

1977

# The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict

W. Thomas Mallison

Sally V. Mallison

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

---

## Recommended Citation

W. Thomas Mallison and Sally V. Mallison, *The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict*, 9 Case W. Res. J. Int'l L. 39 (1977)

Available at: <https://scholarlycommons.law.case.edu/jil/vol9/iss1/5>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict

by *W. Thomas Mallison\**

and

*Sally V. Mallison\*\**

## CONTENTS

I. The Law of Armed Conflict: Participants, Process and Purposes .....	40
II. The Brussels Declaration (1874) .....	43
III. The Hague Conventions on the Law of Land Warfare (1899 and 1907) .....	45
IV. The Geneva Prisoners of War Convention (1949) .....	47
A. The Influence of the Second World War .....	47
B. Criteria for Irregulars to Have Privileged Status .....	49
1. Being Organized .....	49
2. "Belonging to a Party to the Conflict" .....	50
a. Being Associated with a State Party to the Conflict .....	50
b. The Organized Resistance Movement as a Party to the Conflict .....	53
3. Being Under Responsible Military Command .....	55
4. Wearing a Fixed Distinctive Sign .....	56
5. Carrying Arms Openly .....	57
6. Complying with the Laws and Customs of War .....	58
a. Analysis of the Requirement .....	58

---

\* Professor of Law & Director, International & Comparative Law Program, George Washington University.

\*\* Research Associate, International & Comparative Law Program, George Washington University.

Copyright © retained by the authors. This is a portion of a more comprehensive study concerning the international law of armed conflict.

The authors express their appreciation to Messrs. Davis Polk & Wardwell of the New York Bar, and particularly Henry L. King and Charles J. Moxley, Jr., for thoughtful suggestions concerning irregular combatants made during an international law consulting relationship.

b. Situations Where Reprisals are Applicable .....	63
V. Application of the Criteria to Irregular Combatants .....	65
A. Application of the Hague Regulations in the Post World War II War Crimes Cases .....	65
B. Application of the Geneva P.O.W. Convention .....	70
VI. A Future Projection of the Criteria for Irregular Combatants .....	75
Appendix A: Article 9 of the Brussels Declaration (1874) .....	76
Appendix B: Article 1 of the Hague Annexed Regulations (1899 and 1907) .....	76
Appendix C: Article 4A of the Geneva P.O.W. Convention (1949) .....	77

I. THE LAW OF ARMED CONFLICT: PARTICIPANTS,  
    PROCESS AND PURPOSES

**I**NTERNATIONAL ARMED CONFLICT is a situation characterized by relatively intense degrees of violence conducted by States and other participants including organized resistance movements. The international humanitarian law of armed conflict, traditionally known as the law of war, is designed to impose limitations upon the conduct of such violence. To the extent that the law is effective, a situation of international armed conflict becomes a system of controlled coercion. That violence which is an end in itself (perhaps designed to satisfy the pathological cravings of its perpetrators) is prohibited by the law. The urgent need for limitations in an era characterized by massive governmental methods of warfare and guerrilla methods conducted by all participants, with the ensuing inadequate protection of noncombatants, should not require an elaborate academic argument.

The doctrinal or normative elements in the law of armed conflict are better understood and honored when perceived in the context of the juridical decision-making process of which they are an indispensable part. In the present decentralized system of international law, this includes subsidiary processes of factual interaction, claim and counter-claim, and authoritative decision. The fact that national state officials perform a double function as both claimants and decision-makers places them in a network of mutualities and reciprocities which promotes compliance with the doctrinal standards. Stated negatively, a national official who advances claims and makes decisions not justified in law is likely

to find subsequently that his actions are utilized by others to harm his own important national interests.<sup>1</sup>

The effective sanctioning and enforcement of the law of armed conflict, like that of other branches of international law and of municipal law, is dependent in large measure for its observance upon the common interests of the participants.<sup>2</sup> The group participants include States and their typically regular armed forces, and organized resistance movements and their typically irregular armed forces. If the law is to be effective in imposing restraints upon these groups, it must provide inducements to bring their individual combatants within the juridical decision-making process.<sup>3</sup> The futility of attempting to put irregular combatants outside the law is illustrated by the barbaric methods employed against them during the Second World War by the Nazis and the Japanese militarists.<sup>4</sup> Torture and the death penalty were demonstrated to be failures as deterrent sanctions to prevent resistance by irregular forces. The central technique which has been employed thus far with some measure of success is an interrelated system of rights and duties. The rights may be exercised conditioned upon compliance with the duties. More specifically, both regular and irregular combatants who comply with the legal criteria, including the central criterion of adherence to the laws and customs of war, are entitled to exercise controlled violence while they are militarily effective and to have the legally privileged status of prisoners of war (P.O.W.s) upon capture.<sup>5</sup>

Historically, not everyone was entitled to the status of a legally privileged combatant. The ideas associated with knighthood and chivalry in Western Europe limited such combatant status to a military caste who participated in public, as opposed to private, wars.<sup>6</sup> A public war was one avowed or declared by a prince for governmental or state ends.<sup>7</sup> In contrast, hostilities

---

<sup>1</sup> A systematic presentation of the decision-making process appears in M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* ch. 1 (1961).

<sup>2</sup> W. MALLISON, *STUDIES IN THE LAW OF NAVAL WARFARE: SUBMARINES IN GENERAL AND LIMITED WARS* 19 (U.S. Naval War C., Int'l L. Stud., 1966).

<sup>3</sup> See Aldrich, *Human Rights in Armed Conflict: Development of the Law*, 68 DEP'T STATE BULL. 876, 880 (1973).

<sup>4</sup> See *Judgment in Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg*, 1 INT'L MIL. TRIB. 226-38 (Off. Eng. text, 1947).

<sup>5</sup> See J. DE PREUX, *COMMENTARY ON THE GENEVA PRISONERS OF WAR CONVENTION OF 1949*, at 46-47 (Int'l Comm. of the Red Cross, J. Pictet ed. 1960) [hereinafter cited as I.C.R.C.].

<sup>6</sup> M. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 82-100 (1965).

<sup>7</sup> *Id.* at 72. A summary of the medieval historical background appears in

for private purposes were typically characterized by acts of murder and plunder with noncombatants as the main objects of attack. The contemporary relevance of these conceptions is manifested by the criteria which are presently imposed upon regulars and irregulars alike. The requirements that all privileged combatants act for a public purpose and that violence for private gain (the acts of marauders on land or pirates at sea) is prohibited are as fundamental today as they have been historically.<sup>8</sup>

Guerrilla warfare is a factual method or technique of exercising violence and not a legal concept. It may be conceived empirically as a type of warfare characterized by the use of unorthodox tactics including stealth, surprise, and shock, whether conducted by regular armed forces (commandos, rangers, special forces, and so on) or by irregular armed forces including organized resistance movements.<sup>9</sup> Regular armed forces may, in particular contexts, conduct guerrilla warfare by choice, while irregular forces frequently conduct it by necessity. The creation of irregular armed forces has been historically associated with a basic sense of injustice which is sometimes combined with a politically persuasive ideology. The political preferences connected with irregular violence or counter-violence have produced diverse approaches to juridical analysis.<sup>10</sup>

---

Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 BRIT. Y.B. INT'L L. 173-77 (1973).

<sup>8</sup> Mallison and Jabri, *The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity*, 42 GEO. WASH. L. REV. 185, 216-19 and *passim* (1974) [hereinafter cited as *Belli. Occupation*]. For an analysis which ignores the criteria of the Brussels Declaration, Hague Regulations, and Geneva P.O.W. Convention concerning privileged irregular combatants and makes no significant distinction between such combatants and pirates see REISMAN, *Private Armies in a Global War System: Prologue to Decision*, in LAW AND CIVIL WAR IN THE MODERN WORLD 252 (J. N. Moore ed., 1974).

<sup>9</sup> The factual and analytical material on the subject is large. See, e.g., R. TABER, *THE WAR OF THE FLEA* (1970); R. THOMPSON, *DEFEATING COMMUNIST INSURGENCY* (1966); J. B. BELL, *THE MYTH OF THE GUERRILLA* (1971); CHE GUEVARA, *GUERRILLA WARFARE* (Morray transl., 1961); PHILOSOPHY OF THE URBAN GUERRILLA: *THE REVOLUTIONARY WRITINGS OF ABRAHAM GUILLEN* (Hodges transl. and ed., 1973); B. B. FALL, *STREET WITHOUT JOY* (Schocken Books, 1972).

<sup>10</sup> The Soviet post-World War II view appears in Trainin, *Questions of Guerilla Warfare in the Law of War*, 40 AM J. INT'L L. 535 (1946). The Government of Israel view appears in T. MERON, *SOME LEGAL ASPECTS OF ARAB TERRORISTS' CLAIMS TO PRIVILEGED COMBATANCY* (Sabra Books, 1970). The Government of the Republic of South Africa view is reflected in Booyesen, *Terrorists, Prisoners of War and South Africa*, 1 S.AFR. Y.B. INT'L L. 14 (1975). A Third World perspective appears in Abi-Saab, *Wars of National Liberation and the Laws of War*, 3 ANNALS INT'L STUDIES 93 (1972). Concern about Third World perspectives is manifested in Graham, *The 1974 Diplomatic Conference on the Law of War: A*

It should be clear that the elimination of international armed conflict in the present highly interdependent world community is the preeminent public order goal. The more modest, but overriding, legal policy objective of the law of armed conflict is the minimization of the destruction of human and material values.<sup>11</sup> This requires a delimitation of military objectives and the protection of noncombatants as far as possible, even in combat situations. It also requires realistic juridical doctrines which can be applied in the real world of international armed conflict.

This analysis focuses on the contemporary international law criteria applicable to irregular combatants and their ensuing status in law. An analysis of the law concerning regulars will be made where it is relevant to the main subject. Other combatants, such as spies, saboteurs, and the irregulars who do not meet the applicable criteria of the law of armed conflict, are lawful combatants in particular contexts, but they are not entitled to the privileged treatment of P.O.W.s upon capture.<sup>12</sup> This category of unprivileged combatants whose activities are not prohibited by international law is considered where it provides context for the subject under consideration.

## II. THE BRUSSELS DECLARATION (1874)

The Brussels Conference of 1874, the first multilateral conference to consider the law of land warfare, met at the invitation of the Russian Czar. The Declaration produced at this Conference has been accorded little attention by legal scholars because it remained unratified. It comprises, nevertheless, the foundation upon which the modern law of land warfare has been built. Prior to the meeting of the First Hague Conference in 1899, the consensus of the Brussels Conference was widely accepted as the authoritative statement of the customary law on the subject.<sup>13</sup>

During the Franco-Prussian War, the Prussian Government had acted on the assumption that only those irregulars having

---

*Victory for Political Causes and a Return to the "Just War" Concept of the Eleventh Century*, 32 WASH. & LEE L. REV. 25 (1975), responded to in Bond, *Amended Article 1 of Draft Protocol I to the 1949 Geneva Conventions: The Coming of Age of the Guerrilla*, *id.* at 65.

<sup>11</sup> The basic character of this objective is explained in McDUGAL & FELICIANO, *supra* note 1, at 59-93 *passim*.

<sup>12</sup> Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323 (1951); Belli, *Occupation*, *supra* note 8, at 199-200.

<sup>13</sup> See, e.g., 1 GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 16-17 (1920); A. P. HIGGINS, *THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR* 258 (1909).

state authorization were entitled to privileged combatant status. Consequently, each *franc-tireur* who could not produce a special authorization from the French Government upon capture was executed. Remembering these events, the Russian Government proposed in Article 9 of the original draft project to grant the status of privileged belligerents to militia and volunteers not forming part of the regular army provided that they met specified requirements including adherence to the laws and customs of war and, additionally, provided that they were subject to orders from army headquarters. Failing these requirements, it was stated that they shall not have privileged status and "in case of capture shall be proceeded against judicially."<sup>14</sup> The Conference, consistent with the strong convictions of the minor military powers, however, adopted the following modified text of Article 9:

The laws, rights, and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions:

1. That they have at their head a person responsible for his subordinates;
2. That they wear some settled distinctive badge recognizable at a distance;
3. That they carry arms openly; and
4. That, in their operations, they conform to the laws and customs of war.

In countries where militia constitute the army, or form part of it, they are included under the denomination army.

The introductory wording which sets forth the well-established principle that the "laws, rights, and duties of war are applicable" to the regular army was merely declaratory of the existing customary law. The new juridical concept is the provision which applies the same rights and obligations to militia and volunteers if they comply with the specified four conditions: (1) military command; (2) distinctive badge; (3) open arms; (4) conformity to the laws and customs of war. These four fundamental criteria, which are equally applicable to regulars, have been repeated in

<sup>14</sup> *Record of the Brussels Conference of 1874*, PARL. PAPERS, MISC. NO. 1 (G.B. 1975). For the Russian draft-project and the final approved text of the Brussels Declaration with a summary of the discussions that preceded the approval of each section, see 65 BRIT. & FOR. STATE PAPERS 1871-1874, at 1067-1109 (1881). The Final Protocol and the [Final] Project of an International Declaration Concerning the Laws and Customs of War [hereinafter cited as the Brussels Declaration] appear in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 25-34 (Schindler & Toman eds. 1973) [hereinafter cited as Schindler & Toman]. Articles 2 and 3 of the Oxford Manual adopted by the Institute of International Law at Oxford, Sept. 9, 1880, adopted the four criteria of Article 9 of the Brussels Declaration. *Id.* at 35, 37.

Hague Convention II of 1899 as well as in Hague Convention IV of 1907 and the Geneva Prisoner of War Convention of 1949. In addition to its omission of the requirement of subjection to orders from army headquarters, a most significant feature of Article 9 as adopted was its lack of a provision requiring state authorization for irregular forces. The result was an unequivocal rejection of the treatment of French irregulars by the Prussian Government.

### III. THE HAGUE CONVENTIONS ON THE LAW OF LAND WARFARE (1899 AND 1907)

The Brussels Declaration was signed by the representatives of all of the states participating in the Conference, but since it was not ratified by their respective governments, it did not become binding as a multilateral treaty. At the Hague Conference of 1899, this Declaration was taken as the starting point concerning the law of land warfare.<sup>15</sup>

Both the 1899 Convention II with Respect to the Laws and Customs of War on Land\* and the 1907 Convention IV† employed a form which included a preamble, a body of the Convention containing important administrative matters, and regulations annexed to the Convention containing the substantive rules of land warfare. Article 1 of the 1899 and the 1907 Annexed Regulations specified the criteria for irregulars to have privileged status in identical wording. This Article, with minor changes in wording, reproduces the substance of Article 9 of the Brussels Declaration and includes the four criteria of military command, distinctive sign, open arms, and adherence to the laws and customs of war. Consistent with the Brussels Declaration, there is no requirement of state authorization for irregular combatants. Article 1 adds explicit multilateral agreement to the customary consensus appearing in Article 9 of the Brussels Declaration. During the two World Wars, the identical Article 1 of the 1899 and 1907 Hague Regulations provided the governing law concerning the criteria to be met by irregular combatants in order for them to qualify for the privileged treatment of P.O.W.s.

---

<sup>15</sup> See statement of Mr. De Martens, the Russian delegate, at the 1899 Hague Conference, quoted in *Belli. Occupation*, *supra* note 8, at 200, n.65.

\* Hague Convention (II) with Respect to the Laws and Customs of War on Land [and Annexed Regulations], July 29, 1899, [1932] 32 Stat. 1803, T.S. No. 403, II Malloy 2042 [hereinafter cited as Hague Regs. (1899)].

† Hague Convention (IV) Respecting the Laws and Customs of War on Land [and Annexed Regulations], Oct. 18, 1907, [1910] 36 Stat. 2277, T.S. No. 539, I Bevens 631 [hereinafter cited as Hague Regs.].



The practice of the Nazis and the Japanese militarists was, nevertheless, to refuse to accord privileged combatant status to irregular guerrillas or partisans without regard to whether they complied with Article 1. The post-World War II war crimes trials held that the killing of irregulars who complied with Article 1, rather than according them P.O.W. status, was a war crime. In *United States v. Ohlendorf*,<sup>16</sup> the U.S. Military Tribunal, after quoting Article 1, stated:

Many of the defendants seem to assume that by merely characterizing a person a partisan, he may be shot out of hand. But it is not so simple as that. If the partisans are organized and are engaged in what international law regards as legitimate warfare for the defense of their own country, they are entitled to be protected as combatants.

\* \* \* \*

The language used in the official German reports, received in evidence in this case, show, however, that [irregular] combatants were indiscriminately punished only for having fought against the enemy. This is contrary to the law of war.<sup>17</sup>

Professor Lauterpacht has thoughtfully summarized the law of the Hague Regulations which was applicable in both World Wars:

Of such irregular forces two different kinds are to be distinguished — first, such as are acting on their own initiative, and on their own account, without special authorisation. Formerly, it was a recognised rule of International Law that only the members of authorised irregular forces enjoyed the privileges due to the members of the armed forces of belligerents . . . . But according to Article 1 of the Hague Regulations this rule is now obsolete. Its place is taken by the rule that irregulars enjoy the privileges due to members of the armed forces of the belligerents, although they do not act under authorisation . . .<sup>18</sup>

Article 2 of the 1899 and 1907 Annexed Regulations deals with the mass levy — that is, the situation of inhabitants who take up arms spontaneously upon the approach of the invader. The 1899 Regulations require only that such inhabitants respect the laws and customs of war, whereas the 1907 Regulations require that they also carry arms openly. The requirements for mass levies to enjoy privileged combatant status omit the two additional requirements for other irregular combatants.<sup>19</sup>

<sup>16</sup> "The Einsatzgruppen Case," 4 U.S. TRIALS OF WAR CRIM. 1 (1949).

<sup>17</sup> *Id.* at 492, 493.

<sup>18</sup> 2 L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY 256-57 (7th ed., H. Lauterpacht 1952).

<sup>19</sup> See text accompanying notes 78-79 *infra*.

A third category of "belligerents" — that is, combatants — is referred to in the Preamble to the 1899 and 1907 Conventions on Land Warfare. The famous De Martens clause, named for its author, the principal Russian delegate, appeared in the Preamble to each of the Conventions and was worded this way in the 1907 Convention:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

This clause states that the Hague Regulations are supplemented by the customary law of war. It is also specified that "the inhabitants and the belligerents" remain under the protection of international law even though they do not qualify as privileged combatants under either Article 1 or Article 2 of the Hague Regulations. It has been suggested elsewhere that the effect of this provision is to recognize that those who come within its ambit, including irregulars who do not meet the applicable criteria, have the status of lawful but unprivileged combatants.<sup>20</sup>

#### IV. THE GENEVA PRISONERS OF WAR CONVENTION (1949)

##### A. *The Influence of the Second World War*

The Geneva Prisoners of War Convention of 1929<sup>21</sup> provided a more detailed body of rules concerning the treatment of P.O.W.s after capture than did the brief articles of the Hague Regulations on the same subject. It did not, however, develop the law concerning the juridical status of either irregular or regular combatants. It used the incorporation by reference technique by providing that those entitled to P.O.W. status were all those referred to in Articles 1, 2, and 3 of the Hague Regulations of 1907.<sup>22</sup> The Convention written at Geneva in 1949 went far beyond this in specify-

<sup>20</sup> Baxter, *supra* note 12. The Trial of List, "The Hostages Trial," 8 LAW REP. OF TRIALS OF WAR CRIM. 34, 59 (U.S. Mil. Trib., Nuremberg, 1948) (U.N. War Crimes Comm'n pub. 1948) [hereinafter cited as REP. U.N. COMM'N] did not recognize the point made in the text and characterized adherence to the Hague Regulations criteria as "a lawful belligerency" and its violation as "unlawful."

<sup>21</sup> Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, [1932] 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343.

<sup>22</sup> *Id.* at Art. 1.

ing a comprehensive body of rules governing the treatment of P.O.W.s and also developed the law concerning the juridical status of privileged irregular combatants by including organized resistance movements.

The inhabitants of many of the states overrun by the German and Japanese armies during World War II continued military resistance through irregular or partisan forces which employed guerrilla methods of warfare. Such irregulars were typically executed upon capture without regard to whether or not they complied with Article 1 of the Hague Regulations.<sup>23</sup> The International Committee of the Red Cross (I.C.R.C.) attempted with great persistence, but with little success, to obtain the privileged status of P.O.W.s for those irregulars who met the Hague criteria.<sup>24</sup> The Geneva Diplomatic Conference of 1949 met in the shadow of these grim events with a full awareness that the organized resistance movements had fought on the side of the wartime United Nations. In neither the Conference nor in the preparatory work leading to it was there any disposition to diminish the privileged status of irregulars as enunciated in the Hague Regulations.

At the Diplomatic Conference of 1949, a British delegate proposed that the criteria which the Hague Regulations laid down for irregulars be made specifically applicable to regulars of an unrecognized government or authority.<sup>25</sup> Committee II of the Diplomatic Conference, however, did not deem it necessary to expressly state that these criteria were applicable to such regular armed forces.<sup>26</sup> Apparently the matter of applicability to regulars was so well established in customary law that a treaty provision would have been superfluous. There was no suggestion made that the four criteria be explicitly applicable to regulars of recognized governments covered by Article 4A(1). The result was to retain, and to rely upon, the customary law application to regulars of recognized and unrecognized governments of the same criteria which applies to irregulars. Article 4 also provides that P.O.W. status is extended to those specified persons "who have fallen into the power of the enemy," thereby using a broader term than "captured" which was used in the Geneva P.O.W.

---

<sup>23</sup> INT'L MIL. TRIB., *supra* note 4; U.S. TRIALS OF WAR CRIM., *supra* note 16.

<sup>24</sup> I.C.R.C., *supra* note 5, at 53 and n.1.

<sup>25</sup> 2A Final Record of the Diplomatic Conference of Geneva of 1949, at 414 (Swiss Fed. Pol. Dep't, 4 undated vols. numbered 1, 2A, 2B and 3) [hereinafter cited as Geneva Rec.].

<sup>26</sup> The Report of Committee II to the Plenary Assembly of the Conference, 2A Geneva Rec. 559, 561-62.

Convention of 1929.<sup>27</sup> It was sometimes contended during the Second World War that where regulars surrendered in mass they had not been "captured" and consequently it was not legally required to accord them P.O.W. status.

The introductory wording of Article 4A(2) concerning irregulars goes beyond Article 1 of the Hague Regulations. It characterizes privileged combatants who do not comprise a part of the regular armed forces as members of "other militias and members of other volunteer corps, including those of organized resistance movements." The inclusion of "organized resistance movements" is based upon the experience of the Second World War and accords authority and status for resistance movements which are similar or analogous to the wartime model. The broad language which is made applicable to such resistance movements, "operating in or outside their own territory, even if this territory is occupied," provides a comprehensive geographical area of operations for such movements which was not included in the Hague Regulations. The wording, "outside their own territory," authorizes resistance movements anywhere within the national territory of the belligerent occupant. This provision is also designed to prevent a denial of P.O.W. status to members of such movements operating inside occupied territory. A view expressed during the Second World War was that organized resistance movements only had legal authority to operate in unoccupied territory.<sup>28</sup>

## *B. Criteria for Irregulars to Have Privileged Status*

### *1. Being Organized*

The requirement of membership in an "organized" resistance movement is expressly enunciated in the first traditional provision concerning a responsible military commander and is implicit in the other three. Its inclusion in additional wording which introduces the other provisions should be interpreted as indicating a special emphasis on the principle that irregulars or partisans should be organized in belligerent groups which better facilitate their compliance with the other conditions of the Article. This basic principle had been accepted prior to the Diplomatic Conference in the agreement of the Conference of Government Experts "that the first condition preliminary to granting prisoners-

---

<sup>27</sup> Convention, Art. 1, *supra* note 21.

<sup>28</sup> See, e.g., U.S. v. Ohlendorf, *supra* note 16, at 492. The Report of Committee II to the Diplomatic Conference stated that the new wording "became necessary as a result of the experience of the Second World War." 2A Geneva Rec. 559, 562.

of-war status to partisans was their forming a military organization."<sup>29</sup>

The substantive requirement that resistance movements be "organized" is met by the most rudimentary elements of a military organization. Thus, a corporal's squad on detached duty meets the requirement. In the same way, a few irregulars who were part of a larger military unit which has become broken through the exigencies of combat will qualify. A single individual who has become separated from his organized unit retains his status as a member of the organized body even though he is unable to rejoin any part of that body before he is captured.

## 2. "Belonging to a Party to the Conflict"

There are alternative methods of analysis of this criterion. Such an approach is desirable because of the possibility of some ambiguity concerning the meaning of the term "a Party to the Conflict."

### a. Being Associated with a State Party to the Conflict

Neither Article 9 of the Brussels Declaration, nor Article 1 of the Hague Regulations, nor Article 4 of the 1949 Convention provides legal authority for armed bands of marauders or pirates acting principally for private purposes as opposed to public ones. Even if such bands used an internal military-like discipline, they could not meet the Brussels-Hague-Geneva criteria. The distinction made by that criteria between militia and volunteer corps which are a part of the regular army and analogous units which are not such a part is an important one. This distinction, nevertheless, cannot be taken to mean that there need be no connection at all between such independent militia and volunteer corps and a State party to the conflict. Some sort of connection between the two usually existed as a matter of military practice and usage. For example, during the Peninsular War there were varying degrees of association between the Spanish guerrillas and the British Army under the Duke of Wellington in their common war against the French.<sup>30</sup> It is well known that there were similar relationships during World War II between the Allied regular armies and the organized resistance movements fighting on the Allied side. The absence of such an association would make even the most

---

<sup>29</sup> I.C.R.C., *supra* note 5, at 58.

<sup>30</sup> See Draper, *supra* note 7, at 177.

elementary military cooperation impossible. Some kind of association was also helpful in establishing the public purpose of irregulars since it was thought that a State would not consent to a relationship with a band of marauders. The reality of the relationship was widely accepted as a part of the customs of war. If the introductory wording of Article 4A(2) is interpreted as requiring such a relationship, it would be declaratory of the existing consensus rather than law-making.

The need for a measure of association between organized units which are not a part of the regular army and a State party to the conflict may also be implicit in the common Article 2(1) of the Geneva Conventions of 1949 which provides:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Since organized units comprising a part of the irregular armed forces do not themselves constitute "the High Contracting Parties" which may in particular contexts also be the State parties to the conflict,<sup>31</sup> this provision may imply some kind of a relationship between such units and a State party to the conflict. If there are not at least two "High Contracting Parties" that are State parties to the conflict, there is probably not an international conflict situation under the present doctrines and the matter would be governed by the common Article 3 concerning internal armed conflicts which appears in each of the four Geneva Conventions of 1949.

The phrase "belonging to a Party to the conflict" was included in the text of Article 4A(2) as adopted by the Special Committee of the Second Committee<sup>32</sup> and accepted by the Geneva Diplomatic Conference of 1949. It replaced the provision in the draft P.O.W. Convention approved by the XVIIth International Committee of the Red Cross Conference at Stockholm in 1948 which required that such organized resistance movements provide notification to the occupying power of their participation in the conflict.<sup>33</sup> The draft provision appears to

---

<sup>31</sup> Professor Abi-Saab, *supra* note 10, at 117, considers the liberation or resistance movement a party to the conflict. Professor Baxter regards the same conclusion as possible if the resistance movement is an international person. See Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L. J. 1, 14 (1975).

<sup>32</sup> 2A Geneva Rec. 478-79; 2B Geneva Rec. 342.

<sup>33</sup> Art. 3(6)(a), 1 Geneva Rec. 73, 74.

have suggested that the organized resistance movement itself could be a party to the conflict since it, and not a different party, was to provide the notification. There is no indication that the provision which was adopted was regarded as diminishing the status of organized resistance movements in comparison with the draft provision. Since "belonging" is applicable to militia, volunteer corps, and organized resistance movements which are not part of the regular armed forces, such relationships that may be involved are not the same as those which exist between a State party to the conflict and its regular armed forces. While a governmental statement of authorization or recognition of an irregular group is satisfactory, it has been clear since the time of the Brussels Declaration that this is not indispensable. Among the preeminent World War II examples influencing the drafting of Article 4A(2) were Marshal Tito's partisan forces. These irregular forces were by the tacit agreement of the Allied forces, as well as by an understanding based upon common sense, fighting on the Allied side.<sup>34</sup> The Yugoslavian partisans did not act pursuant to the authority or under the control of any government. They not only rejected any suggestion of relationship with the Royal Government of Yugoslavia in exile, but were at the end of the war the creators of the contemporary Socialist Federal Republic of Yugoslavia.

The element of "belonging to a Party to the conflict" may be satisfied by merely a *de facto* relationship between the irregular unit and a State which is a party to the armed conflict. It may be met, according to the I.C.R.C. *Commentary*, very informally:

It may find expression merely by tacit agreement if the operations are such as to indicate clearly for which side the resistance organization is fighting.<sup>35</sup>

It is well known that a particular provision of an international agreement, such as Article 4A(2), should be interpreted in the context of other relevant parts of the agreement.<sup>36</sup> Article 4A(3) of the P.O.W. Convention includes as privileged combatants:

Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

---

<sup>34</sup> The "experience of the Second World War" which "the authors of the Convention wished to make specific provision to cover" is summarized in I.C.R.C., *supra* note 5, at 57.

<sup>35</sup> *Id.*

<sup>36</sup> See MCDUGAL, LASSWELL, & MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 273-302 (1967).

This provision must be interpreted "in the light of the actual case which motivated its drafting," that of the "forces of General DeGaulle which were under the authority of the French National Liberation Committee."<sup>37</sup> After 1940, they continued the armed struggle against Germany contrary to the terms of the Vichy French-German armistice agreement of that year. That armistice expressly provided that French nationals who continued to bear arms against the German forces would not be considered as privileged belligerents who were entitled to the protection of the laws of war. The German authorities, however, subsequently acknowledged the privileged status of these forces and regarded them as "fighting for England."<sup>38</sup> Even if General De Gaulle's forces did not "profess allegiance" to a government (they expressly opposed the Vichy French Government), the "Free French" (later known as the "Fighting French") constituted an unrecognized public authority, short of a government in exile, to which they professed allegiance. An analogous situation today would entitle such combatants to the same privileged treatment of P.O.W.'s as other regulars. There is nothing to indicate that Article 4A(2) requires a relationship for irregulars more demanding than the one which Article 4A(3) imposes upon regulars.

b. The Organized Resistance Movement as a Party to the Conflict

The term "a Party to the conflict," which is somewhat ambiguous standing alone, may be better understood by reference to the context in which it is used. It appears in other Articles of the P.O.W. Convention in contexts in which, in order to effectuate the purposes of the Convention, it probably includes organized resistance movements.<sup>39</sup> "High Contracting Parties" is used once in the common Article 1 and twice in the common Article 2 to refer to the State parties to the Convention. It is used in precisely the same way at the beginning of the common Article 3 concerning internal conflicts or civil wars. At the outset of the same Article, "Party to the conflict" is used in a context which indicates clearly the inclusion of all of the parties to the internal conflict. In addition to the legitimate government, this must necessarily include the revolutionaries whose military

---

<sup>37</sup> I.C.R.C., *supra* note 5, at 62.

<sup>38</sup> *Id.* at 63.

<sup>39</sup> See these articles which use the term without further specification: 17(3) *re* identity cards; 65(4) *re* notification of P.O.W. financial accounts; 71(3) *re* language of P.O.W. correspondence.



forces are typically organized as irregular groups associated with one or more revolutionary parties. In some internal conflicts, a revolutionary party may have a regular army structure, such as the Confederate States Army in the Civil War in the United States. The last paragraph of Article 3 uses "the Parties to the conflict" to refer to all such parties in a factual sense by providing that the application of the humanitarian provisions shall not affect their legal status. Since the legal status of States is not a major issue, this appears to refer to the status of revolutionary parties.

The next use of the term, "a Party to the conflict," is in Article 4A(1). Since this subsection deals with regular armed forces, the context which is thus provided indicates that the term here refers, at least as the norm, to State parties to the conflict. It probably refers to recognized State parties because the third subsection deals with regular forces of an unrecognized government or public authority. The next inclusion of "a Party to the conflict" is in Article 4A(2). If it refers to a State party to the conflict only, then the alternative analysis set forth above is applicable. The present analysis indicates that it may refer to the irregular movement as a party to the conflict. This is a possibility in view of the ambiguity of the term even when considered in the context. The emphasis placed upon the comprehensive geographical area of operations allocated to organized resistance movements perhaps enhances the possibility that these movements themselves may be such parties. It is more important that the interpretation of the movement as a party is supported by the experience of the Second World War upon which Article 4A(2) is based. Marshal Tito's partisan forces, it should be recalled, had allegiance to their own organized resistance movement which was a party to the international conflict. They were not associated with any State party to the conflict until their successes against the German Army made it militarily advantageous to the Allied powers to develop a relationship to them.

At the 1949 Diplomatic Conference, the views of those who wished to impose additional requirements upon organized resistance movements were rejected and such movements were assimilated to irregular militia and volunteer corps.<sup>40</sup> Such militia and corps were those previously specified in Article 9 of the Brussels Declaration and Article 1 of the Hague Regulations, neither of which required state authorization or subjection to orders

---

<sup>40</sup> See Report of Committee II to the Plenary Assembly of the Diplomatic Conference (1949), 2A Geneva Rec. 559, 562.

from regular army headquarters. The interpretation of "a Party to the conflict" which is consistent with the Brussels and Hague criteria is that it makes a broad factual reference under which the organized resistance movement, like an irregular militia or volunteer corps, may be a party to the conflict. This interpretation also makes the word "belonging" in the English text more accurate because organized resistance forces can clearly "belong" to their own movement which is a party to the conflict. Such forces cannot "belong," in the sense of subordination and control, to a State party to the conflict. If they do "belong" in such a meaning, they are no longer irregular forces under Article 4A(2) but are regular militias or volunteer corps under Article 4A(1). Professor Baxter has made the constructive suggestion that an organized resistance movement can be a party to the conflict if it is recognized as an international person.<sup>41</sup> This should present no difficulties to viable organized resistance movements since recognition from an international law perspective is based upon factual realities rather than upon idiosyncratic national policies.<sup>42</sup>

### 3. *Being Under Responsible Military Command*

This provision and the ensuing three provisions are the same traditional requirements of Article 9 of the Brussels Declaration and Article 1 of the Hague Regulations. The present requirement limits privileged status to those irregulars who are a part of a belligerent group with a hierarchical authority which assumes responsibility for the actions of its members. It is not necessary that the commander be a regular army officer or be commissioned by a government. The U.S. Army Manual, *The Law of Land Warfare*, declares that "state recognition, however, is not essential, and an organization may be formed spontaneously and elect its own officers."<sup>43</sup> The main purpose for having a "responsible commander" is to provide for reasonable assurance of adherence by irregulars to the fundamental requirement of compliance with the laws of war. It is thought that a somewhat effective sanction exists by making the commander "responsible for his subordinates." Although there is no stated limitation upon the responsibility of the commander, the requirement should be interpreted so as to effectu-

---

<sup>41</sup> See Baxter, *supra* note 31.

<sup>42</sup> The leading case which emphasizes the empirical character of the international law determination is *Great Britain v. Costa Rica*, "The Tinoco Claims Arbitration," 18 AM. J. INT'L L. [Docs.] 147 (1924).

<sup>43</sup> Field Manual 27-10, THE LAW OF LAND WARFARE, ¶ 64 (1956) [hereinafter cited as FM 27-10]. The lack of need for state recognition is also relevant to the requirement of "belonging to a Party to the conflict."

ate its major purpose. This is to have a practical and working command structure which is strengthened by making the commander responsible for those actions of his subordinates which a reasonable military commander should control. While the dividing line cannot be fixed in advance so as to cover all possible fact situations, some of the clearer situations can be identified. If subordinates attack non-combatant targets as such, the commander is responsible. If a subordinate commits an isolated murder for his own personal objectives and while not subject to the control of the commander, the latter is not responsible. Command must be exercised in the preparation and execution of military operations but not at all times without exception.

In the post-World War II war crimes trials, the defense of superior orders was available to subordinates in some situations. In general, it was not treated as a bar to the conviction of a subordinate for executing an illegal order but, dependent upon all the circumstances, it was considered in mitigation of punishment.<sup>44</sup> It should be apparent that unless some effect is given to the defense of superior orders, each subordinate is invited to determine the legality of orders for himself with destructive consequences for the discipline which is an inseparable part of military command. There is no doubt that the commander who issues illegal orders is responsible for them.<sup>45</sup>

#### 4. *Wearing a Fixed Distinctive Sign*

Article 4A(2)(b) prescribes "having a fixed distinctive sign recognizable at a distance," and it is apparent that the sign must be worn so that it is visible. This distinctive sign requirement for the irregular is analogous to the wearing of a uniform by a regular. Each requirement is designed to allow privileged status to those combatants who are distinguishable in appearance from the civilian population. The sign must nominally be "fixed," but it is widely agreed that the requirement is met by an armband, an insignia, or, for example, a distinctive headgear or coat.<sup>46</sup> These

---

<sup>44</sup> McDUGAL & FELICIANO, *supra* note 1, at 690-99 analyzes the war crimes trial *re* superior orders. See also Parks, *Command Responsibility for War Crimes*, 62 MIL. L. R. 1 (1973).

<sup>45</sup> Trial of Kurt Meyer, "The Abbaye Ardenne Case," 4 REP. U.N. COMM'N 97 (Can. Mil. Ct., Aurich, Germany, 1945); Trial of Baba Masao, 11 REP. U.N. COMM'N 56 (Austl. Mil. Ct., Rabaul, 1947); Trial of Wilhelm Von Leeb, "The German High Command Trial," 12 REP. U.N. COMM'N 1 (U.S. Mil. Trib., Nuremberg, 1948). The cited cases deal with regular army commanders but it is unlikely that a significantly different standard would be applied to irregular commanders.

<sup>46</sup> FM 27-10, *supra* note 43, at ¶ 64.

items, like the more distinctive portions of a regular military uniform, are susceptible to being rapidly disposed of should the need arise.

The requirement that the sign be "recognizable at a distance" is rather vague since there is no specification of such obvious questions as to what distance, by whom, and in what circumstances. The distinctive sign of irregulars, like the uniform of regulars, need only be worn during military operations.<sup>47</sup> Such operations should be reasonably construed as including deployments which are preliminary to actual combat. The sign should be the same for all members of a particular resistance organization.

The foregoing may appear to suggest that this appearance requirement applicable to irregulars is much less stringent than the requirement of a uniform for regulars. It should be recalled, however, that the purpose of the contemporary regular uniforms is to provide maximum camouflage in the physical environment.<sup>48</sup> Since regulars establish the standard, then irregulars also may become as near to invisible in the landscape as possible without losing their privileged status so long as they remain distinguishable from noncombatants.

In the *Trial of Skorzeny*,<sup>49</sup> Colonel Otto Skorzeny and others serving under his command in the German Army were charged with a criminal offense in that, while participating in the Ardennes offensive, they wore American uniforms and treacherously fired upon and killed members of the United States armed forces. The facts also showed that they used American "jeep" vehicles and other equipment to further their disguise. The evidence did not conclusively establish that the defendants had killed American personnel in these circumstances and all the accused were acquitted. It seems improbable that irregulars should be held to a higher standard than regulars were in this case.

### 5. *Carrying Arms Openly*

The purpose of this requirement is to prevent irregulars, at the risk of forfeiting their privileged status as prisoners of war upon capture, from perfidiously misleading the enemy by conceal-

---

<sup>47</sup> The Conference of Government Experts prior to the Geneva Conference of 1949 recommended that irregulars should be required to "habitually and constantly display a fixed distinctive sign recognizable at a distance" but this was rejected. I.C.R.C., *supra* note 5, at 59-60.

<sup>48</sup> M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 59 (1959).

<sup>49</sup> 9 REP. U.N. COMM'N 90 (U.S. Mil. Gov't Ct., Germany, 1947).

ing their own identity.<sup>50</sup> The conditions of "open arms" and "distinctive sign" emphasize the necessity that irregulars distinguish themselves as combatants during their operations against the enemy. The I.C.R.C. *Commentary* states that the requirement that arms be carried "openly" means that the "enemy must be able to recognize partisans as combatants in the same way as regular armed forces, whatever their weapons."<sup>51</sup> Similarly, it cannot be interpreted to mean that irregulars are under an obligation to carry their arms "more openly" than does a regular soldier. The *Commentary* states: "[I]t is not an attempt to prescribe that a hand-grenade or a revolver must be carried at belt or shoulder rather than in a pocket or under a coat,"<sup>52</sup> and also that:

[A]lthough the difference may seem slight, there must be no confusion between carrying arms "openly" and carrying them "visibly" or "ostensibly." Surprise is a factor in any war operation, whether or not involving regular troops.<sup>53</sup>

These statements are applicable to irregulars who are complying with the laws and customs of war including wearing a fixed distinctive sign. An irregular in civilian clothing who approaches an enemy sentinel and suddenly attacks with a previously hidden revolver or hand grenade has clearly violated the law. The open arms requirement, like that of the distinctive sign, is only applicable during military operations.

## 6. *Complying with the Laws and Customs of War*

### a. Analysis of the Requirement

This requirement is an expression of the fundamental concept which constitutes the basis for the whole body of the law of war. Unless hostilities "are to degenerate into a savage contest of physical forces freed from all restraints," the laws and customs of war must continue to be observed in all relevant circumstances.<sup>54</sup> It prescribes that irregulars, on the same basis as regulars, are bound to conform in the conduct of their operations to the recognized standards of the international humanitarian law.

---

<sup>50</sup> Acts of perfidy are in violation of the laws and customs of war. See OPPENHEIM-LAUTERPACHT, *supra* note 18, at 430.

<sup>51</sup> I.C.R.C., *supra* note 5, at 61.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> OPPENHEIM-LAUTERPACHT, *supra* note 18, at 218. The criteria considered in the present analysis is not limited to irregular soldiers but also includes irregular sailors and airmen.

While it is clear that the present requirement includes each of the preceding criteria of Article 4A(2), its full ambit is not defined with precision. The I.C.R.C. *Commentary* recognizes that "the concept of the laws and customs of war is rather vague and subject to variations as the forms of war evolve."<sup>55</sup> In attempting to give it some precision, the *Commentary* states, "[T]he term 'resistance,'" as employed in Article 4A(2) should cover, "not only open conflict against the Occupying Power, but also other forms of opposition to the latter."<sup>56</sup> In spite of the problem of "vagueness," there exist some criteria for judging the lawfulness or otherwise of the particular actions of combatants and for holding the perpetrators of illegitimate acts of warfare criminally responsible for their behavior. The U.S. Army *Law of Land Warfare* provides a representative description of such conduct as would be considered violative of the laws and customs of war by especially warning against:

employment of treachery, denial of quarter, maltreatment of prisoners of war, wounded, and dead, improper conduct toward flags of truce, pillage, and unnecessary violence and destruction.<sup>57</sup>

These acts would, of course, be equally violative of law if committed by regular forces.

A further explanation of the basic character of the condition of adhering to the laws and customs of war is provided in the I.C.R.C. *Commentary*:

Partisans [irregulars] are . . . required to respect the Geneva Conventions *to the fullest extent possible*. In particular, they must conform to international agreements as those which prohibit the use of certain weapons (gas). In all their operations, they must be guided by the moral criteria which, in the absence of written provisions, must direct the conscience of man; in launching attacks, they must not cause violence and suffering disproportionate to the military result which they may reasonably hope to achieve. They may not attack civilians or disarmed persons and must, in all their operations, respect the principles of honour and loyalty *as they expect their enemies to do*.<sup>58</sup>

The important matter, set forth in the last italicized clause of the statement, points out the consequences of a belligerent State's persistent and demonstrable disregard of the rules of inter-

<sup>55</sup> I.C.R.C., *supra* note 5, at 61.

<sup>56</sup> *Id.* at 58.

<sup>57</sup> FM 27-10, *supra* note 43, at ¶ 64.

<sup>58</sup> I.C.R.C., *supra* note 5, at 61. (Emphasis added.)

national law as, for example, in its treatment of the inhabitants of the territory under belligerent occupation. It also indicates the unreality of expecting irregulars to adhere to the law when a State violates it. As a practical matter in obtaining enforcement of the laws and customs of war by resistance movements "operating in or outside their own territory," observance of the doctrines by State parties to the conflict is important in establishing conditions for mutuality and reciprocity which promote similar observance by irregulars. In addition, the State parties to the 1949 Geneva Conventions have unilateral obligations, not contingent upon mutuality, in the common Article 1 "to respect and to ensure respect" for the Conventions. Since resistance movements were not, as such, represented at Geneva in 1949, it is fatuous to expect them to adhere to the laws and customs of war in situations where the States violate the rules which the States wrote and adopted there.

The first italicized clause in the statement quoted refers to irregulars adhering to the Conventions "to the fullest extent possible." This is an eminently practical recognition of the military reality that even relatively well organized and disciplined resistance movements operate under severe handicaps which regular armed forces often avoid. The experiences of resistance movements in World War II, as well as in irregular warfare since then, amply bear out that such difficulties exist. The I.C.R.C. *Commentary* has thus recognized that, since in the real world of events even regulars do not invariably adhere to the laws and customs of war, it is better to have irregulars adhere as much as possible rather than not at all.

The humanitarian treatment of prisoners of war in contemporary conflict situations is an appropriate subject for concern. It is clear that the State parties to the P.O.W. Convention are bound to carry out all of the very detailed administrative arrangements concerning the protection and care of P.O.W.s which appear in the 143 Articles of the Convention. It would require a considerable departure from reality to expect irregular forces to meet the same requirements in the treatment of P.O.W.s in their hands. A provision of the draft P.O.W. Convention prepared by the I.C.R.C. stated that irregulars, in addition to the four criteria first formulated in the Brussels Declaration, must also "treat nationals of the Occupying Power who fall into their hands in accordance with the provisions of the present Convention."<sup>59</sup> This provision was deleted by the Diplomatic Confer-

---

<sup>59</sup> Article 3(6)(b), 1 Geneva Rec. 73, 74.

ence because of an unwillingness to impose additional criteria beyond the four traditional ones. The outcome is a recognition of the realities with which irregular forces and their P.O.W.s are confronted. One should not, however, leap to the opposite conclusion and believe that prisoners are at the mercy of irregular forces. At the minimum, fundamental humanitarian treatment must be accorded to prisoners in the hands of irregulars. This is required by the terms of Article 13 of the P.O.W. Convention which expressly prohibits reprisals against P.O.W.s. Article 14 requires respect for the persons and the honor of prisoners and includes special protection for women. Article 15 provides for necessary medical attention and this means, at the least, the standard of medical care usually provided in the irregular force and, where it is available, a considerably higher standard. Article 16 prohibits adverse distinctions "based on race, nationality, religious beliefs or political opinions, or any other distinction founded on similar criteria." These fundamentals, among others, must be extended to prisoners in the hands of irregular forces as a part of their obligation to obey the laws and customs of war.<sup>60</sup>

The central legal policy objective in the requirement of adhering to the "laws and customs of war" is that this is designed to promote maximum lawfulness in the conduct of hostilities. An unworkable rigidity in doctrinal formulation and application could lead irregulars to the conclusion that if they cannot meet all the requirements of the legal system, they have nothing to lose by violation of law. Unless irregulars commit violations of the laws of war of the type which involves destruction of noncombatant human values and militarily irrelevant material values, it is doubtful that the present condition is violated and that privileged belligerent status may be denied to them lawfully.<sup>61</sup>

This conclusion is more compelling if the test of adherence to "the laws and customs of war" is applied to regular armed forces in lieu of the complacent view that their compliance may be assumed. These criteria are applied to irregulars no matter how difficult the factual conditions under which they conduct their military operations. It is essential to apply the same criteria to the regulars who comprise a standing governmental instrument specialized in the use of violence and with an undoubted ability to do so consistent with law. Regular forces have conducted inten-

---

<sup>60</sup> Other articles which may be applicable to organized resistance movements as parties to the conflict are cited *supra* note 39.

<sup>61</sup> The text is analogous to the municipal criminal law principle requiring that guilt be proved beyond a reasonable doubt.



sive bombing of densely populated urban areas as well as employing so-called "free fire zones" in places where it is known that there is a considerable noncombatant civilian population. If these methods of warfare, along with aerial bombing "reprisals" directed at refugee camps which probably harbor some irregulars as well as a substantial population of noncombatants, are lawful for regular armed forces,<sup>62</sup> it becomes very difficult to apply a higher standard to irregular forces. If any law of armed conflict is to be preserved, it is essential to recognize that such direct attacks on civilians are unlawful without regard to the identity of the perpetrators. Professor Lauterpacht has enunciated the central point which he characterizes as an "absolute rule of law":

Nevertheless it is in that prohibition, which is a clear rule of law, of intentional terrorization — or destruction — of the civilian population as an avowed or obvious object of attack that lies the last vestige of the claim that war can be legally regulated at all. Without that irreducible principle of restraint there is no limit to the licence and depravity of force.<sup>63</sup>

It is useful to consider briefly the applicability of each of the six criteria of Article 4A(2) to the group and to its individual members. Each of the six criteria is imposed upon the irregular group as an entity. According to the widely accepted view, if the group does not meet the first three criteria (organization, association with a party to the conflict, and military command), the individual member cannot qualify for privileged status as a P.O.W.<sup>64</sup> The last three criteria (distinctive sign, open arms, and adhering to laws and customs) must be met by both the group as a whole and the individual member to entitle the latter to privileged status.<sup>65</sup> The *Law of Land Warfare* sets forth the accepted principle that group adherence to the sixth criterion is "fulfilled if most of the members of the [irregular] body observe the laws and customs of war, notwithstanding the fact that the individual member concerned may have committed a war crime."<sup>66</sup> In the same way, group adherence to the distinctive sign and open arms criteria is met if most of the members of the group comply. Because of both the need to bring irregulars within the legal system and the humanitarian purpose of the ap-

---

<sup>62</sup> See Carnahan, *The Law of Air Bombardment in its Historical Context*, 17 AIR FORCE L. R. 39 (Summer, 1975).

<sup>63</sup> *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 369 (1952).

<sup>64</sup> See, e.g., Draper, *supra* note 7, at 196.

<sup>65</sup> *Id.*

<sup>66</sup> FM 27-10, *supra* note 43, at ¶ 64.

plicable law, state officials should not lightly reach the conclusion that most of the members of an irregular group do not comply with one of the last three criteria.

The individual who complies with each of these three last criteria, but whose group does not comply with one of them, is denied privileged status. While this is a lawful result, it seems unfair and harsh to the individual who wears a distinctive sign, carries arms openly, and adheres to the laws and customs. From his or her perspective, it could appear to be the imposition of a collective punishment where there is no personal guilt. Even though these last three traditional requirements of Article 4A(2) are stated to be applied to the group, this must be interpreted in a reasonable way so as to further the overriding humanitarian purpose of the P.O.W. Convention. At the least, this purpose should lead to a substantial mitigation of the punishment of the individual which is usually involved in a denial of privileged status.

Before concluding the analysis of the requirement of conducting operations in compliance with "the laws and customs of war," it should be mentioned briefly that military units which are specially trained and utilized to violate the laws of war do not meet the group requirement of adherence to these laws. Examples of such regular forces from the Second World War include the infamous *Einsatzgruppen* or special task forces of the German Government for the killing of the "racially inferior" enemy civilian population<sup>67</sup> as well as the Japanese Army "military police" which had particular responsibility for attacks upon despised members of the civilian population in the Japanese-occupied territories. There are, unfortunately, numerous contemporary examples of regular and irregular armed forces which systematically violate the laws and customs of war.<sup>68</sup>

#### b. Situations Where Reprisals Are Applicable

The Geneva Conventions for the Protection of War Victims of 1949 have prohibited all reprisals against P.O.W.'s, protected civilians, and militarily ineffective combatants, that is, those who are wounded, sick, or shipwrecked.<sup>69</sup> This leaves reprisals still

---

<sup>67</sup> Col. Draper makes the surprising statement that there is an issue concerning whether or not the *Einsatzgruppen* belonged to the German Government. Draper, *supra* note 7, at 200-201.

<sup>68</sup> A systematic inventory of examples should indicate that they do not appear upon only one side of the political or ideological spectrum.

<sup>69</sup> Art. 46, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1956] 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Art. 47, Geneva Convention

applicable to effective combatant forces. The U.S. Army *Law of Land Warfare* provides the following definition:

Reprisals are acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.<sup>70</sup>

The doctrine of reprisals is applicable, *inter alia* to situations where a belligerent occupant persistently disregards the international law limitations upon its authority in the occupied territory. Such continuous violations of the Geneva Civilians Convention are not only violations by the belligerent occupant, but also constitute violations by the other State parties to the Convention because of their unilateral obligation under the common Article 1 "to ensure respect" for the Convention as well as to respect it. If such violations of law, nevertheless, are continued, this gives to the resistance forces a right to conduct military operations in a way which goes beyond the usual lawful bounds of military resistance and self-defense. Even in such a situation, attacks upon civilians cannot be justified.

In the post-World War II war crimes trials, it was recognized that where an objective judicial determination was made, German officials could inflict severe punishment upon irregulars who did not meet the requirements of the Hague Regulations for privileged combatant status. Where such resistance, however, was ascertained to have been caused by the unlawful conduct of the belligerent occupant, the opposite conclusion was reached. The acts of resistance were then determined to be lawful measures of and ones, significantly, reprisal to which the occupant was held to have no legal authority to institute counter-reprisals. In *Re Christiansen*,<sup>71</sup> the Netherlands Special Court (War Criminals) at Arnhem tried the commander of the German Army of Occupa-

---

for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, [1956] 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Art. 13(3), Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1956] 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as P.O.W. Conv.]; Art. 33(3), Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1956] 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as Civ. Conv.].

<sup>70</sup> Para 497(a). The same source stresses that reprisals should not be resorted to in a hasty and ill-considered manner. Para. 497(b). See generally F. KALSHOVEN, *BELLIGERENT REPRISALS* (1971).

<sup>71</sup> [1948] ANN. DIG. INT'L L. CASES 412 (1948).

tion in Holland who was accused, *inter alia*, of ordering the forcible removal and expulsion of the civilian population of the village of Tuten and the destruction by fire and otherwise of a large number of buildings in the town as a reprisal for an attack by members of the Dutch resistance. General Christiansen defended on the ground that his acts were permissible acts of reprisal against illegal acts of the resistance movement.<sup>72</sup> In rejecting this defense, the court said that the acts of resistance were occasioned by the occupant's violations of law and that there was no legal basis for invoking counter-reprisals. "The reason was that their [the irregular resistance forces] acts were acts of justifiable defence which the Occupying Power was forbidden either to punish or to counter with reprisals."<sup>73</sup>

In the same way, the opinion in the *Einsatzgruppen Case*<sup>74</sup> stated concerning the claim of reprisals which was made in defense:

If it is assumed that some of the resistance units in Russia or members of the population did commit acts which were in themselves unlawful under the rules of war, it would still have to be shown that these acts were not in legitimate defense against wrongs perpetrated upon them by the invader. Under international law, as in domestic law, there can be no reprisal against reprisal. The assassin who is being repulsed by his intended victim may not slay him and then, in turn, plead self-defense.<sup>75</sup>

In summary, the doctrine of reprisals, in particular factual contexts involving, *inter alia*, persistent violations of law by the belligerent occupant, gives resistance forces an exceptional legal right to conduct military operations by methods which would otherwise be in violation of "the laws and customs of war."

## V. APPLICATION OF THE CRITERIA TO IRREGULAR COMBATANTS

### A. *Application of the Hague Regulations in the Post-World War II War Crimes Cases*

The trials following the Second World War, except for the International Military Tribunals at Nuremberg and Tokyo, were conducted by courts which were constituted by municipal law authority. Their decisions are relevant to the present analysis because the respective municipal laws of the Western Allies required that the accepted principles of international law be ap-

<sup>72</sup> *Id.* at 413.

<sup>73</sup> *Id.* at 414.

<sup>74</sup> *Supra* note 16.

<sup>75</sup> *Id.* at 493.

plied.<sup>76</sup> In analyzing these cases, it is important to recall that military courts, like civilian juries, do not usually give reasons for conclusions of fact.

The *Trial of Bauer*<sup>77</sup> took place before the French Permanent Military Tribunal at Dijon in 1945. The facts involved a German column under the command of Colonel Bauer which, during August and September, 1944, was retreating from the area of Bordeaux and had reached the town of Autun where it engaged in a battle with a force of French regulars and some members of the French Forces of the Interior (F.F.I.).<sup>78</sup> Three members of the F.F.I. were captured and were summarily executed for the alleged offence of acting as combatants. The charge against Bauer and some of his subordinates was the murder of the three irregular combatants who were entitled to P.O.W. status. According to the prosecution, the three members of the F.F.I. were dressed almost entirely in civilian clothes, but there was some testimony to indicate that one or two of them wore French tri-color distinctive marks and that the third wore a khaki overall. The accused were convicted as charged and, while Bauer was sentenced to death, his subordinates received lesser sentences since they had acted pursuant to his orders.

The prosecution invoked Article 2 of the Hague Regulations of 1907 concerning mass levies which provides:

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

---

<sup>76</sup> The applicable British law is set forth in 1 REP. U.N. COMM'N 105 (1947), and the Royal Warrant of June 18, 1945, is in T. Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10 at 254 (1949). The French law is in 3 REP. U.N. COMM'N 93 (1948). The Netherlands law is in 11 REP. U.N. COMM'N 86 (1949). The United States law is in 3 REP. U.N. COMM'N 103 (1948) and in 15 U.S. TRIALS WAR CRIM. *passim*. (1949) covering procedure, practice and administration. See also Koessler, *American War Crimes Trials in Europe*, 39 GEO. L. J. 18 (1950). See generally on the applicable law, *Digest of Laws and Cases*, 15 REP. U.N. COMM'N *passim* (1949).

<sup>77</sup> 8 REP. U.N. COMM'N 15 (1949).

<sup>78</sup> General Eisenhower's proclamation of July 15, 1944, designated the F.F.I. as a regular army under his command. See I.C.R.C., *supra* note 5, at 57, n.2. The report of the present case, however, considers the members of the F.F.I. as irregulars.

Article 42 of the Hague Regulations of 1907 emphasizes the concept of effective occupation<sup>79</sup> and provides:

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

It is clear that the two requirements of Article 2 concerning open arms and respecting the laws and customs of war were met by the captured members of the F.F.I. A significant feature of this case is that, while Article 2 deals with mass levies which are activated "on the approach of the enemy," the court apparently had no hesitancy in applying the same concept to a situation where the enemy was in retreat; that is, departing rather than approaching, and where the effective occupation had been terminated rather than not yet started. It is possible that "the approach of the enemy" may be properly interpreted as an enemy making a tactical stand and engaging in combat even though, from the strategic viewpoint, the enemy is engaged in a retreat. The widespread practice of irregulars joining in military operations with regular army units which were engaged in the liberation of occupied territory in the latter part of the Second World War clearly influenced the decision of the court.

If the prosecution had claimed that the F.F.I. members were entitled to the privileged treatment of P.O.W.s under Article 1 rather than under Article 2, the issue concerning effective occupation would have been irrelevant. It seems probable that the F.F.I. irregulars could have met all four requirements of Article 1 since their participation in the combat situation with French regular units indicated that they were under responsible military command. In addition, the testimony concerning tri-color distinctive badges and khaki overalls manifests a distinction in appearance between the irregulars and the civilian population.

In the *Trial of Renoth*<sup>80</sup> before a British Military Court in Germany, the principal defendants were accused of committing a war crime:

in that they at Elten, Germany on 16th September 1944 in violation of the laws and usages of war, were concerned in the killing of an unknown Allied airman, a prisoner of war.<sup>81</sup>

---

<sup>79</sup> This concept is now replaced by the provision in the common Article 2 of the 1949 Geneva Conventions that each Convention "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party." See *Belli. Occupation*, *supra* note 8, at 188.

<sup>80</sup> 11 REP. U.N. COMM'N 76 (1949).

<sup>81</sup> *Id.*

Two of the defendants were policemen and two were customs officials. The prosecution charged that after the Allied aircraft crashed on German soil, and the airman emerged unhurt, he was "arrested" by Renoth and then attacked and beaten with fists and rifles by a number of individuals including the three other accused. Renoth, the principal defendant, who pleaded the defense of superior orders at the trial, stood aside while these events took place and then shot and killed the pilot. All of the accused were convicted. It is clear that the deceased airman was entitled to the privileged status of a P.O.W. and that the defendants, as government officials, had a particular obligation to protect him rather than to permit and join with a murderous attack upon him.

There is an inference in this case that the airman was beaten and killed because he was thought by the defendants to have violated the laws and customs of war by attacking civilian targets. Assuming that this was the actual situation, the case illustrates the crucial point that the airman should, nevertheless, have been protected and accorded P.O.W. status. Any charges against him should have been brought in a judicial trial with its accompanying safeguards. In analogous circumstances where doubt may exist concerning compliance with the laws and customs of war, an irregular combatant has the same right to be accorded privileged status as a P.O.W. even though he may later face charges before a proper court.

The necessity for according prisoner of war status to all privileged combatants on a nondiscriminatory basis is illustrated by the *Trial of Schoengrath*<sup>82</sup> before a British Military Court in Germany in 1946. In this case, the defendants, seven members of the Nazi SS, were charged with committing a war crime "in the killing of an unknown Allied airman, a prisoner of war." The facts concerned an airman who had descended by parachute from his damaged bomber aircraft which had been flying westward over occupied Holland. The defendants, apparently acting on the assumption that he was an Allied airman, shot him shortly after his capture rather than accord him status as a P.O.W. The defense contended that there was no case to answer because the prosecution had produced no evidence to show that the victim was in fact an Allied airman. The prosecution replied that it was too far-fetched to assume that the bomber aircraft involved, in view of the facts, had neutral status. The court convicted the defendants as charged even though the nationality of the air-

---

<sup>82</sup> 11 REP. U.N. COMM'N 83.

man was not proved. The decision is sound because the airman was entitled to prisoner of war status in the light of the facts which were shown. Even if he had been a neutral national serving in the air force of an Allied state, he would have been entitled to privileged combatant status without discrimination.

Because irregulars are entitled to P.O.W. status on the same criteria as regulars, it follows that a neutral national serving in an irregular force is entitled to privileged status. To describe such an irregular of neutral nationality as a "mercenary" may well impugn his political motivation from the standpoint of the preferences of his opponents, but it should not deprive him of a privileged status to which he is otherwise legally entitled. A contrary result would lead to a substantial politicalization of the relevant law and a corresponding diminution of its essential humanitarian and nondiscriminatory characteristics.<sup>83</sup>

In the *Trial of Von Falkenhorst*<sup>84</sup> before a British Military Court at Brunswick, the accused had held the rank of general and had been commander-in-chief of the German armed forces in Norway. He was charged with a war crime in causing the killing of members of Allied armed forces by, *inter alia*, passing to his subordinates Hitler's infamous "Commando Order."<sup>85</sup> The first paragraph of the Order stated that the Allied powers had been using methods of warfare prohibited by treaty and that, in particular, the "brutal and treacherous" commandos were under orders to kill "defenceless prisoners." The Order further required that quarter be refused to commandos, whether captured in uniform or not, and directed the court martial of officers who failed to instruct their troops accordingly or who acted contrary to its provisions. The defense was that Von Falkenhorst "took this measure as a reprisal" and that he was not able to verify the facts set forth by Hitler. The accused was found guilty and it is probable that his rank and position as a commander-in-chief placed a higher standard upon him than would have been imposed upon a subordinate commander. Because Norway was often the scene of commando raids, he could have ascertained that the commandos adhered to the laws and customs of war and this would have eliminated any basis for the claim of reprisals. In addition, the then effective Geneva P.O.W. Convention of 1929

---

<sup>83</sup> See Note, *The Laws of War and the Angolan Trial of Mercenaries*, 9 CASE W. RES. J. INT'L L. 323 (1977).

<sup>84</sup> 11 REP. U.N. COMM'N 18 (1949).

<sup>85</sup> The "Commando Order," 11 REP. U.N. COMM'N 20-21.



prohibited reprisals against P.O.W.s<sup>86</sup> and the same prohibition is also set forth in the 1949 P.O.W. Convention.<sup>87</sup> It is a fundamental element in even an unduly narrow interpretation of the laws and customs of war. Consequently, it governs both irregulars and regulars in their treatment of P.O.W.s.

*B. Application of the Geneva P.O.W. Convention (1949)*

Article 5(2) of the P.O.W. Convention provides:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

It is clear that in doubtful cases, pending judicial determination, provisional privileged status must be granted. The I.C.R.C. draft provision which was approved by the Stockholm Conference stated that in cases of doubt the status of the person concerned should be "determined by some responsible authority."<sup>88</sup> The Geneva Conference rejected this wording on the grounds that it might permit hasty decisions by military personnel in a battlefield context.<sup>89</sup> After considering the words "military tribunal," the Geneva Conference decided upon "competent tribunal" but without providing detailed specification of the characteristics of such a tribunal.<sup>90</sup> At the minimum standard which has been established in customary law as essential for fair adjudication, such a court should be composed of an impartial judge or judges and make provision for representation of the person whose status is in doubt by competent counsel in order to provide the basic elements of a fair trial. The application of this minimum standard would mean that Nazi-type courts dominated by a racist or analogous discriminatory ideology could not meet the requirements of a competent tribunal. The common Article 3 concerning internal conflicts requires that judgments concerning combatants must be pronounced by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable

---

<sup>86</sup> *Supra* note 21, Art. 2(3). Reprisal and counter-reprisal killings of P.O.W.s by the German Army and the French Forces of the Interior are described and analyzed in KALSHOVEN, *supra* note 70, at 193-200.

<sup>87</sup> Art. 13(3).

<sup>88</sup> I.C.R.C., *supra* note 5, at 77.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* and 2A Geneva Rec. 388.

by civilized peoples.”<sup>91</sup> Since internal conflicts had not previously been regulated on a multilateral basis, it was deemed necessary to describe the applicable judicial standard. There is no basis to believe that the shorter wording in Article 5(2) concerning courts which determine the status of combatants in international conflicts imposes a lower standard.

In *Military Prosecutor v. Kassem*,<sup>92</sup> decided by an Israeli Military Court sitting in Ramallah on April 13, 1969, the question of entitlement of irregulars to P.O.W. status was considered. The defendants were captured after an exchange of gunfire with an Israeli Army unit and while wearing dark green uniforms and peaked caps and carrying arms openly. They also carried military identification papers issued by the Popular Front for the Liberation of Palestine of which they were members.<sup>93</sup> The court denied their claim to P.O.W. status on the basis of the following interpretation of the English text of Article 4A(2).

For some reason, however, the literature on the subject overlooks the most basic condition of the right of combatants to be considered upon capture as prisoners of war, namely, the condition that the irregular forces must belong to a belligerent party. If they do not belong to the Government or State for which they fight, then it seems to us that, from the outset, under current International Law they do not possess the right to enjoy the status of prisoners of war upon capture.<sup>94</sup>

The court interpreted “belonging” as requiring irregular subordination to state control including a command relationship. This holding recalls the situation which existed during the Franco-Prussian War. It has been decisively rejected by modern international law since the refusal of the Brussels Conference to accept the draft provision that irregulars be “subject to orders from headquarters.”<sup>95</sup> If the defendants had “belonged” to a State party to the conflict, in the sense of being under its direction and command, they would have been entitled to P.O.W. status under Article 4A(1) which includes “members of militia or volunteer corps forming part of such [regular] armed forces.”<sup>96</sup> It becomes

---

<sup>91</sup> Art. 3(1)(d).

<sup>92</sup> 42 INT'L L. REP. 470 (1971).

<sup>93</sup> This demonstrates Popular Front compliance with P.O.W. Conv. Art. 17 (3) which provides: “Each party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card . . . .” *Supra* note 69.

<sup>94</sup> *Supra* note 92, at 476.

<sup>95</sup> See text following note 14 *supra*.

<sup>96</sup> See text accompanying notes 40-41 *supra*.

impossible to effectuate the major purposes of Article 4A(2), including bringing irregulars within the legal system, if it is interpreted in a manner to make it indistinguishable from Article 4A(1).

Professor Schwarzenberger has also evaluated the holding in the *Kassem Case*. He has pointed out that the court improperly gave weight to the illegality of the Popular Front for the Liberation of Palestine under the municipal law of the Kingdom of Jordan.<sup>97</sup> After referring to the introductory wording in Article 4A(2) of the P.O.W. Convention, he states:

Any of these words are capable of liberal and restrictive interpretations. Yet, in accordance with the humanitarian objects of the Geneva Conventions, a liberal interpretation of words such as "belong" and "Party to the conflict" appears to be more appropriate. In this view of the matter, an organization can "belong" to a country, irrespective of whether it is recognized by the Government or whether, under the law of a particular State, it is legal or illegal.<sup>98</sup>

The court also held that the Popular Front for the Liberation of Palestine failed to comply with the laws and customs of war and provided several examples of apparent group violations, but no violations by the defendants individually were suggested.<sup>99</sup> There is no indication in the report of the case that defense counsel raised the issue of the possible exceptional legality of particular acts of resistance (not including direct attacks upon noncombatants) as reprisals to prior violations of law by the belligerent occupant as was done in the *Einsatzgruppen Case*.<sup>100</sup>

The U.S. Army Military Assistance Command Vietnam

<sup>97</sup> *Human Rights and Guerrilla Warfare*, 1 ISRAEL Y.B. HUMAN RTS. 246, 249-250 (1971).

<sup>98</sup> *Id.* at 250.

<sup>99</sup> INT'L L. REP., *supra* note 92, at 483.

<sup>100</sup> See text accompanying notes 74-75 *supra*. Probably the most comprehensive violation of law by the Government of Israel concerning belligerent occupation is its refusal to apply the Geneva Civilians Convention to which it is a state party. The consistent position of the U.S. Government and of the United Nations Security Council, that the Convention is legally applicable, is reflected in 75 DEP'T STATE BULL. 692-95 (1976) which includes the Security Council Consensus Statement on the subject of Nov. 11, 1976.

According to the Geneva Civilians Conv., *supra* note 69, Art. 158(3), a denunciation shall not take effect until 1 year after notice is given and, when the denouncing power is involved in a conflict, the denunciation shall not take effect "until peace has been concluded." Israel has not attempted denunciation, as such. Semi-official Israeli viewpoints appear in Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279 (1968); Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISRAEL Y.B. HUMAN RTS. 262 (1971).

(MACV) Directive 381-46, dated December 27, 1967<sup>101</sup> concerning the classification of captured personnel, provides a further example of application of the requirements of the P.O.W. Convention Article 4A(2). Under the MACV Directive, the Viet Cong, including both main force and local force units as well as units of the regular North Vietnamese Army were accorded P.O.W. status upon capture.<sup>102</sup>

"Irregulars" are characterized in the Directive in a separate heading as comprising: (1) Guerrillas, (2) Self-Defense Force, and (3) Secret Self-Defense Force.<sup>103</sup> Membership in one of these units, without more, does not entitle an individual to P.O.W. status since there are further requirements in terms of the acts performed. The Directive provides that members of the above units were entitled to privileged P.O.W. status if "captured while actually engaged in combat or a belligerent act under arms, other than an act of terrorism, sabotage, or spying";<sup>104</sup> or, in the alternative, such a member "who admits or for whom there is proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage, or spying."<sup>105</sup> Other provisions of the Directive indicate that a member of one of the listed units who is engaged in "terrorism, sabotage, or spying" would be treated as a "civil defendant,"<sup>106</sup> and would be entitled to the substantive and procedural protections of the Civilians Convention. Since the exceptions of "terrorist" and "sabotage" activities are described in the Directive as typical "guerrilla" methods,<sup>107</sup> the according of P.O.W. status is not as broad as might appear at first glance. Terrorism and sabotage are widely regarded as in violation of the laws and customs of war, and consequently the denial of P.O.W. status, after determination by the competent tribunal prescribed in Article 5(2), is consistent with Article 4A(2). In the same way, the intelligence activities or spying referred to in connection with the "Secret Self-Defense Force" deprives irregulars of privileged status in this situation.<sup>108</sup> This U.S. Army Directive which was

---

<sup>101</sup> The relevant portion of this Directive, Annex A, appears in 62 AM. J. INT'L L. 765 at 766 (1968).

<sup>102</sup> *Id.* at 766-67.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 767. The time factors specified are significant in interpretation of the Directive.

<sup>105</sup> Directive, *supra* note 101, at 767.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

applicable in Vietnam was commended by the representative of the International Committee of the Red Cross in Saigon as the first time:

that a government goes far beyond the requirements of the Geneva [P.O.W.] Convention in an official instruction to its armed forces . . . . May it be remembered that this light first shone in the darkness of this tragic war in Vietnam.<sup>109</sup>

The application of Article 4A(1) of the P.O.W. Convention to regular armed forces is illustrated by *Mohamed Ali v. Public Prosecutor*<sup>110</sup> decided by the Judicial Committee of the Privy Council in 1968. While a situation of armed conflict existed between Indonesia and Malaysia, two members of the Indonesian Army landed in Singapore (then a part of Malaysia) in March 1965, in order to commit acts of sabotage. The defendants were wearing civilian clothes when they placed explosives which caused three civilian deaths in a commercial office building. They were charged with the crime of murder and the trial court convicted them in spite of their plea that they were entitled to P.O.W. status under international law. In dismissing their appeals, it was held that it was not sufficient for the defendants merely to show that they were members of regular armed forces, but that they also had to comply with the four traditional requirements specified for irregular combatants in the Hague Regulations and in the P.O.W. Convention. The Privy Council quoted from the British Government, *Manual of Military Law*:

Should *regular* combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture.<sup>111</sup>

Since the defendants carried out acts against non-military targets which caused civilian deaths, while dressed in civilian clothing, it is clear that they did not meet the four criteria for the privileged status of P.O.W.s. If they had been accorded P.O.W. status initially, they could still have been tried later for violation of the laws and customs of war. A significant feature of the case is that it held the four traditional Brussels-Hague-Geneva criteria, which are usually applied to irregulars, explicitly applicable to

---

<sup>109</sup> Quoted in G. PRUGH, *LAW AT WAR: VIETNAM 1964-1973*, at 66-67 (Dep't of Army, 1975). See Haight, *The Geneva Conventions in the Shadow War*, 94 U.S. NAVAL INST. PROC. 43 (Sept. 1968).

<sup>110</sup> 42 INT'L L. REPS. 458 (1971).

<sup>111</sup> *Id.* at 466. (The emphasis appears in the quotation.)

regulars. This holding provides support for the conclusion that the criteria applicable to both groups are identical.

#### VI. A FUTURE PROJECTION OF THE CRITERIA FOR IRREGULAR COMBATANTS

At the Geneva Diplomatic Conference on the Reaffirmation and Development of the International Humanitarian Law Applicable in Armed Conflict the task is to supplement the four existing Geneva Conventions for the Protection of War Victims.<sup>112</sup> This is to be done through the drafting and, it is hoped, the adoption of Protocol I concerning international armed conflicts and Protocol II concerning internal conflicts.<sup>113</sup> Consideration is being given to reducing the criteria applicable to irregular combatants as a prerequisite to privileged status upon capture.<sup>114</sup> The first step in such a process, an understanding of the presently effective law, has been the objective of the present inquiry.

Draft Article 42 of Protocol I, entitled "New category of prisoners of war," is subject to amendment and then to acceptance or rejection by the Conference. In its present form it specifies that the proposed category is in addition to the provisions of Article 4 of the P.O.W. Convention. It provides for three criteria in lieu of the four traditional Brussels-Hague-Geneva criteria. The first draft criterion is responsible military command. The second, in lieu of distinctive sign and open arms, is "that they distinguish themselves from the civilian population in military operations." Professors McDougal and Feliciano and Professor Baxter have criticized the distinctive sign or uniform as a meaningful basis upon which to decide important rights.<sup>115</sup> The third draft criterion is "that they conduct their military operations in accordance with the [four Geneva] Conventions and with the present [international conflicts] Protocol." This may ultimately be a good deal more precise than "the laws and customs of war." Until the entire Protocol I is adopted by the Conference and becomes an agreement in force, however, its scope and meaning are not known.

<sup>112</sup> G.H. Aldrich, Report of the U.S. Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Third Session, (Oct. 15, 1976).

<sup>113</sup> Draft Additional Protocols to the Geneva Conventions of Aug. 12, 1949 (Int'l Comm. of the Red Cross, Geneva 1973).

<sup>114</sup> Further recommendations on this subject appear in M. VEUTHEY, *GUERRILLA ET DROIT HUMANITAIRE* 373-78 (1976).

<sup>115</sup> MCDUGAL & FELICIANO, *supra* note 1, at 558-59; Baxter, *The Municipal and International Law Basis of Jurisdiction Over War Crimes*, 28 *BRIT. Y.B. INT'L L.* 382, 393 (1951).

It may be appropriate to suggest that consideration be given at the Geneva Diplomatic Conference to sanctions concerning the law of irregular combatants. Specifically, the humanitarian purposes of the presently effective or future doctrines cannot be achieved unless these doctrines are interpreted accurately and applied consistently and without discrimination.

## APPENDIX A

### ARTICLE 9 OF THE BRUSSELS DECLARATION (1874)

**Art. 9.** The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

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

In countries where militia constitute the army, or form part of it, they are included under the denomination *army*.

## APPENDIX B

### ARTICLE 1 OF THE HAGUE ANNEXED REGULATIONS (1899 and 1907)

**1899**

*Annex to the Convention*  
REGULATIONS RESPECTING  
THE LAWS AND CUSTOMS  
OF WAR ON LAND  
SECTION I  
ON BELLIGERENTS  
CHAPTER I  
**On The Qualifications  
of Belligerents**

**Article 1.** The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;

**1907**

*Annex to the Convention*  
REGULATIONS RESPECTING  
THE LAWS AND CUSTOMS  
OF WAR ON LAND  
SECTION I  
ON BELLIGERENTS  
CHAPTER I  
**The Qualifications  
of Belligerents**

**Article 1.** The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;

2. To have a fixed distinctive emblem recognizable at a distance;

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

2. To have a fixed distinctive emblem recognizable at a distance;

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

### APPENDIX C

#### ARTICLE 4A OF THE GENEVA P.O.W. CONVENTION (1949)

##### Art. 4.

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
- (5) Members of crews, including masters, pilots and apprentices,



of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.