 and AP I, Art. 45.

Perhaps as telling is the doctrinal approach of many armed forces of providing a prisoner of war standard of treatment to detained persons at the point of capture regardless of their actual status.[280] There are often significant problems in identifying which detained persons might be prosecuted and then actually commencing criminal action. The challenges associated with the long-term detention of captured persons suggest the Civilian Convention's model, and in particular the internment provisions (based on prisoner of war treatment standards), provides the most appropriate and consistent means by which to ensure adequate humanitarian protection.[281] As has been noted, this model would still allow persons accused of an offense to be detained in pre-trial custody in a manner common to domestic criminal law procedures.

(ii) Special forces

How does Additional Protocol I impact on special operations forces that conduct operations without meeting the established criteria for combatancy? Although Article 44(7) is formulated in terms reinforcing the "generally accepted practice of states with respect to the wearing of uniforms," that article, in effect, recognizes the long standing practice of providing special forces assistance to armed groups in occupied territory.[282] Outside the scope of Additional Protocol I, it is the customary international law reflected in the *Hostages Case*[283] that applies. As with spying, the conduct of operations in civilian clothes by military or civilian personnel is not itself illegal under international law although the capturing state may choose to prosecute under its domestic criminal law or in the case of occupation under the laws of

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[280] See, e.g., *The Code of Conduct for Canadian Forces Personnel*, 2-9-B-GG-005-027/AF-023, www.forces.gc.ca/jag/training/publications/code_of_conduct/Code_of_Conduct_e.pdf.

[281] The Canadian approach is to provide prisoner of war treatment to captured detainess regardless of actual status. For example, this approach was used in respect of Somalia detainees in 1993 although it was criticized by one author. See Kelly, *supra* note 232, p. 233. Since the internment provisions of the Civilian Convention are themselves based on prisoner of war standards of treatment the practical solution of applying the prisoner of war treatment standards rather than debate the application of GC IV or other Conventions has proven to be sound from both a training and operational perspective.

[282] See Bothe, *supra* note 9, p. 257 and ICRC Commentary, API, Art. 44, *supra* note 126, para. 1723.

[283] *The Hostages Case*, Trials of War Criminals (Washington: Government Printing Office 1950).

the occupied territory or special laws put in place to maintain security.[284]

Additional Protocol I expands on the 1907 Hague Regulations regarding perfidious action [285] by outlining that it is perfidy to kill, injure, or capture an adversary by inviting that person's confidence to believe he or she is entitled to, or is obliged to accord, protection under international humanitarian law. [286] Article 37(1)(c) lists "the feigning of civilian, non-combatant status" as perfidious conduct. There is a correspondence between Article 44(3) and Article 37 as acts that comply with the obligation to distinguish "shall not be considered to be perfidious." [287] However, any allegation of perfidy has to be considered carefully. Perfidious conduct requires intent to betray confidence. The simple wearing of civilian clothes even to cloak entry into another country or zone of operations is not perfidious. [288]

Situations like firing from an ambush site in civilian clothes are more complicated. It has been noted that, under such circumstances, it is the natural or artificial environment that camouflages the combatant and not civilian clothing. [289] However, in light of Article 44(3)'s obligation to distinguish oneself from the civilian population while "engaging in an attack or in a military operation preparatory to an attack" there remains the issue of the actual deployment to the ambush site.

There is also the question of whether Article 44(3) of Additional Protocol I has altered customary international law by rendering participation in combat while not distinguishing oneself a breach of international law. It has been suggested that reference to "obligation" in the first sentence of Article 44(3) makes it a breach of the Protocol for combatants to fail to distinguish themselves from civilians. Further, commanders would be responsible for that breach under the duty and command responsibility provisions of Articles 86 and 87 of the

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[284] See GC IV, Arts. 64 -68.

[285] See 1907 Hague Regulations, Art. 23.

[286] AP I, Art. 37. In respect of the United States position see Matheson, *supra* note 5, p. 425 ("We support the principle that individual combatants not kill, injure, or capture personnel by resort to perfidy.").

[287] AP I, Art. 44(3).

[288] See Bothe, *supra* note 9, pp. 252-253.

[289] ICRC Commentary, AP I, Art. 44 *supra* note 126, para. 1708.

Additional Protocol. [290] Notwithstanding, this interpretation does not address adequately the obligation it would create for states and other lawful participants in armed conflict. As noted above, there has always been an obligation to distinguish combatants from civilians. Making participation in combat while failing to distinguish oneself from the civilian population a breach of international law would constitute a significant departure from existing law. [291] Additionally, since Article 44(3) only applies to those combatants serving states and national liberation movements, it leaves out the customary rules for unprivileged belligerency in place for other non-state actors and the special forces operating outside of military service. This would primarily be penalizing regular armed forces and their commanders without providing overall consistency to the application of the law.

The view of Christopher Greenwood regarding Article 44(3) appears more compelling where he doubts it was the intention to change the existing law and considers few states will want to prosecute a lawful combatant in this way. [292] Those soldiers would not only lose combatant immunity but the state would also have to admit their forces breached international law. Further this suggested alteration to customary international law runs contrary to both history and present practice regarding the employment of military and civilian special forces.

Finally, it is also noted that, while killing or wounding treacherously individuals belonging to a hostile nation or army has been identified as a 'war crime' under the 1998 Rome Statute of the International Criminal Court, the obligation for a combatant to distinguish himself or herself from the civilian population is not listed as an offense. [293] The

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[290] See Bothe, *supra* note 9, p. 251, Waldemar Solf, "A Response to Douglas J. Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol" *Akron Law Review* 20 (1986), pp. 274-276 and Ferrell, *supra* note 217, pp. 113-116.

[291] See Baxter, *supra* note 11, pp. 334-335.

[292] See Christopher Greenwood, "Terrorism and Humanitarian Law—The Debate over Additional Protocol I," *Israel Yearbook of Human Rights* 19 (1989), p. 204. See also Aldrich, *supra* note 275, p. 775 where he notes "the military laws of state parties will have to be changed to make such punishments possible."

[293] See Rome Statute of the International Criminal Court, July 17, 1998, Art. 8(2)(f), UN Doc. A/Conf.183/9*(1998), reprinted in *International Legal Materials* 37 (1998), corrected through May 8, 2000, by UN Doc. CN.177.2000.Treaties–5, Arts. 8.2.(b)(xi) and 8.2.(e)(ix). [hereinafter the Rome Statute].

first sentence of Article 44(3) of Additional Protocol I is essentially a statement of customary international law, however, the reference to "obligation" should not be interpreted to impose criminal liability as the word "prohibited" does for perfidy and indiscriminate attack. [294]

Unprivileged belligerents in contemporary armed conflict

To what extent do the phrases 'unprivileged belligerent' and 'unlawful combatant' apply to non-international armed conflicts? [295] In a traditional approach, combatancy is limited to armed conflicts between states. In maintaining internal security, the armed forces, police, and the paramilitary forces comply with the applicable human rights law associated with law enforcement.[296] However, as the principles of customary international law have been recognized as applicable to non-international armed conflict, [297] it is logical to conclude that the concept of combatant immunity would apply to the armed forces of the state tasked with using force in a non-international armed conflict. [298] Those fighting against the state in an internal conflict remain criminals subject to detention, arrest and prosecution.[299] As is reflected

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[294] AP I, Art. 51(4).

[295] See Dormann, *supra* note 5, p. 47.

[296] While the Rome Statute, art. 8 (2)(e)(ix) refers to the killing or wounding treacherously of a "combatant adversary" in respect of non-international armed conflicts it has been recognized that legal instruments such as AP II do not include the concept of "combatant." It is suggested that in this context the term refers to persons taking a direct/active part in hostilities. See Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2003).

[297] Prosecutor v. Tadic, (Appeal Chamber), paras. 96–127 (2 October 1995) available at www.un.org/icty/tadic/appeal/decision-e/51002.htm. See also The UK Manual, *supra* note 11, pp. 386-387, para. 15.5.

[298] While "armed conflict" occurs when there is a resort to armed force between states it also arises where there is "protracted armed violence between governmental authorities and organized armed groups within a State." See Prosecutor v. Tadic (Appeal decision), *supra* note 297, para. 70. See also *Case 11.137, Juan Carlos Abella v. Argentina*, Inter-American Year Book on Human Rights (1997), p. 684 para. 155 (Commission report) where the Inter-American Commission on Human Rights relied on the "concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence" in deciding that international humanitarian law applied. See also M. Cherif Bassiouni, "Legal Control of International Terrorism: A Policy-Oriented Assessment," *Harvard Journal of International Law* 43 (2002), p. 99. ("…only states can be at war. Clearly, however, a state can be engaged in an armed conflict with an insurgent or revolutionary group).

[299] The UK Manual, *supra* note 11, p. 387, para. 15.6 .1.

in Common Article 3 of the 1949 Geneva Conventions and Article 13 of Additional Protocol II, non-international armed conflicts involve persons other than the armed forces of the state taking active or direct part in the hostilities. These unprivileged belligerents would be liable to be treated as criminals just like their counterparts in international armed conflict.

In addition, the bright line division between the humanitarian law- and law enforcement-based legal regimes often breaks down when applied to complex security situations. For example, "global terrorism seems to straddle the law enforcement and armed conflict paradigms." [300] The direct interface between humanitarian law and human rights law occurs not only in respect of transnational terrorists, but also in the context of occupied territories and non-international armed conflict. Both military forces and their traditional law enforcement counterparts may be confronted with threats that range from violence associated with normal criminal activity to military type attacks under circumstances where it could be difficult to distinguish initially the nature or scope of the threat. In each of these situations, internal order may be maintained by a combination of military and police forces engaged primarily, but not exclusively, in law enforcement against 'criminal' activity.

As there is no requirement that armed forces distinguish themselves from the civilian population when conducting law enforcement operations, it would be unrealistic to suggest that military forces must comply with the principle of distinction at all times. [301] Ironically, one of the outcomes of working within the human rights-based law enforcement framework is that it does not include the principle of distinction or the idea that wearing of civilian clothes to gain an

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[300] See Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," *American Journal of International Law* 98 (2004), p. 5.

[301] Not all policing is carried out by police forces. Both para-military forces (sometimes referred to as a "third" force) and military forces to assist in law enforcement functions. See Grant Wardlaw, *Political Terrorism: Theories, Tactics and Countermeasures* (Cambridge University Press, 1982), pp. 97-100, and Joan Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights," *European Journal of Inernational Law* 14 (2003), p. 244. Perfidy has been recognized as part of the customary international law applicable to internal armed conflicts. See Dormann, *supra* note 296, pp. 476-479. See also Prosecutor v. Tadic, para. 125 (October 2, 1995), www.un.org/icty/tadic/appeal/decision-e/51002.htm.

advantage on a suspect constitutes perfidy.[302] Indeed, one of the reasons why policing is effective is that "it is more invasive and, to a significant degree, more subtle than the control exercised in interstate relationships."[303] Undercover operations and surveillance are a key part of domestic policing operations. A strong argument can be made that the military forces would not be "unprivileged belligerents" by virtue of their not wearing uniforms or otherwise not distinguishing themselves from the civilian population while engaged in operations that include a law enforcement mandate.

Finally, there remains the challenge of civilians incorporated into the national security structure of the state who may become direct participants in hostilities. In this regard, the significant 'civilianization' of many roles traditionally carried out by members of the armed forces is raising difficult questions about the nature of civilian participation. The involvement of civilians in operations has led to the conclusion that they are in danger of being considered to be involved in combat.[304] Ultimately, these civilians would be participating as unprivileged belligerents, and their participation would not have to be on the frontline. The inclusion of civilian leaders in the targeting decisions of military forces certainly places them at risk of being considered direct participants in armed conflict.[305] In terms of information warfare, civilian participation in a computer network attack could lead to conclusions that they are taking a direct part in hostilities. This increased civilianization of the defense forces of states may lead ultimately to an adjustment of how legitimacy is viewed in assessing the treatment of captured unprivileged belligerents.

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[302] It is likely, however, that activities such as feigning incapacitation by wounds or sickness and protected status by the use of signs and emblems such as the Red Cross or Red Crescent would be considered problematic.

[303] See Watkin, *supra* note 300, p. 13.

[304] Maj. L.L. Turner and Maj. L.G. Norton, "Civilians at the Tip of the Spear," *Air Force Law Review* 51 (2001), pp. 29-33, and Maj. M.E. Guillory, "Civilianizing the Force: Is the United States Crossing the Rubicon," *Air Force Law Review* 51 (2001), p. 136.

[305] See Michael Gordon, "US Air Raids in '02 Prepared for War in Iraq," *The New York Times*, July 20, 2003, and Douglas Jehl and Eric Schmitt, "Errors Are Seen in Early Attacks on Iraqi Leaders," *The New York Times*, June 13, 2004, for an outline of the role of the United States Secretary of Defense in target decision-making.

Standards of treatment: Human rights vs. humanitarian law

The question of whether human rights or humanitarian law standards of treatment are to be applied to specific unprivileged belligerents remains unsettled. With respect to traditional armed conflict between states, most unprivileged belligerents fall within the protection of the Civilian Convention regardless of the scope given to occupation. To the extent that the detailed provisions of that Convention do not apply, customary international law requires, at a minimum, the application of human rights standards -- whether articulated in Common Article 3 of the 1949 Conventions, Article 75 of Additional Protocol I, or by operation of the Martens clause.[306]

Given this interface it might be expected that there is little room for debate as to whether captured unprivileged belligerents should be protected adequately under international humanitarian law. However, such a view may not account fully for the degree to which the two normative frameworks -- international human rights and humanitarian law -- co-exist with an inadequately defined and at times awkward interface. Instances of where that overlap occurs are non-international armed conflict, occupation, and domestic operations conducted as part of the 'war on terrorism.' [307]

Although the decisions of the International Court of Justice acknowledge the continued operation of human rights norms during armed conflict,[308] there remains the view of some states that the *lex specialis* of humanitarian law in effect blocks the general application of human rights law and its accompanying accountability framework. [309] However, exclusionary interpretations in international law can also arise regarding the application of human rights law. This has perhaps

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[306] See Dormann, *supra* note 5, p. 68.

[307] Watkin, *supra* note 300, pp. 24-30.

[308] See *Nuclear Weapons, Advisory Opinion*, *supra* note 26, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* International Court of Justice (2004), para. 106, www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm .

[309] For example, see "Coard and Others v. United States (Case 10.951), *International Law Reports* 123 (2003), p. 169, para. 38 (Inter-American Commission on Human Rights report 1999); and "Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba (April 15, 2002)," *International Legal Materials* 41 (2002), p. 1019.

been demonstrated most graphically in the views expressed that detainees in Guantanamo Bay are in a legal "black hole."[310] Such language would seem at odds with the position of International Committee of the Red Cross that "no person captured in the fight against terrorism can be considered outside the law."[311] The issues being dealt with that gave rise to the 'black hole' reference were twofold: the denial to *habeas corpus* and the rules and procedures governing the trial by Military Commissions. [312] With the *habeas corpus* issue dealt with by the United States Supreme Court in favor of the detainees[313] the questions appear not necessarily related to gaps in the law but rather the scope and detail of human rights protections. [314]

These issues can be dealt with comfortably within the humanitarian law framework governing unprivileged belligerents that incorporate human rights norms, particularly through the operation of Article 75 of Additional Protocol I regardless of whether that text operates as a matter of conventional or customary law. [315] Here, the language of "black holes" may be helpful in gaining attention; however, it has the potential to portray inaccurately the humanitarian law protection applicable to unprivileged belligerents as being limited or deficient. In this respect, it has been noted that post-September 11, 2001 terrorism is a new phenomenon "to which traditional constitutional and international legal restraints may not be wholly responsive." [316] Ultimately, the solution may likely involve "adjustments in applicable domestic and international law." [317] However, the resulting dialogue

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[310] See Steyn, *supra* note 20.

[311] See *International Humanitarian Law and Terrorism: Questions and Answers*, International Committee of the Red Cross, May 2004 ("no person captured in the fight against terrorism can be considered outside the law; there is no such thing as a 'black hole' in terms of legal protection.").

[312] See Steyn, *supra* note 20, p. 15.

[313] *Hamdi v. Rumsfeld,* 124 Supreme Court 2633 (2004) and *Rasul v. Bush,* 124 Supreme Court 2686 (2004).

[314] See Anderson, *supra* note 40, for an analysis of Military Commissions from both a United States domestic law and international law perspective. See also the series of articles in "Agora: Military Commissions," *American Journal of International Law* 96 (2002), p. 320.

[315] See Steyn, *supra* note 20, p. 9.

[316] Thomas M. Franck, "Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror," *American Journal of International Law* 98 (2004), p. 688.

[317] Id.

will also hopefully reflect the full body of international humanitarian law that already exists to extend human rights-based protection to captured unprivileged belligerents.

What the present controversy does establish is the lack of clarity in the existing 'black letter' law. As noted, the traditional standard for the treatment of captured persons in times of international armed conflict has increasingly become that associated with prisoners of war. However, the phrase "prisoner of war" is itself linked intimately to the legitimacy debate.[318] Though that status is extended to civilians such as "persons accompanying the armed forces,"[319] the requirement that they "have received authorization, from the armed forces which they accompany" maintains the link to the "right authority." It has generally been seen as problematic to extend prisoner of war status to "fighters whose very act of fighting is considered unlawful." [320]

In the immediate post-World War II period, this problem was apparently avoided by providing prisoner of war treatment under cover of the term "internment." In this regard, the reliance on human rights norms in Article 75 of Additional Protocol, while providing an important level of protection, may also have aborted unwittingly the trend towards extending a prisoner of war level of treatment to detained persons, including unprivileged belligerents. While human rights standards provide crucial protection to captured personnel, history has shown that, in times of conflict, there is a need for a more detailed set of standards based on the protection provided to prisoners of war. The one hundred and forty-three articles of the Prisoner of War Convention and the fifty-six articles of the Civilian Convention [321] dealing with internment were created in response to the abuses that have occurred in the emotional atmosphere of armed conflict. This is not to suggest that a human rights-based regime is any less important. However, such regime does not offer the detailed guidance that the

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[318] See Greenwood,*supra* note 292, p. 192: "If a state is required to treat those who take up arms in the name of national liberation as prisoners of war, rather than as common criminals…it is almost inevitable both that the group for which they fight will seek to make political capital out of that fact and that others will be more likely to view the use of force by that group as legitimate."

[319] GC III, Art. 4(4).

[320] See Draper,*supra* note 37, p. 215 n. 1.

[321] See GC IV, Arts. 79 -35.

world community has created to govern the detention of most persons during international armed conflict. [322]

The solution may be to move towards an 'internment' model for the treatment of detainees held in long-term detention. [323] This would, in effect, be extending the standards of the Civilian Convention that apply to unlawful belligerents and others detained in occupied territory to those captured outside of such territory. This model would also allow for unprivileged belligerents to be held in pre-trial confinement and be tried for their criminal acts against the domestic law of the capturing power. Further, participants in hostilities (such as Al Qaeda) who engage in crimes against humanity [324] or war crimes [325] could also be dealt with in a criminal context when they are actually accused of an offense. It is in this situation that the regulation of pre-trial confinement and the conduct of the trial that the human rights based provisions of Article 75 of Additional Protocol I would have particular relevance. This approach would perhaps provide the most certain means to end the present debate about 'black holes' and gaps in protection. Further, it would separate standards of treatment from status more clearly, except for those persons who are accused of an offense.

Until there is greater international political will to establish a treaty regime that extends internee-like standards of treatment to all detainees taken in armed conflict, it is unlikely that the present confusion will be addressed adequately and lastingly. There remains

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[322] However for an approach that suggests the POW status carries "no significant, unique protective consequences" see Jinks, *supra* note 252.

[323] In the context of Guantanamo Bay there has been considerable debate about the extension of detailed prisoner of war standards to captured "unlawful combatants." See Bialke, *supra* note 6, p. 59 where it is noted detainees for security and other reasons are not permitted to do things like run their own camp, prepare meals, receive monthly pay or be able to work for pay.

[324] See Antonio Cassese, "Terrorism is also Disrupting some Crucial Legal Categories of International Law," *European Journal of International Law* 12 (2001), pp. 994-995; Bassiouni, *supra* note 298, p. 101; and Sabine von Schorlemer, "Human Rights: Substantive and Institutional Implications of the War Against Terrorism," *European Journal of International Law* 14 (2003), pp. 272-274.

[325] See Dinstein, *supra* note 26, p. 234 ["the same person is both an unlawful combatant and a war criminal, the enemy state has an option whether to proceed against him in one way (under international law) or the other (under domestic law)."].

considerable reluctance to consider change to existing law, largely, it would seem, because of a fear that the existing status quo may be impacted adversely.[326] In addition, traditionally, the efforts to extend such protection have floundered in a debate over legitimizing unprivileged belligerents. In such uncertainty resides, paradoxically, an opportunity. By removing the direct connection to 'legitimacy,' there may be an opening to advance humanitarian protection for conflict detainees regardless of cause or origin. Unprivileged belligerents would not automatically be treated as criminals. Detained persons would be treated on the basis of their humanity and not the cause they serve, while those against whom criminal acts can be established would be subject to the appropriate legal process.

Conclusion

Combatancy has throughout the history of organized warfare been an exclusionary concept. To the extent that the separation of combatants from others in society is linked to the principle of distinction, the creation of an exclusive group of warriors has a laudable goal. Unfortunately, the attempt to codify international humanitarian law in this area has been the subject of a significant struggle between powerful states and those seeking to recognize a broader 'patriotic' reaction to external threats. It is here that the greatest challenges have occurred in attempting to ensure the law addresses fully warfare in terms of both its nature and scope.

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[326] See Anthony Dworkin, *Revising the Law of War to Account for Terrorism: the Case Against Updating the Geneva Conventions, On the Ground That Changes Are Likely Only to Damage Human Rights* http://writ.news.findlaw.com/commentary/20030204_dworkin.html ("reopening the debate will allow groups to push for other changes to the law…that could set back humanitarian values.") and Dr. Jakob Kellenberger, *International Humanitarian Law at the Beginning of the 21st Century,* Statement at the 26th Round Table in San Remo on the Current Problems of International Humanitarian Law: The Two Additional Protocols to the Geneva Conventions: 25 Years Later - Challenges and Prospects (Sep. 5, 2002), available at www.icrc.org/Web/eng/siteeng0.nsf/html/5E2C8V?OpenDocument. ("[D]o they want to lower existing standards of protection? As far as this last point is concerned, you will understand that the ICRC will never be associated with initiatives aimed at weakening existing standards of protection.").

At the turn of the twentieth century, the attempt to codify international law reflected a Eurocentric idea of armed conflict in which dominant states established successfully a preference for the large uniformed armed forces. However, participation in hostilities has ultimately a cultural basis that is not limited to either standing armies or the wearing of uniforms. In order to address warfare comprehensively, international humanitarian law must address both its direct and indirect manifestations. To the extent the 1907 Hague Regulations legitimized primarily the former type of warfare, it was shifting ideas of legitimacy related to indirect warfare that ultimately led to fundamental change in the manner in which warfare was to be regulated.

As far back as the Lieber Code, there were indications that phraseology used to describe unlawful combatants (e.g. "brigand") masked a more complex relationship between the participants in the conflict than its criminal connotation suggested. For example, captured Confederate personnel were treated as prisoners of war even though the conflict was a civil war.[327] The failure of the Hague Regulations to address fully the nature of warfare was demonstrated perhaps most graphically by the reliance placed by major European states on 'special' forces to conduct guerrilla operations in both World Wars. Although the drafters of the 1949 Geneva Conventions failed to account realistically for the participation of organized resistance movements during the Second World War, it is clear that their use resulted in an altered perspective on legitimacy in the *Hostages Case*[328] and in scholarship. The heavier reliance on indirect warfare during the Cold War increased pressure to broaden the privileged class of warriors as is reflected in Additional Protocol I. Notwithstanding the reluctance of a number of states to ratify this mid-1970s effort to broaden humanitarian law, it is perhaps inevitable that the increasingly complex nature of modern conflict will bring further pressure to advance this area of the law in the twenty-first century.

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[327] While the Lieber Code refers to prisoners of war it was specifically written in the context of providing humanitarian protection and not to afford implicit recognition of Confederate sovereignty "but would not constitute recognition of the rebels as true belligerents in international law, nor would the United States forfeit the right to try the rebels for treason." See Hartigan, *supra* note 186, p. 9.

[328] *The Hostages Case, Trials of War Criminals* (Washington: Government Printing Office 1950).

In humanitarian terms, it is unfortunate that the standard of treatment applied to captured personell has been – and in many respects remains – linked intimately to notions of legitimacy. While there are no gaps in the humanitarian protection offered to the warriors of modern conflict, it is also not possible to state that there is equality either. The highest level of protection associated with prisoners of war remains tied to the concept of lawful combatancy. However, the imprecise criteria for attaining combatant status and the fact that the determination of legitimacy rests largely with the detaining power can mean that any claim to be a lawful combatant is subject to considerable uncertainty.

Even where protection similar to the prisoner of war standard is provided in the guise of internment under the Civilian Convention, the entitlement to that treatment is limited by concepts such as nationality and territoriality. Additional Protocol I maintains a hierarchy of unprivileged belligerents dependant upon whether a link can be made to a state or other right authority as a combatant. In introducing human rights standards of protection for those not otherwise covered by humanitarian law, Article 75 of Additional Protocol I was designed to fill any gap in protection. While this goal has been reached it does not remove what often appears to be a patchwork of statuses and protection.

The issue of whether 'unprivileged belligerents' would be entitled to the protection associated with internment was decided fifty years ago. The remaining question is why that protection should not also be extended to those who technically may be outside the reach of the 1949 Civilian Convention. In 1951, Richard Baxter stated that "[a]s the current tendency of the law of war appears to be to extend the protection of prisoner of war status to an ever-increasing group, it is possible to envisage a day when the law will be so retailored as to place all belligerents, however, garbed, in a protected status."[329] Given the continuing link between prisoner of war status and legitimacy that goal may not be attainable. However, extending the internment provisions of the Civilian's Convention would have a similar effect. This would ensure a consistent application of international

[329] Baxter, *supra* note 11, p. 343.

humanitarian law protection based on the treatment standards associated with prisoners of war without introducing the emotive and often divisive issue of legitimacy.

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