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# Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance

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# Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance

ERIC TALBOT JENSEN\*

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I.	History of Combatant Status.....	214
II.	Combatant Status under Current International Law .....	218
A.	Analysis of Article 4 of the GPW.....	220
B.	Protections for Noncombatants.....	224
C.	GPI Arguments .....	226
III.	Evolve the Law to Allow Intermediate Levels of Recognition for Partial Compliance .....	232
IV.	Specific Provisions .....	235
A.	Immunity from Speech or Association Crimes Connected with Political Beliefs .....	236
B.	No Execution of Punishment Until Conflict Resolved...	238
C.	Offer of Parole, Including Immunity for Weapons Crimes not Resulting in Death or Injury.....	240
D.	Compliance with International Law as Mitigation at Sentencing .....	243
E.	No Death Penalty.....	244
F.	If the Movement Results in International Armed Conflict and the Fighter Gets Subsequent Combatant Status, the Prior Lawful Warlike Actions Are Also Covered by Combatant Immunity .....	246
V.	Conclusion .....	248

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We are working at a disadvantage....The lack of uniforms, so that you can't define the enemy very well. And the intertwining of the enemy with combatants is very, very difficult. So you've got combatants and non-combatants mixed together intentionally....[I]f you think about just the way that, for instance, the Shi'ias could basically in this area right here, thousands of pilgrims on their way into this region right here, and the militia being able to just take off the black uniforms, and blend right in, into all those pilgrims.<sup>1</sup>

At 4:45, while moving from (UNINTELLIGIBLE) to clear an armed enemy—a coalition force was ambushed by enemy elements of unknown size. Reports indicate at least 20 rocket grenades were observed during the course of the engagement. Forty to 50 armed individuals were observed, some wearing black pajamas, uniforms, others wearing civilian clothes.<sup>2</sup>

The quotes above come from military operations by coalition forces in Iraq in April 2004. They highlight a problem that occurs not only in Iraq, but also in the numerous armed conflicts currently occurring throughout the world. Modern war is no longer characterized by “uniformed armies on a large plain, with civilians tucked away safely far behind the front-lines.”<sup>3</sup> Rather, military operations are now conducted in the contemporary operational environment,<sup>4</sup> which assumes 360-degree operations against asymmetric opponents<sup>5</sup> who

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1. Kelly McCann, *CNN Live Sunday: U.S. Helicopter Shot Down in Iraq, Both Pilots Killed; 7 Chinese Citizens Taken Hostage in Iraq* (CNN television broadcast, Apr. 11, 2004) (041104CN.V36), transcript available at LEXIS, News File.

2. Brigadier General Mark Kimmitt, *CNN Live Event: Coalition News Briefing* (CNN television broadcast, Apr. 11, 2004) (041101CN.V54), available at LEXIS, News File; see also Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025, 1026 (2004) (citing the strategic use of civilian dress by unlawful combatants).

3. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 730 (2004) (stating also that “[i]n fact, even the battles of the nineteenth century rarely fit this paradigm, and modern conflict fits this paradigm still less well”).

4. *The Contemporary Operational Environment*, in OPERATION ENDURING FREEDOM TACTICS, TECHNIQUES AND PROCEDURES HANDBOOK NO. 02-8, at <http://www.strategypage.com/articles/operationenduringfreedom/chap1.asp> (last visited Sept. 21, 2005).

5. Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 USAFA J. LEG. STUD. 71, 72 (1997–98) (“In broad terms, ‘asymmetrical’ warfare describes strategies that seek to avoid an opponent’s strengths; it is an approach that focuses whatever may be one side’s comparative advantages against their enemy’s relative weaknesses.”); see also Michael N. Schmitt, *The Impact of High and Low-Tech Warfare on the Principle of Distinction*, Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative

strike at known weaknesses, including a nation's compliance with the law of war.<sup>6</sup>

When faced with such opponents, militaries intent on complying with the law of war struggle between the requirements of distinction<sup>7</sup> and their desire to protect non-combatants, and the practical reality of protecting their force from fighters<sup>8</sup> such as those mentioned in the initial quotes who act as combatants when engaging in combat but dissolve into the crowd of non-combatants when faced with opposing military forces.<sup>9</sup> These fighters, who may be members of insurgent

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Briefing Paper 1, 2, 12–13 (Nov. 2003), available at <http://www.ihlresearch.org/ihl/pdfs/briefing3296.pdf> (last visited Sept. 21, 2005) (asserting that “military dominance in a conflict, whether State-on-State, as in the war with Iraq, or non-State actor-on-State, as in the case of the Palestinian uprising or transnational terrorism, paradoxically leads disadvantaged opponents to respond asymmetrically with low-tech, albeit highly effective, methods and means”); cf. Sylvain Charat, *Three Weapons to Fight Terror*, WASH. TIMES, Sept. 9, 2004, at A23, available at LEXIS, News File (alleging that terrorism is the prototypical type of asymmetric warfare).

6. See David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, NAT'L INTEREST, Fall 2003, at 9 (asserting that those who reject the controlling force of law of war create the largest contemporary security threat, and that those groups, in intentional disregard of such law, strategically endanger and attack civilians); see also R. George Wright, *Combating Civilian Casualties: Rules and Balancing in the Developing Law of War*, 38 WAKE FOREST L. REV. 129, 131 (2003) (stating that some combatants intentionally ignore the law of war or manipulate such law to gain strategic advantage); cf. William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 673–74 (2004) (asserting that the asymmetric nature of respect for the law of war makes deterrence strategies useless against military forces that choose to ignore legal conventions); Col. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, Carr Center for Human Rights Policy 4, 5 (2001), available online at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> (last visited Sept. 21, 2005) (arguing that if the law of war remains as it is, it may be problematic because those who reject the confines of the law of war can manipulate the laws in order to endanger civilians).

7. See Mark D. Maxwell, *The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?*, MIL. REV., Sept.-Oct. 2004, at 17–18 (describing the principle of distinction and what steps must be taken in distinguishing between civilians, lawful combatants, and unlawful combatants as well as the implications of this process for targeting decisions); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 15–17 (2004); Schmitt, *supra* note 5, at 1, 7; Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 113–14 (2001); Francisco Forrest Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*, 64 SASK. L. REV. 347, 352 (2001) (arguing that in seeking to minimize civilian casualties in pursuance with international war conventions, states have created the unintended effect of reduced casualty rates among opposing combatants).

8. Daniel P. Schoenekase, *Targeting Decisions Regarding Human Shields: Civilians on the Battlefield*, MIL. REV., Sept.-Oct. 2004, at 26–27; Ken Dilanian, *U.S. Troops Walk the Fine Line*, PHILA. INQUIRER, Feb. 13, 2005, available at LEXIS, News File.

9. See Edward Wong & Eric Schmitt, *Rebel Fighters Who Fled Attack May Now Be Active Elsewhere*, N.Y. TIMES, Nov. 10, 2004, at A1 (describing insurgents' use of their ability to blend

groups,<sup>10</sup> guerrillas,<sup>11</sup> disaffected citizens,<sup>12</sup> or terrorists,<sup>13</sup> do not receive the protections and benefits of combatant status based on the criteria set out in article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW).<sup>14</sup> This combatant status is something they greatly desire because of the attendant combatant immunity for warlike acts.<sup>15</sup>

These battlefield fighters do not receive combatant status because under current international law, this status is an all-or-nothing

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with civilians to evade U.S. forces in Iraq); cf. Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 928–29 (1994) (describing guerrillas' use of civilian clothing to conceal identity).

10. Though terms such as insurgent, guerrilla, and terrorist have specific meaning to specific people, those definitions are often inconsistent; a person who is labeled an insurgent by one may be identified as a guerrilla by another. See, e.g., Matthew Brzezinski, *Surrealpolitik: How a Chechen Terror Suspect Wound up Living on Taxpayers' Dollars Near the National Zoo*, WASH. POST, Mar. 20, 2005 (Magazine), available at LEXIS, News File (detailing the quarrel between Russia and the United States over a Chechen leader who has been given asylum in the United States despite the fact that Russians consider him a terrorist); see also Milan Judge to Sue in 'Guerrillas not Terrorists' Row, Ansa Eng. Media Serv., Feb. 7, 2005, available at LEXIS, News File (describing an Italian judge who angered the Italian government by finding that indicted terror suspects were guerrillas and not terrorists); cf. Michael L. Gross, *Bioethics and Armed Conflict: Mapping the Moral Dimensions of Medicine and War*, Hastings Center Rep., Nov. 1, 2004, at 22, available at LEXIS, News File; *The U.N. and the Fight Against Terrorism: Hearing of the Int'l Terrorism and Nonproliferation Subcomm. Of the House Int'l Relations Comm.*, Fed. News Serv., Mar. 17, 2005, available at LEXIS, News File (highlighting the lack of a concrete international definition of terrorism).

11. See, e.g., *FARC Losing Battle to Government, Analyst Says*, Asia Afr. Intelligence Wire, Oct. 13, 2004, available at INFOTRAC, Gale Group File.

12. See, e.g., *Senior U.S. Military Officer Reviews Challenges in Latin America*, States News Serv., Mar. 16, 2005, available at LEXIS, News File (discussing the disaffected civilian populace in Bolivia and its effect on the government); cf. Bill Torpy, *War Shifts Gears as Allied Troops Tackle Reaching Out to Civilians*, Cox News Serv., Apr. 11, 2003, available at LEXIS, News File (citing the importance of military forces cultivating relationships with civilians in the occupied zones).

13. See, e.g., *S. Korea Assessing Iraq Troop Deployment After Death of 2 Civilians*, AFX-Asia, Dec. 1, 2003, available at LEXIS, News File (regarding the effect of deliberate targeting of civilians by terrorists in South Korea's decision on whether to send troops to Iraq).

14. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, reprinted in DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* 434–35 (2d ed. 1981). Mercenaries are also specifically precluded from combatant status. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, adopted June 10, 1977, 1125 U.N.T.S. 3; see also Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1, 35–37 (1999).

15. Jordan J. Paust, *Current Pressures on International Humanitarian Law: War and Enemy Status after 9/11: Attacks on the Law of War*, 28 YALE J. INT'L L. 325, 330 (2003); see also William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 97–98 (2003).

proposition. Either a fighting force qualifies under all the criteria of article 4 of the GPW and receives all the privileges and immunities of combatant status, or a force does not qualify, and is provided no protection above that of any other civilian in the area, and may even be disqualified from the protections afforded to civilians. Given the reality of today's battlefields where the conflict is seldom between the armed forces of two nations, these requirements are counterproductive in the world's attempts to protect noncombatants.<sup>16</sup> Providing fighters none of the benefits of combatant status unless they meet all the requirements of article 4 of the GPW provides a disincentive for fighters to distinguish themselves from the civilian population. Rather, the proscriptions on attacking non-combatants actually give those who would not otherwise get combatant immunity an incentive to move in and out of the civilian population at their convenience.

To remedy this counterproductive state of the law, the all-or-nothing nature of combatant status should evolve to allow for intermediate levels of recognition in response to partial compliance with the traditional combatant requirements. As those on the battlefield comply with portions of the combatant requirements, particularly that of distinguishing themselves from noncombatants, they should accrue privileges commensurate with their efforts. These intermediate privileges should include immunity from prosecution for speech or association crimes connected with political beliefs; abeyance of execution of punishment until conflict is resolved; offer of parole, including immunity for weapons crimes not resulting in death or injury; compliance with international law as a mitigating factor at sentencing; disallowance of the death penalty; and, if the movement which the fighter is a part of eventually achieves combatant status, the fighter's prior lawful warlike actions should also be covered by combatant immunity. Providing intermediate levels of recognition for partial compliance will provide incentives for otherwise unlawful combatants

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16. See George H. Aldrich, *The Hague Peace Conferences: The Laws of War on Land*, 94 AM. J. INT'L L. 42 (2000) (listing combatant status and protection of noncombatants as two of the top five areas of the law that need further development in the early 21st century); see also Lt. Col. Paul Kantwill & Maj. Sean Watts, "Hostile Protected Persons" or "Extra-Conventional Persons": *How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681, 705-08 (2005) (detailing the U.S. Administration's lack of consideration of the Geneva Convention Relative to the Protection of Civilian Persons In Time of War when considering the status of fighters captured in Afghanistan during the global war on terror).

to comply with international law without eroding the maximum benefits offered to those who comply with all requirements of combatant status.

This Article will begin by briefly reviewing the history of combatant status under international law. It will then review the current international law of combatant status, including an analysis of article 4 of the GPW and the requirements and privileges associated with combatant status. The principle of distinction and protection for noncombatants will be reviewed, with particular attention to how the current rules for combatants do not support this principle. The Article will then examine how developing trends are also counterproductive to the protection of combatants, as illustrated by the controversial provisions on combatant status in the 1977 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (GPI).<sup>17</sup> This discussion will be followed by an explanation of how changing the law to provide intermediate levels of recognition for partial compliance with the law of war will give fighters an incentive to distinguish themselves, thereby increasing protections to noncombatants.

## I. HISTORY OF COMBATANT STATUS

Though almost every culture has had rules concerning the conduct of hostilities,<sup>18</sup> the modern law of armed conflict, including the idea of combatant status, is generally a western notion<sup>19</sup> and began developing (particularly in the area of defining who is a combatant) during the age of chivalry.<sup>20</sup> During these times of knighthood and its limited warrior class, including the *jus militare*, certain ideas of who should and should

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17. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, *supra* note 14, 1125 U.N.T.S. at 23–25. The United States recognizes portions of GPI as customary international law. See generally Michael J. Matheson, *The United States Position on the Relation of Customary Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987) (discussing which articles of GPI the United States believes are customary international law and to which the United States objects).

18. See, e.g., SUN TZU, *THE ART OF WAR* 76 (Samuel Griffith trans., Oxford Univ. Press 1963) (illustrating where Sun Tzu, in the 5th century B.C., wrote, "Treat the captives well, and care for them....Generally in war the best policy is to take a state intact; to ruin it is inferior to this."); cf. Bradford, *supra* note 6, at 641 n.12 ("Many ancient cultures, religions, and belief systems developed rules distinguishing between combatants and noncombatants and limiting methods and means of warfare.").

19. Brooks, *supra* note 3, at 706.

20. See Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. TOL. L. REV. 111, 114 (2001). Wingfield gives an excellent overview of the laws of war during the Age of Chivalry (approximately 1100–1500 A.D.).

not participate in conflict began to solidify.<sup>21</sup> Much of this corresponded with the rise of the nation-state and its dominance as the major player in international relations.<sup>22</sup>

As the feudal system gave way to the rise of professional armies, these chivalric codes began to break down and local populations began to take a more active role in hostilities. Thus began a breakdown of the clear line between combatants and noncombatants. Nathan Canestaro writes:

The erosion of the line between civilians and the professional military began with the fundamental changes in warfare seen in the Napoleonic era. The expanding scale of warfare, the advent of popular revolutions in some European countries, especially France, and repeated clashes between professional soldiers and armed peasantry during the Napoleonic wars, brought commoners into warfare in significant numbers for the first time.<sup>23</sup>

Perhaps in an attempt to counter this trend, codification of the law of war began to make meaningful advances in the mid-nineteenth century. This codification included the 1863 Instructions for the Government of Armies of the United States in the Field prepared by Francis Lieber (hereinafter Lieber Code),<sup>24</sup> the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field<sup>25</sup> with its accompanying Additional Articles of 1868,<sup>26</sup> the 1868 Declaration of St. Petersburg,<sup>27</sup> the unratified Brussels Conference of 1874,<sup>28</sup> the Hague Conventions of 1899 and 1907,<sup>29</sup> the 1906 Convention for the

21. Nathan A. Canestaro, "Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq, 43 COLUM. J. TRANSNAT'L L. 73, 82 (2004).

22. See *id.* at 83 (arguing that "the principle that the right to wage war is limited to sovereign authority was asserted by the prominent Sixteenth Century legal scholar and father of international law, Hugo Grotius..."). Canestaro gives an interesting and concise summary of the historical beginnings of combatant status.

23. *Id.* at 84.

24. Instructions for the Government of Armies of the United States in the Field, U.S. War Department, Adjutant General's Office, General Orders No. 100, Apr. 24, 1863 [hereinafter Lieber Code], reprinted in SCHINDLER & TOMAN, *supra* note 14, at 3.

25. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 24, 1864, 75 U.N.T.S. 31, reprinted in SCHINDLER & TOMAN, *supra* note 14, at 279.

26. See Additional Articles (1868), reprinted in SCHINDLER & TOMAN, *supra* note 14, at 285.

27. Declaration of St. Petersburg (1868), reprinted in SCHINDLER & TOMAN, *supra* note 14, at 101.

28. Brussels Conference (1874), reprinted in SCHINDLER & TOMAN, *supra* note 14, at 25.

29. Hague Conventions (1899 & 1907), reprinted in SCHINDLER & TOMAN, *supra* note 14, at



Amelioration of the Condition of the Wounded and Sick in Armies in the Field,<sup>30</sup> and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.<sup>31</sup> This trend to codify the law of war included some references to combatants, including defining what constituted a lawful combatant.

While allowing for starvation of the general populace and the forced return of civilians back into besieged cities,<sup>32</sup> the Lieber Code also recognized the trend that “the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.”<sup>33</sup> It also allowed for summary treatment of persons who were taking part in hostilities but not as part of the armed forces of the enemy state.<sup>34</sup> While certainly not the standards nations ascribe to today, these provisions became the basis for further international law codifications.

Shortly after the Lieber Code, Czar Alexander II of Russia brought together delegates from fifteen European nations who produced the 1874 Brussels Declaration.<sup>35</sup> Though it was never ratified,<sup>36</sup> it contained a section on who should be recognized as combatants and

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63–103.

30. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (July 6, 1906), *reprinted in* SCHINDLER & TOMAN, *supra* note 14, at 301.

31. 1929 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 118 L.N.T.S. 343 (1929).

32. Lieber Code, *supra* note 24, arts. 17–18, at 6.

33. *Id.* art. 23, at 7; *see also id.* arts. 20–25, 37, at 6–9.

34. Lieber Code, *supra* note 24, art. 82. Article 82 states:

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

*Id.*

35. Brussels Conference (1874), *reprinted in* SCHINDLER & TOMAN, *supra* note 14, at 28.

36. *See generally* Jack S. Weiss, *The Approval of Arms Control Agreements as Congressional-Executive Agreements*, 38 UCLA L. REV. 1533 (1991) (highlighting the Constitutional requirement for the President, after signing a treaty, to send it to the Senate for advice and consent before it may come into effect). Many nations have the same requirements and this is accounted for in international law. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 11–15, 19, 1155 U.N.T.S. 331; *see also* Jim Lobe, *Bush ‘Unsigns’ War Crimes Treaty*, AlterNet, May 6, 2002, at <http://www.alternet.org/story/13055/> (last visited Sept. 21, 2005) (noting that though the United States signed the 1998 Rome Statute to establish an International Criminal Court, it will not ratify it).

noncombatants. This included article 9, the first codification of the oft-quoted four criteria for combatants. Article 9 states:

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."<sup>37</sup>

This language is repeated again in article 1 of the Annex to the 1907 Hague Regulations<sup>38</sup> and incorporated by direct reference in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.<sup>39</sup> The underlying assumption is that the regular armies of states have the obligation to abide by the laws of war simply because they are acting under the authority of the sovereign. Combatant immunity and other combatant privileges stem from this same fact.<sup>40</sup> Because other forces like the militia and volunteer corps may not be led by the sovereign's specific authority or may not be fighting under the sovereign's specific orders, they only benefit from the privileges of combatants when acting sufficiently like the sovereign's forces to be indistinguishable on the battlefield.

Along with establishing some baseline rules on what constituted a combatant and clarifying what standards had to be met to receive that status, these early codifications also had the effect of dividing the battlefield into two categories: combatants and noncombatants. This bifurcation continues as a part of international law today, and is the

37. Brussels Conference (1874), reprinted in SCHINDLER & TOMAN, *supra* note 14, at 28.

38. Hague Regulations Annex, art. 1 (1907), reprinted in SCHINDLER & TOMAN, *supra* note 14, at 75; see also Norman G. Printer, Jr., *The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L. & FOREIGN AFF. 331, 363-65 (2003).

39. 1929 Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 31, at 343.

40. Canestaro, *supra* note 21, at 83.

foundation of the formulation of the current understanding of combatant status and its accompanying privileges.<sup>41</sup>

## II. COMBATANT STATUS UNDER CURRENT INTERNATIONAL LAW

After World War II, the victorious nations convened at Geneva, Switzerland, in an attempt to remedy some of the problems that occurred during the war.<sup>42</sup> These meetings resulted in the four Geneva Conventions,<sup>43</sup> addressing various aspects of persons on the battlefield. The first three agreements built on prior Geneva Conventions,<sup>44</sup> the third of which is the GPW, which built on the 1929 Convention Relative to the Treatment of Prisoners of War<sup>45</sup> and reconfirmed the principles found in the earlier document. However, the fourth convention, Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GCC),<sup>46</sup> which outlined the protections of civilians on the battlefield, was a clear recognition from the experiences of World War II for the increasing need to protect noncombatants on the battlefield.<sup>47</sup> These four conventions have become the definitive statement of customary international law<sup>48</sup> and are binding on all states.<sup>49</sup>

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41. Maxwell, *supra* note 7, at 17–18.

42. See Mary Eileen E. McGrath, *Contemporary International Legal Issues—Nuclear Weapons: The Crisis of Conscience*, 107 MIL. L. REV. 191, 209–12 (1985).

43. See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* SCHINDLER & TOMAN, *supra* note 14, at 373; Convention (II) for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in* SCHINDLER & TOMAN, *supra* note 14, at 401; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* SCHINDLER & TOMAN, *supra* note 14, at 423 [hereinafter GPW]; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* SCHINDLER & TOMAN, *supra* note 14, at 495 [hereinafter GCC].

44. Joshua S. Clover, “Remember, We’re the Good Guys”: *The Classification and Trial of the Guantanamo Bay Detainees*, 45 S. TEX. L. REV. 351, 358 (2004).

45. 1929 Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 31, at 343.

46. GCC, *supra* note 43, at 495.

47. See Kantwill & Watts, *supra* note 16, at 725; McGrath, *supra* note 42, at 209–10.

48. See, e.g., Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL’Y SYMP. 47, 50 (1999); see also GREEN H. HACKWORTH, U.S. DEP’T OF STATE, 1 DIGEST OF INTERNATIONAL LAW § 3, at 15–17 (1940) (outlining basic tenets of customary international law).

49. See HACKWORTH, *supra* note 48, § 1, at 2. The only country that has not ratified the 1949 Geneva Conventions is Nauru. INTERNATIONAL COMMITTEE OF THE RED CROSS, 2004 ANNUAL REPORT 183 (2005), available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section\\_annual\\_report\\_2004](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_annual_report_2004) (last visited Oct. 1, 2005).

One of the principles underlying the Conventions was the idea that all persons on the battlefield could be divided into one of two categories: combatant or noncombatant.<sup>50</sup> As Charlotte Liegl-Paul writes concerning the current state of the law:

Whether on the battlefield voluntarily or involuntarily, each person must have a classification in order to determine his or her rights and responsibilities. Personnel on the battlefield are classified as either combatants or noncombatants....Combatants have the right to participate directly in hostilities; all others must refrain from participating in the hostilities. Civilians acting inconsistent with their noncombatant status risk losing the protections of this status.<sup>51</sup>

Within the Conventions, the GPW addresses combatants while noncombatants are discussed in the GCC. Though noncombatants are not defined,<sup>52</sup> article 4 of the GPW defines who will receive combatant status. It is this standard that has recently been the subject of widespread scrutiny.<sup>53</sup>

50. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 3 ¶¶ 74–87 (July 8, 1996) available at <http://www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm> (last visited Sept. 21, 2005) (“The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants.” ¶ 78); Orna Ben-Naftali & Sean S. Gleichevitch, *Missing in Legal Action: Lebanese Hostages in Israel*, 41 HARV. INT’L L.J. 185, 243–44 (2000).

51. Charlotte M. Liegl-Paul, *Civilian Prisoners of War: A Proposed Citizen Code of Conduct*, 182 MIL. L. REV. 106, 113 (2004) (citations omitted).

52. The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, Dec. 12, 1977, art. 50, 1125 U.N.T.S. 3, tries to solve this problem in article 50, which states:

Article 50—Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

This does not do much to clarify the issues since it just falls back on the language of the prior Convention. It does, however, reiterate that there are only two legal statuses for persons on the battlefield.

53. See, e.g., Jennifer Elsea, *Treatment of “Battlefield Detainees” in the War on Terrorism*, Cong. Res. Serv. Pol’y Paper, Dec. 8, 2003, available at LEXIS, News File.

### A. *Analysis of Article 4 of the GPW*

The GPW starts off with an introductory paragraph, followed by articles 2<sup>54</sup> and 3,<sup>55</sup> which are common to all four Geneva Conventions and deal with applicability of the Conventions. The next article, article 4, discusses the issue of combatant status and addresses who is covered by its provisions. It states, in pertinent part:

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, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

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54. Article 2 defines the applicability of the Geneva Conventions and is common to all four Conventions to ensure that they apply to the same situations. Article 2 specifically states that the Conventions apply to international armed conflict or conflict "between two or more of the High Contracting Parties [to the Geneva Conventions], even if the state of war is not recognized by one of them" and to states of "occupation." See GPW, *supra* note 43, reprinted in SCHINDLER & TOMAN, *supra* note 14, at 429–30. The full body of the law of war applies to common article 2 conflicts, including the provisions of the Geneva Conventions. International & Operational Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, OPERATIONAL LAW HANDBOOK 12, 15 (Derek I. Grimes ed., 2005).

55. In contrast to article 2 conflicts, article 3 deals with "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 43, art. 2; Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *supra* note 43, art. 2; GPW, *supra* note 43, art. 2; and Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *supra* note 43, art. 2. A much smaller and less encompassing set of rights applies to individuals participating in common article 3 conflicts. For a discussion on the differences between common articles 2 and 3, see W. Michael Reisman and James Silk, *Which Law Applies to the Afghan Conflict?*, 82 AM. J. INT'L L. 459 (1988); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 260 (2000). These rights do not include combatant immunity.

- (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.
- ...
- (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 of war.<sup>56</sup>

It is important to note that the 1949 Conventions were written largely in response to the experiences of World War II. Given the partisan operations during that conflict, deciding how to treat such forces was certainly part of the negotiating process. The state representatives each came with different ideas based on their experience from the war, some of whom had supported large numbers of partisans and other irregular forces.<sup>57</sup> Article 4 attempted to deal with the issues of partisans and others who might participate on the battlefield and deserve protection.<sup>58</sup>

For example, the issue of extending combatant status to those participating in civil wars was also debated at the Diplomatic Conference of 1949. The delegates decided against it because they did not want to grant combatant protections to groups fighting against their own government.<sup>59</sup> Combatant status was too valuable a privilege to

56. GPW, *supra* note 43, art. 4.

57. See COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 52–53 (Jean S. Pictet ed., 1958); Aldrich, *supra* note 16, at 44.

58. *But see* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 374 (2004) ("It is well understood in humanitarian law circles that the 1949 Geneva Conventions did little to resolve the long-standing dispute over whether and when irregular forces should qualify for lawful combatant status.").

59. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 19–20 (2004). Article 3, dealing with noninternational armed conflicts, specifically does not grant combatant immunity, regardless of compliance with the four criteria of article 4. See Jinks, *supra* note 58, at 404–05 ("States supported this language [of Article 3] so that members of an irregular armed group could be subjected to domestic criminal prosecution for their very participation in the hostilities even if conducted in accordance with the laws of war.").

distribute to all fighting forces. This special status was to be reserved for a select few who clearly distinguished themselves as lawful battlefield fighters.

Since the events of September 11, 2001, and the United States' resulting detention of "unlawful combatants"<sup>60</sup> in Guantanamo, there has been an ongoing debate concerning the definition of a combatant and who qualifies for combatant status. In its simplest form, the question is whether the four criteria in paragraph 4A(2) apply to the regular armed forces mentioned in 4A(1) and (3).<sup>61</sup> Though it is not resolved under international law,<sup>62</sup> the United States has taken a clear stand on this issue.<sup>63</sup> For the purposes of this Article, the resolution of this question is unimportant. It suffices to say that for those who are most contentious on the battlefield, meaning those who are not the regular forces of their nation state, compliance with the four criteria are required to receive the benefits of combatant status.

A further point of importance from article 4 is that these provisions provide an all-or-nothing test. As Professor Rosa Ehrenreich Brooks states, "one's status as a 'lawful combatant' under the Geneva Conventions hinges, as a threshold matter, not on one's substantive actions but on certain questions of form: whether one is under responsible command, whether one 'wears a fixed distinctive sign recognizable at a distance,' and whether one carries arms openly."<sup>64</sup> Further, these conditions are conjunctive, meaning that an individual must comply with all of them, or no status and no privileges are granted. As the United States argued in relation to the Taliban, their open noncompliance with the laws of war disqualified them from the privileges of combatant status despite their potential compliance with other criteria.<sup>65</sup>

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60. See Printer, *supra* note 38, at 363–69 (defining combatants, noncombatants, and unlawful combatants).

61. See Berman, *supra* note 59, at 41–43 (2004) for an efficient encapsulation of the arguments on both sides.

62. See Leon Friedman, *U.S. is Violating Accord on POWs*, NEWSDAY, Jan. 26, 2004.

63. See John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 225 (2003).

64. Brooks, *supra* note 3, at 706.

65. Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 30–34 (2004). *But see* Steven W. Becker, "Mirror, Mirror on the Wall...": *Assessing the Aftermath of September 11th*, 37 VAL. U.L. REV. 563, 571–75 (2003) (arguing that the Taliban deserved combatant status based on article 4 of the GPW).

The United States advocates against the Taliban and others who fail to comply with the article receiving combatant status because the status is associated with a number of privileges that are further outlined in the Convention. The most important benefit is combatant immunity; there are others of great value as well, such as repatriation after the war,<sup>66</sup> specific limitation on living conditions;<sup>67</sup> work requirements;<sup>68</sup> correspondence and relief packages,<sup>69</sup> and limitation on disciplinary and judicial proceedings.<sup>70</sup>

Professor Jinks has recently argued that these privileges attending combatant status are not significantly more extensive than those privileges offered to civilians in the GCC.<sup>71</sup> However, the one major exception to this is the lack of criminal sanction for normally illegal acts such as killing and destruction of property granted to combatants. Even Jinks agrees that “[i]n the end, the unique protective significance of POW status is combatant immunity.”<sup>72</sup> This blanket immunity for warlike acts that fit within the law of armed conflict turns a murderer into a soldier doing his duty to his sovereign. It is this immunity that the United States refuses to grant to al Qaeda and the Taliban,<sup>73</sup> despite

66. GPW, *supra* note 43, art. 118.

67. *Id.* arts. 22–25.

68. *Id.* arts. 49–57.

69. *Id.* arts. 71–77.

70. *Id.* arts. 82–108.

71. Jinks, *supra* note 58, at 380. Also see the Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 43, where article 6 discusses the end of the application of the Convention at the end of hostilities or one year after in the case of occupation, articles 83–94 deal with internment camps, articles 95–96 deal with internee labor, articles 107–113 cover correspondence, articles 64–75 discuss disciplinary and judicial proceedings for the population as a whole, and articles 117–26 deal with disciplinary and judicial proceedings or internees. See also Gabor Rona, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Legal Frameworks to Combat Terrorists: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT’L L. 499, 504 (2005) (noting that the United States’ position would afford enemy combatants neither GPW privileges nor GCC privileges but would leave them in a “legal black hole.”); Kantwill & Watts, *supra* note 16, at 687–708.

72. Jinks, *supra* note 58, at 436; see also Derek Jinks, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?: Protective Parity and the Laws of War*, 79 NOTRE DAME L. REV. 1493, 1520 (2004); LOUISE DOSWALD-BECK, *Implementation of International Humanitarian Law in Future Wars*, in 71 THE LAW OF ARMED CONFLICT: INTO THE NEW MILLENNIUM 55 (Naval War College International Law Studies) (Michael N. Schmitt & Leslie C. Green eds., 1998).

73. The United States recently published Joint Publication 3-63, Joint Doctrine for Detainee Operations, where it states that enemy combatants “are not granted or entitled to the privileges of the Geneva Convention.” THE JOINT CHIEFS OF STAFF, JOINT PUB 3-63, JOINT DOCTRINE FOR DETAINEE OPERATIONS I-1 (Final Coordinating Draft, Mar. 23, 2005), available at <http://cryptome.org/joint/joint-pubs.htm> (last visited Sept. 21, 2005); see also Jim Mannion, *Rights Group Decries Proposed Military Doctrine that Formalizes “Enemy Combatants” Status*,



reasonable arguments to do so. The United States believes that it would not only cloak calculated murder in legitimacy, but also derogate the protections given noncombatants.<sup>74</sup>

### *B. Protections for Noncombatants*

The primary reason for insisting on the criteria for combatant status is to allow for distinction on the battlefield.<sup>75</sup> As Lieutenant Colonel Joseph Bialke states:

Armed conflict places large numbers of civilians on all sides of a conflict in grave situations where the risks of death, suffering, loss, and other depredations are extremely high. This is especially so when combatants disguise themselves as protected noncombatant civilians. [The law of armed conflict] has long been designed to mitigate the risks to civilians by clearly distinguishing lawful combatants from unlawful combatants.<sup>76</sup>

In the absence of this ability to distinguish combatants from noncombatants, soldiers on the battlefield are left in the unsatisfactory situation mentioned in the quotes beginning this Article. They must decide either not to shoot those who appear to be noncombatants and risk being killed, or attempt to distinguish between combatants and noncombatants, and in doing so, knowingly accept the risk of killing noncombatants for self-preservation.<sup>77</sup>

Distinguishing between combatants and noncombatants is generally done by requiring combatants<sup>78</sup> to wear uniforms.<sup>79</sup> The purpose of the

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Agence France Presse, Apr. 8, 2005.

74. Bialke, *supra* note 65, at 84.

75. See Jinks, *supra* note 72, at 1497, which states:

Noncombatants are granted immunity from attack so long as they do not participate directly in hostilities. In this sense, the protection of noncombatants from attack is predicated on a clear distinction between combatants and noncombatants. If attacking forces cannot distinguish between enemy soldiers and civilians, this type of rule cannot work well....It is the goal of protecting innocent civilians that requires a sharp line between combatants and noncombatants.

76. Bialke, *supra* note 76, at 7.

77. See Maxwell, *supra* note 7, at 23 ("Absent this ability to distinguish between lawful and unlawful combatants, an enemy might well be left with one of two targeting choices: do not engage any civilians, even though some are engaging its forces, or engage every enemy civilian on the battlefield. The latter choice will likely prevail.").

78. A significant issue in recent wars is the expansive use of civilian employees and contractors to support the force. The obvious challenge for nations like the United States which extensively use civilians in combat is to retain the legal protections for noncombatants in a way to allow these essential civilian contractors on the battlefield. See Liegl-Paul, *supra* note 51, at 108 ("The [U.S. Department of Defense] employs civilians in a variety of roles in [Iraq and

uniform requirement is to allow other combatants to know who to target and who not to target,<sup>80</sup> thereby protecting noncombatants.<sup>81</sup> The advantages to the fixed distinctive sign are obvious. A person's outward appearance provides no information about whether the person is likely to comply with the laws of war or is commanded by a reasonable entity. Furthermore, because of the general lack of safety in war-torn areas, many civilians carry weapons for protection.<sup>82</sup> Of the four article 4

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Afghanistan]. Department of Defense civilians and contractors, at times, work side by side with uniformed personnel." (citations omitted)). Prior to Operation Enduring Freedom, both the Army and Air Force issued guidance that contractors should not wear military uniforms. Michael Guillory states:

Initially, both the Army and the Air Force indicated that contractors should not wear military uniforms. "Contractors accompanying the force are not authorized to wear uniforms, except for specific items required for safety or security, such as: chemical defense equipment, cold weather equipment, or mission specific safety equipment." On February 8, 2001, the Acting Secretary of the Air Force issued a similar admonition but the prohibitions are not ironclad: "If required by the Theater commander, the deployment processing center will issue Organizational Clothing and Individual Equipment to contractor personnel. The wearing of such equipment by contractor personnel, however, is voluntary." "Exceptions may be made for compelling reasons....Should commanders issue any type of standard uniform item to contractors [sic] personnel, care must be taken to require that the contractor personnel be distinguishable from military personnel through the use of some distinctively colored patches, armbands, or headgear."

Guillory, *supra* note 7, at 128–29; *see also* Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511 (2005) (providing an excellent analysis of the status of civilian contractors and employees in armed conflict).

79. Bialke, *supra* note 65, at 13 ("LOAC [the law of armed conflict] seeks to protect civilian populations by proscribing conduct that endangers such populations unreasonably, such as taking part in combat without wearing a distinctive uniform or other form of identification that is clear and visible at a distance.").

80. Berman, *supra* note 59, at 43.

81. Guillory, *supra* note 7, at 133.

82. *See* Guillory, *supra* note 7, at 129–30 (quoting U.S. DEPARTMENT OF THE ARMY, FIELD MANUAL 100-21, CONTRACTORS ON THE BATTLEFIELD, 1–8 (2000)):

The general policy of the Army is that contractor personnel will not be armed. However, under certain conditions...they may be allowed to do so. The decision to allow contractor personnel to carry and use weapons for personal protection rests with the CINC. Once the CINC has approved their issue and use, the contractor's company policy must permit the use of weapons by its employees; and, the employee must agree to carry a weapon. When all of these conditions have been met, contractor personnel may only be issued military specification sidearms, loaded with military specification ammunition, by the military. Additionally, contractor personnel must be specifically trained and familiarized with the weapon, and trained in the use of deadly force in order to protect themselves. Contractor personnel will not possess privately owned weapons.

*See also* Guillory, *supra* note 7, at 129–30 (quoting Lawrence J. Delaney, Interim Policy Memorandum—Contractors in the Theater (8 Feb. 2001)):

criteria, this leaves the fixed distinctive sign as clearly the best way to distinguish between combatants and noncombatants. Though other “distinctive sign[s] recognizable at a distance” have been used,<sup>83</sup> “the use of a uniform or distinctive sign is the most basic of the four indicia of lawful belligerency”<sup>84</sup> and remains the most effective means for distinguishing between combatants and noncombatants.

The goal of international law, given its desire to protect noncombatants during armed conflict, ought to be to ensure all battlefield fighters distinguish themselves by wearing a uniform. Unfortunately, the international community seems to be moving in the opposite direction.

### C. GPI Arguments

Despite the value of uniforms in preserving the principle of distinction, the international community decided to devalue the requirement for a fixed distinctive sign in Protocol I to the Geneva Conventions (GPI).<sup>85</sup> This Protocol was written in response to the experiences of the Vietnam War<sup>86</sup> and specifically relaxed the requirements for combatant status. Articles 43 and 44 state, in pertinent part:

#### Article 43. Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which,

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Air Force commanders should not issue firearms to contractor personnel operating on their installations, nor should they allow contractor personnel to carry personally owned weapons. With the express permission of the geographic CINC and in consultation with host nation authorities, Air Force commanders may deviate from this prohibition of firearms only in the most unusual of circumstances (e.g., for protection from bandits or dangerous animals if no military personnel are present to provide protection).

83. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 523 (2003); see also *id.* (describing the Northern Alliance fighters in Afghanistan distinguishing themselves by the wear of a hat or tribal scarf.)

84. Bialke, *supra* note 65, at 24–25.

85. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) [hereinafter GPI], *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391.

86. See Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 679 (1994).

inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

...

Article 44. Combatants and prisoners of war

...

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

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

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

...

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

...

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.<sup>87</sup>

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87. GPI, *supra* note 85. The remainder of the provisions in these two articles are also important and have bearing on this problem:

Article 43

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

These provisions are highly controversial.<sup>88</sup> The United States signed but did not ratify the GPI because, although it accepts much of the GPI as customary international law,<sup>89</sup> it specifically objects to articles 43 and 44.<sup>90</sup> In fact, President Reagan made those objections explicit in his letter of Transmittal to the Senate concerning their advice and consent.<sup>91</sup>

Article 44(3) changes the traditional requirements of article 4 of the GPW by not requiring the uniform when, "owing to the nature of the hostilities an armed combatant cannot so distinguish himself."<sup>92</sup> This derogation from the traditional standard "has been construed to overly broaden the category of lawful combatants to include un-uniformed guerrillas, insurgents and similar groups. This dramatically lowers the

#### Article 44

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

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

...

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

...

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

...

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

*Id.*

88. See Aldrich, *supra* note 16, at 45–48. Mr. Aldrich was a part of the U.S. delegation to Protocol I and provides an interesting analysis of some of these provisions, while noting that they were controversial and caused much consternation and debate amongst the parties.

89. See Michael J. Matheson, *The United States Position on the Relation of Customary Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987) (discussing which articles of the GPI the United States believes are customary international law and to which the United States objects).

90. See Yoo & Ho, *supra* note 63, at 226–28; Matheson, *supra* note 89, at 425–26 (specifically detailing the United States' view on articles 43 and 44).

91. See Message of President Ronald Reagan to United States Senate, Jan. 29, 1987, *reprinted* in 81 AM. J. INT'L L. 910 (1987).

92. GPI, *supra* note 85, art. 44(3).

standard of a combatant's requirements of lawful belligerency and POW status, significantly diminishes combatant/noncombatant distinctions, and hence substantially endangers noncombatant civilians."<sup>93</sup> Part of the reason combatants are given special privileges is because they distinguish themselves from the civilian population,<sup>94</sup> and by so doing, hold themselves out as targets to lawful and unlawful combatants alike.<sup>95</sup> Article 44(7) creates a "bias against regular armed forces" because it leaves their responsibilities and requirements intact while article 44(3) excuses others from keeping them.<sup>96</sup>

As one of the sponsors of the Protocol, the ICRC compiled a commentary on the proceedings.<sup>97</sup> Concerning article 43, the Commentary states that "[i]t does not allow this combatant to have the status of a combatant while he is in action, and the status of a civilian at other times. It does not recognize combatant status strike as 'on demand.'"<sup>98</sup> It then adds that this language is designed to put "all combatants on an equal legal footing."<sup>99</sup> However, in the next paragraph, the commentary admits that "[a]n effective distinction between combatants and non-combatants may be more difficult as a result, but not to the point of becoming impossible."<sup>100</sup>

The approach of the GPI is counterproductive. Rather than attempt to give battlefield fighters an incentive to strive for complete compliance, GPI lowers the requirements for combatant status to bring more people within the ambit of the Convention's coverage. This approach does not support the overall idea of "promoting the protection of the civilian population from the effects of hostilities"<sup>101</sup> because it tries to solve the

93. Bialke, *supra* note 65, at 29.

94. See Jinks, *supra* note 72, at 1513 (arguing that the protections coming from Geneva Law are based on the assumption that all human beings deserved to be treated humanely and, therefore, unlawful combatants should be eligible for that same treatment. The difference in the case of privileges other than medical care, such as targeting issues and combatant immunity, is that by wearing uniforms, members of the military publicly make themselves targets, something unlawful combatants are not willing to do).

95. Cf. Ferrell, *supra* note 15, at 105 (arguing that some special operations missions in civilian clothes may result in the loss of combatant status or a charge of perfidy); W. Hays Parks, *supra* note 83, at 497 (arguing that it is permissible to dress in "non-standard" uniforms to "lower the visibility of U.S. forces").

96. Berman, *supra* note 59, at 47-49; Lee A. Casey & David B. Rivkin, Jr., *Double-Red-Crossed*, NAT'L INTEREST, Spring 2005, at 66-67.

97. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 (S. Pictet et al. eds., 1958).

98. *Id.* ¶ 1678.

99. *Id.*

100. *Id.* ¶ 1679.

101. GPI, *supra* note 85, art. 43(3).

problem of combatant status by relaxing the standards, giving insurgents a disincentive to distinguish themselves. Article 44(3)'s allowance for part-time combatants who "distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack"<sup>102</sup> may be an attempt to encourage those who otherwise would not distinguish themselves to do so. The exception allowed when "an armed combatant cannot so distinguish himself,"<sup>103</sup> however, not only destroys the utility of the article but is a fatal flaw to the document.<sup>104</sup>

GPI's derogation of the standards required to achieve combatant status, if accepted by the international community as a whole, would risk the safety of civilians. It is self-evident that "[n]oncombatants are most at risk when combatants hide amongst them, wearing civilian clothes and using civilians as human shields. There are good reasons to think that many fighters will continue to engage in this dangerous subterfuge."<sup>105</sup>

George Aldrich, head of the U.S. delegation to the Geneva Conference that signed the GPI,<sup>106</sup> wrote in 2000: "Whether or not these new rules offer enough incentive to induce resistance groups to comply can, of course, be determined only in practice."<sup>107</sup> The recent conflicts in Afghanistan and Iraq illustrate current practice and provide a clear example of why GPI's relaxation of the uniform standard is the wrong approach to encouraging the protection of civilians and why intermediate levels of recognition for those who wear fixed distinctive signs is so needed. The Taliban example illustrates this point. The Bush administration decided that the Taliban and al Qaeda would not receive combatant status.<sup>108</sup> Many have argued the United States was justified in its treatment of the Taliban and al Qaeda.<sup>109</sup> The President recognized

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

103. *Id.*

104. See Aldrich, *supra* note 16, at 47 (explaining the intended interpretation of the language in article 44(3)).

105. Callen, *supra* note 2, at 1072; Berman, *supra* note 59, at 50.

106. See Aldrich, *supra* note 16, at 46.

107. See *id.* at 48.

108. See White House Fact Sheet: Status of Detainees at Guantanamo, available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (last visited Oct. 1, 2005); Brooks, *supra* note 3, at 732-33; see also David A. Martin, *Immigration Law and Human Rights: Legal Line Drawing Post-September 11: Symposium Article: Offshore Detainees and the Role of Courts after Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 1 (2005) (discussing the Guantanamo detainee cases in the United States federal court system).

109. Bialke, *supra* note 65, at 2; Casey & Rivkin, Jr., *supra* note 96, at 63.

the Taliban as the regular forces of Afghanistan but made the decision not to grant them combatant status because of their lack of compliance with the law of war.<sup>110</sup> Given this decision, the Taliban have no continuing incentive to distinguish themselves from the civilian populace.<sup>111</sup>

Consider the consequences if the Taliban had anticipated that they would not be given combatant status, faded into the civilian populace, and fought from a position of anonymity as the terrorists have done in Iraq. There is no doubt this strategic maneuver would have resulted in more civilian and coalition force deaths. Yet what incentive did the Taliban have to do otherwise? Because of the current all-or-nothing approach to combatant status, the Taliban is faced with only disincentives to distinguish themselves.

Conversely, the laws of armed conflict, particularly those dealing with combatants, have been challenged by asymmetric opponents like al Qaeda and Fedayeen.<sup>112</sup> Though the Fedayeen have been distinguishable on certain occasions,<sup>113</sup> they and other groups such as Mahdi's Militia have fought in civilian clothes from within civilian formations.<sup>114</sup> It is unlikely that providing intermediate levels of recognition to al Qaeda will change its tactics,<sup>115</sup> but it may affect groups like the Fedayeen and Mahdi's Militia who otherwise would not get any of the privileges of combatant status. Granting them limited privileges in exchange for the ability to better distinguish noncombatants would be a significant step toward attaining the overall international law goal of providing greater protections to noncombatants.

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110. Bialke, *supra* note 65, at 16.

111. See *Department of Defense News Briefing Part 1 of 2*, M2 Presswire, Feb. 11, 2002, available at LEXIS, News File. But see *The Osgood File: U.S. Troops Find Weapons in Afghan Caves and Believe Hundreds of Taliban Fighters Still Remaining* (CBS television broadcast Mar. 6, 2002), transcript available at LEXIS, News File.

112. Michael Sirak, *Legal Armed Conflict*, JANE'S DEFENCE WEEKLY, Jan. 14, 2004, at 25.

113. See *After Attack, S. Korean Engineers Quit Iraq*, WASH. POST, Dec. 8, 2003, available at LEXIS, News File; *U.S.-Iraq: A Sunday in Samarra Analysis*, IPS-Inter Press Serv., Dec. 6, 2003, available at LEXIS, News File. But see *Commanders Relate Lessons Learned in Iraq*, U.S. FED. NEWS, Oct. 29, 2004, available at LEXIS, News File.

114. *Insight: Interview with Thomas Friedman* (CNN INTERNATIONAL, Apr. 1, 2004), transcript available at LEXIS, News File.

115. Aldrich, *supra* note 16, at 44-45.



### III. EVOLVE THE LAW TO ALLOW INTERMEDIATE LEVELS OF RECOGNITION FOR PARTIAL COMPLIANCE

A sound approach is to evolve the law to allow for intermediate levels of recognition for partial compliance with the requirements clearly identified in article 4 of the GPW, particularly that of wearing a fixed distinctive emblem, or uniform. The benefit of this approach is that it would not lower the standard for full combatant status, thereby leaving incentives in place to completely comply, but it would provide intermediate incentives to encourage groups to do all they could to distinguish themselves from the populace, thereby preserving protections for noncombatants.

The combatant status determination system is outdated in today's world situation<sup>116</sup> and alternatives need to be found. Derek Jinks states that "[c]riminalization of belligerency creates perverse incentives for the unlawful combatants: because their very participation in the hostilities subjects them to criminal prosecution upon capture, they have no incentive to comply with the law of war."<sup>117</sup> The all-or-nothing nature of combatant status leaves those who cannot comply with little incentive to even try. Therefore, "[t]he denial of combatants' privilege to some combatants does not mean that they will not engage in combat. One may even speculate as to whether those fighting without the privilege may do so with a special ferocity, precisely because the stakes are so high."<sup>118</sup>

Once they have made the decision to fight outside of complete compliance, unlawful fighters know that they will receive no benefits and will be quickly tried as murderers in domestic courts or military tribunals. This motivation exists because the current system is organized with only negative incentives to comply with combatant status unless one can meet all four criteria of GPW.<sup>119</sup>

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116. Brooks, *supra* note 3, at 734, 756–57:

It should be noted that the rules for determining the lawfulness or unlawfulness of a combatant are themselves archaic and arguably biased in favor of wealthier armies. The notion that "lawfulness" might hinge, for instance, on the wearing of "fixed distinctive signs" is odd; again, the classic paradigm, with its images of bugles and banners, does not accord well with the realities of modern conflicts, in which the rag-tag soldiers of third-world states and militias may simply lack the resources to wear anything resembling a uniform. Here, the law of armed conflict offers a set of chivalric rules that favors those with more resources.

(citations omitted).

117. Jinks, *supra* note 58, at 438; Jinks, *supra* note 72, at 1523.

118. Berman, *supra* note 59, at 12.

119. Callen, *supra* note 2, at 1026–28, 1063–64.

Jinks has recently written two thought-provoking articles on this issue. Jinks agrees that “the question is how best to encourage fighters to distinguish themselves from the civilian population.”<sup>120</sup> He argues that “protective status categories are an inefficient way to incentivize individual combatants because these categories necessarily trade on collective considerations—such as the organizational characteristics of the fighting force.”<sup>121</sup> In other words, the four criteria for combatant status are too dependent upon a structural view of the person on the battlefield. There is no way for an individual actor to gain combatant status. He then proposes that “[t]he rule of distinction would be better served by an individual ‘war crimes’ approach that accorded all fighters substantial humanitarian protection and punished (in accord with basic requirements of due process) individual bad actors.”<sup>122</sup>

There is no doubt that Jinks is correct in his analysis concerning the need to give positive incentives to fighters. However, this solution fails to view the problem from the perspective of a soldier on the ground trying to distinguish between persons dressed in civilian clothes, knowing that only some of whom are unlawful combatants. The fact that all who commit war crimes will be prosecuted, whether lawful or unlawful combatants, will only deter those unlawful combatants who are concerned about war crimes prosecutions. Jinks’ solution also does not address the fact that this deterrence by prosecution approach may only, as mentioned above, increase the ferocity and frequency with which the fighter uses civilians in his fight.<sup>123</sup> Jinks offers only negative incentives, no carrots to counterbalance the sticks,<sup>124</sup> and argues that the Geneva Conventions are specifically organized in that way.<sup>125</sup>

The ultimate solution may include parts of Jinks’ proposal, but there must also be some “carrot-type” incentives to encourage the unlawful combatant to distinguish himself and, therefore, make himself a target (thus protecting the noncombatant population).<sup>126</sup> Jason Callen agrees

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120. Jinks, *supra* note 72, at 1495.

121. *Id.*

122. *Id.*

123. *See supra* note 111.

124. Jinks, *supra* note 58, at 441.

125. Jinks, *supra* note 72, at 1524–25.

126. The International Committee of the Red Cross does not believe that any change is necessary despite the clear noncompliance and its resulting risks to noncombatants. *See* Balthasar Staehelin and John Hutson Discuss the Idea of Possibly Changing the Geneva Conventions to Reflect a More Modern View of Warfare (NPR broadcast Nov. 28, 2004), *transcript available at* LEXIS, News File. (Mr. Staehelin, the Director for the International Committee of the Red Cross Operations for the Middle East and North Africa, states: “I think that the Geneva Conventions

and explains that “[t]he best way to protect civilians is to create the strongest incentives for combatants to distinguish themselves from the rest of the population.”<sup>127</sup> Callen believes that the Conventions currently do this through rewarding only compliance; the incentive of combatant immunity should be sufficient. However, as the quotations at the beginning of the article and the continuing experience in Iraq<sup>128</sup> clearly portray, the incentives are currently not strong enough to provide for the desired safety of noncombatants.

Combatant immunity is a great carrot, or incentive, and ought to be used as such<sup>129</sup> in an attempt to bring battlefield fighters into complete compliance. Further, it is clear that partial compliance does not merit complete privilege. Unlawful battlefield combatants ought not to benefit completely from rules with which they do not comply.<sup>130</sup> But there are certainly intermediate protections and benefits that can be offered to those irregular armed forces to help encourage them to distinguish themselves from the general populace and give soldiers and other lawful battlefield participants a greater opportunity to apply the principle of distinction clearly.

These protections and benefits could include immunity from prosecution for speech or association crimes connected with political beliefs; abeyance of execution of punishment until conflict is resolved; offer of parole, including immunity for weapons crimes not resulting in death or injury; compliance with international law as a mitigating factor at sentencing; disallowance of the death penalty; and if the movement which the fighter is a part of eventually achieves combatant status, the fighter’s prior lawful warlike actions may also be covered by combatant immunity.

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provide very good answers to the problems we have today. If they were respected, I think we would have a totally different situation. So, in our view, the most important issue today is respect for these conventions and not for revisions.”); *see also* Gabor Rona, *supra* note 71, at 499 (“While there will always be room for tinkering around the margins of any legal framework, the implication that a new one needs to be developed specifically to combat terrorism is doubtful.”).

127. Callen, *supra* note 2, at 1072.

128. *See* Dilanian, *supra* note 8 (“The inability to separate the good guys from the bad is the central dilemma that has bedeviled American soldiers in Iraq for nearly two years as they have tried to root out an unknown number of insurgents who wreak havoc and then blend into the civilian population.”).

129. Jinks, *supra* note 58, at 438.

130. *See* 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, A, 621 (1949) *cited in* Callen, *supra* note 2, at 1051.

#### IV. SPECIFIC PROVISIONS

In enumerating specific proposed incentives to encourage all battlefield fighters to distinguish themselves from the local populace, it is important to ensure that these privileges are not already granted to the class of people targeted for change. Since the armed conflicts in Afghanistan and Iraq, there has been lively discussion on what privileges actually accrue to “unlawful combatants.” As previously mentioned, some believe that unlawful combatants are already covered by the GCC and that those benefits closely approximate the privileges accorded prisoners of war in the GPW. This argument is cogently stated by Jinks who writes that “[t]he Geneva Conventions protect unlawful combatants, and this protection very closely approximates that accorded POWs.”<sup>131</sup> He concludes his article:

What difference does POW status make? Contrary to conventional wisdom (and the prevailing policy debates in the current “war on terrorism”), I maintain that POW status carries *no significant, unique protective consequences*. As a descriptive matter, the unique protective significance of POW status is minimal and in sharp decline. The text, structure, and history of the 1949 Geneva Conventions and the 1977 Additional Protocols thereto strongly support this conclusion.<sup>132</sup>

On the other hand, the traditional approach has been to argue that unlawful combatants receive neither the protections of the GPW or the GCC. Jason Callen endorses this position when he writes that the “text of the Civilian Convention, together with the Convention’s legislative history, shows that battlefield unlawful combatants are not among the unlawful combatants covered by the Conventions.”<sup>133</sup> As opposed to the ICRC commentary that Jinks uses to support his argument,<sup>134</sup> Callen

131. Jinks, *supra* note 58, at 440.

132. *Id.* at 442.

133. Callen, *supra* note 2, at 1031.

134. *See id.* Callen writes:

Scholars who argue that the Civilian convention protects all types of unlawful combatants rely on the International Committee of the Red Cross’s Commentary to the Geneva Conventions. The Commentary provides background on the negotiations that occurred during the drafting of each Convention and offers the ICRC’s interpretation of the meaning of the respective Convention’s Articles. While the ICRC Commentary suggests that the Civilian Convention was intended to cover all unlawful combatants, the commentary does not persuasively show that this is what the Conventions’ authors intended.

looks to prior conferences and the Final Record of the Geneva Conference<sup>135</sup> for his support.

The resolution of this argument is significant because if unlawful combatants are covered by the GCC as Jinks argues, some of the proposals below will represent less meaningful incentives. However, the fact that the discussion is ongoing and that Callen adopts the traditional approach make the suggestion of incentives important. Further, state practice, at least among coalition forces in Iraq and Afghanistan, has been not to apply GCC privileges to unlawful combatants as a matter of law, though U.S. forces have provided many privileges as a matter of policy.<sup>136</sup>

#### A. *Immunity from Speech or Association Crimes Connected with Political Beliefs*

The first incentive that should be offered to battlefield fighters who choose to distinguish themselves by wearing uniforms is immunity from prosecution for treasonous or inciting speech or associating with others who are involved in the armed conflict. These individuals could still be detained and held until they no longer represented a risk or the termination of the conflict,<sup>137</sup> but if prosecution was contemplated, the detainees would be immune from prosecution for their speech or associations. Such an incentive may have been useful, for example, in Baghdad in April 2004.

At that time, members of Mahdi's Militia were engaging in open hostilities against the occupying coalition forces.<sup>138</sup> Some wore uniforms and others did not.<sup>139</sup> These battlefield fighters did not qualify for

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*Id.* (citations omitted).

135. *Id.* at 1029.

136. See Department of Defense Directive 5100.77, DoD Law of War Program (Dec. 9, 1998), available at <http://www.dtic.mil/whs/directives/corres/pdf2/d510077p.pdf> (last visited Oct. 1, 2005):

5.3. The Heads of the DoD Components shall:

5.3.1. Ensure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.

*Id.*; Gregory P. Noone et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL L. REV. 1, 17 (2004).

137. Jordan J. Paust, *Current Pressures on International Humanitarian Law: War and Enemy Status after 9/11: Attacks on the Law of War*, 28 YALE J. INT'L L. 325, 328–29 (2003).

138. Bill Powell et al., *An Eruption of Iraqi Insurgency Tests U.S. Resolve and Plays Havoc with Plans to Hand Over Control. How will the President Respond?*, TIME, Apr. 19, 2004, at 34.

139. Kimmitt, *supra* note 2.

combatant status but certainly engaged in combat activities. They also engaged in many open meetings and gatherings to voice support for Muqtada Al-Sadr. Coalition forces could lawfully detain these individuals as security internees<sup>140</sup> and then either prosecute them under violations of domestic Iraqi law or Coalition Provisional Authority Orders.<sup>141</sup> However, if the proposed incentive was in place, and the security internees were dressed in Mahdi's Militia's distinctive black uniforms with green arm- or headbands, those persons could be held as security internees but not later prosecuted for the crimes associated with speech or association.<sup>142</sup>

This immunity represents an incentive for the unlawful battlefield fighter because if he is detained while in civilian clothes, he can immediately be prosecuted for violations of the law; yet if he distinguishes himself from the general populace, he receives immunity. Though he may be detained, he cannot be prosecuted for those crimes.

This offer of immunity in exchange for the wearing of a uniform represents a benefit to the occupier because it allows him to easily distinguish those who are actively supporting the counterinsurgency. As occupying forces move into a gathering of armed and unarmed people, some wearing fixed distinctive emblems and some not, it is easy to assess who the insurgents are.

140. GCC, *supra* note 43, art. 78.

141. See CPA Official Documents, available at <http://www.iraqcoalition.org/regulations> (last visited Sept. 21, 2005) (site scheduled to be taken down on June 30, 2006). For example, CPA Order 14, concerning media organizations, states:

Media organizations are prohibited from broadcasting or publishing original, re-broadcast, re-printed, or syndicated material that:

- a) incites violence against any individual or group, including racial, ethnic or religious groups and women;
- b) incites civil disorder, rioting or damage to property;
- c) incites violence against Coalition Forces or CPA personnel;
- d) advocates alterations to Iraq's borders by violent means....

Coalition Provisional Authority Order 14: Prohibited Media Activity, available at [http://www.iraqcoalition.org/regulations/20030610\\_CPAORD\\_14\\_Prohibited\\_Media\\_Activity.pdf](http://www.iraqcoalition.org/regulations/20030610_CPAORD_14_Prohibited_Media_Activity.pdf) (last visited Oct. 10, 2005) (site scheduled to be taken down on June 30, 2006).

142. This proposal is somewhat analogous to the immunity given to civilians in GCC, article 70. See GCC, *supra* note 43, arts. 64–75. The occupier cannot prosecute or punish a protected person during occupation for the support he may have provided to the armies defending against the victorious occupier. OSCAR M. UHLER ET AL., COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 348–49 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958). Particularly in the case of an insurgency as in Iraq, the attempt is to throw off the occupier and establish a new government or restore the old. If the insurgency is successful, the same principle of fighting for or against a prior government is not punishable by the succeeding government.

### B. *No Execution of Punishment Until Conflict Resolved*

Another incentive that should be implemented for those irregular forces willing to distinguish themselves on the battlefield is to guarantee that no punishment for their lawful combatant-like criminal activities will be carried out until the end of hostilities. The use of the “end of hostilities” standard as a measure for granting privileges is somewhat analogous to provisions in both the GPW<sup>143</sup> and the GCC.<sup>144</sup> This becomes especially important when considered with some of the other proposals below, such as precluding the death penalty and the potential grant of combatant immunity if the unlawful combatants’ organization later achieves combatant status.

Traditionally, unlawful combatants are subject to capture, detention, trial and punishment like prisoners of war,<sup>145</sup> and also trial and punishment by military tribunals for their unlawful acts on the battlefield.<sup>146</sup> However, in most cases, a POW may only receive disciplinary punishment,<sup>147</sup> not to exceed thirty days of confinement.<sup>148</sup> In the few instances where a POW is subject to judicial process,<sup>149</sup> he retains all the rights granted by the GPW,<sup>150</sup> including immunity for his lawful warlike acts.<sup>151</sup> Further, once hostilities are over, unless he has

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143. See GPW, *supra* note 43, arts. 118–19 (requiring POWs to be repatriated at the cessation of hostilities unless suspected of war crimes).

144. Article 6 of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War states:

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations....

Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *supra* note 43, art. 6.

145. See GPW, *supra* note 43, arts. 83–108.

146. Berman, *supra* note 59, at 68.

147. GPW, *supra* note 43, art. 83.

148. *Id.* arts. 89–90.

149. There is some debate over whether this would involve only war crimes committed prior to capture or also crimes committed during detention. Compare COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, *supra* note 142, with Howard S. Levie, *War Crimes in the Persian Gulf*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 153, 155–56 (1996).

150. GPW, *supra* note 43, art. 108, reprinted in SCHINDLER & TOMAN, *supra* note 14, at 466–67.

151. Jordan J. Paust, *Current Pressures on International Humanitarian Law: War and Enemy Status after 9/11: Attacks on the Law of War*, 28 YALE J. INT’L L. 325, 330 (2003).

committed war crimes, he is repatriated to the civilian population with no further criminal consequences. His punishment for having been captured as a lawful combatant is really only detention until the end of the conflict.<sup>152</sup>

Protected persons under the GCC also enjoy certain protections.<sup>153</sup> They cannot be prosecuted for crimes committed or opinions expressed prior to the occupation,<sup>154</sup> and they have the right to most modern guarantees of a fair trial.<sup>155</sup> They also may be interred as security internees or put under house arrest.<sup>156</sup> This restraint can continue for extended periods, conceivably to the end of the occupation,<sup>157</sup> but must be reviewed periodically.<sup>158</sup> Protected persons also can be prosecuted for criminal activity.<sup>159</sup> While unlawful combatants may or may not deserve these benefits, they merit some additional protections if they are willing to wear uniforms.

A “no execution of punishment until after the conflict is resolved” standard is reasonable, follows from the facts of the situation, and represents a clear incentive for the unlawful fighter. Without this provision, he is likely to be summarily dealt with, potentially tried, and executed<sup>160</sup> depending on the nations involved in the conflict. However, his movement may be successful and his fellow partisans brought to power. In that case, if he had not had his punishment executed but was merely being held until the conflict was resolved, he would certainly be freed from any prison in which he was languishing. Further, it is only the punishment that must be held in abeyance so a trial could go forward and if acquitted, the unlawful belligerent goes free. If convicted, the unlawful belligerent may be held as a security internee until the conflict is resolved and he begins to serve his punishment, or until he is freed because he no longer represents a threat.<sup>161</sup>

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152. GPW, *supra* note 43, art. 118.

153. GCC, *supra* note 43, art. 70.

154. *Id.* arts. 64–75.

155. *Id.* arts. 71–75.

156. *Id.* art. 78.

157. *Id.* art. 77.

158. *Id.*

159. *Id.* arts. 64–75.

160. Mark Mathews, *Kashmir Conflict an Old Grudge; But New Escalation by India, Pakistan has Higher Stakes*, BALT. SUN, Dec. 29, 2001, at 1A; *Hundreds of Chechens Said Missing*, AP Online, June 4, 2001, available at LEXIS, CURNWS File; *Ex-Dictator Starts University Lectures*, Press Ass’n, Sep. 29, 1997, available at LEXIS, CURNWS File; *Risky New Role for Mexico’s Army*, UPI, Oct. 19, 1996, available at LEXIS, CURNWS File.

161. GCC, *supra* note 43, arts. 43, 78.



This also offers a clear benefit to the lawful battlefield forces. Again, the fact that the unlawful fighter has donned a uniform and chosen to distinguish himself not only will spare the civilian population, but will make him much easier to target and either kill or capture. The requirement to detain the captured belligerent will prove an inconvenience for the lawful forces, but is an exchange most forces will be willing to make for an increased ability to identify the enemy. The lawful forces could also decide to offer parole for detained unlawful combatants as discussed below to relieve them of the detention requirement.

*C. Offer of Parole, Including Immunity for Weapons Crimes not Resulting in Death or Injury*

Collecting large numbers of POWs and/or detainees is always problematic for an armed force, and especially so for an invading force. The required expenditure of resources can be quite burdensome to a force even as well supplied as the United States.<sup>162</sup> Offering parole to unlawful combatants may be a way not only to decrease the significant logistics requirements required for detainees, but also to provide incentives for those same detainees to distinguish themselves by wearing uniforms.

Parole, as commonly used in international law, is “releasing a prisoner of war...in return for a pledge not to bear arms.”<sup>163</sup> The practice has been used since at least the age of the Roman Empire and continued into the twentieth century.<sup>164</sup> Parole was codified in the 1907 Hague Convention<sup>165</sup> and in the 1949 GPW<sup>166</sup> and remains a viable concept

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162. See David Rose, *Guantanamo Bay on Trial*, VANITY FAIR, Jan. 2004, at 88 (discussing Halliburton’s \$135 million government contract to upgrade the detainee facilities at Guantanamo Bay).

163. Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 200 (1998).

164. For an excellent history on the use of parole, see *id.* at 201–09.

165. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, art. 10, reprinted in SCHINDLER & TOMAN, *supra* note 34, at 78. Article 10 of the Convention states:

Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honour, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

*Id.* art. 10.

166. See GPW, *supra* note 43, art. 21 (“Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend.”).

today, though it is seldom used and proscribed by the United States for use by its military members.<sup>167</sup> Joshua Clover has urged the reinstatement of the possibility for parole, for use with the Guantanamo detainees.<sup>168</sup> He advances three reasons why parole of that particular group of detainees would be advantageous:

First, paroling these detainees would alleviate concerns over the fact that they may otherwise be held indefinitely. Second, although they may appear to be “freed,” paroled prisoners of war are prohibited from being employed in active military service against their original captors. Third, if these parolees are later discovered to have “broken” their parole, the original detaining power, in this case the United States, “has extensive options in dealing with the miscreant.” Though the laws of war conflict on some of the procedural specifics, the parole breaker could conceivably lose his prisoner of war status.<sup>169</sup>

These same advantages would apply to a much more general application of the principle of parole to unlawful combatants who distinguish themselves from noncombatants. Knowing that parole may be offered to those who distinguish themselves (so long as they have not otherwise committed murder or other serious violations of the law of war) is an incentive that will potentially affect some of the most devout insurgents.

A counterargument might be that if these unlawful fighters are already violating the law of war by not complying with the four criteria of combatancy, they have no reason to comply with a grant of parole that relies on personal honor to a large degree.<sup>170</sup> There is some risk involved, but treating parole-breaking as a grave breach<sup>171</sup> and exercising universal jurisdiction,<sup>172</sup> would, if nothing else, give overwhelming recourse and act as a deterrent. A similar system has been used in

167. See Exec. Order No. 10,631, 20 Fed. Reg. 6,057, art. III (Aug. 17, 1955), amended by Exec. Order No. 12,017, 42 Fed. Reg. 57,941 (Nov. 3, 1977), further amended by Exec. Order No. 12,633, 53 Fed. Reg. 10,355 (Mar. 30, 1988) (establishing the code of conduct for the U.S. armed forces that requires members of the military to deny parole from the enemy).

168. Clover, *supra* note 44, at 370.

169. *Id.* (citations omitted).

170. See, e.g., Bradford, *supra* note 6, at 721 n.244; Brown, *supra* note 163, at 210–11.

171. See generally GCC, *supra* note 43, arts. 43, 147. Historically, parole violators were subject to death. Bradford, *supra* note 6, at 724 n.266.

172. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 253 (2000).

Iraq,<sup>173</sup> though there is no unclassified report on its success at this point. Further, it is important to note that parole would only be offered to those who had sufficient incentive to put on a uniform and make themselves a target, rather than take the easier and safer method of fighting from among the civilian crowds and immediately disappearing into safety. It may be that those willing to so identify themselves to gain the opportunity of parole will also have the integrity to honor their parole obligations.

Though the parolee would still not have the right to combatant immunity, and, therefore, could be prosecuted for any unlawful killing or injury he had caused in the course of his actions, this parole may also include a grant of immunity for weapons crimes that do not result in death or serious injury.<sup>174</sup> Further, the parole might include a grant of immunity from other unlawful combat activities such as sabotage or destruction of military property belonging to the opposing forces, providing it did not result in death or serious injury.<sup>175</sup>

The benefits to unlawful combatants of parole are great and should serve as a considerable incentive to wear a uniform. Insurgencies and guerrilla warfare are often full of sabotage and other non-deadly activities. For these activities, parole would exist as an option so long as the unlawful combatant was willing to mark himself as a target. Further, the offer of parole provides the unlawful combatant the opportunity to return to his home and care for his family and return to normal life, though now removed from continuing the conflict.

Distinction again provides the benefits to the lawful combatants. The ability to see the saboteur for who he is, before he completes his work is of incredible value, certainly worth returning him to society on the grounds that he will fit himself back into the compliant civilian population. The risks of parole violation bear heavy thought before granting parole, but are likely risks worth taking.

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173. See Richard A. Opiel, Jr., *5 Iraqis Die in Gunfight After Bomb Hits U.S. Convoy*, N.Y. TIMES, Jan. 10, 2005, at A3 (detailing the release of Iraqi detainees into the supervision of community "guarantors").

174. See generally Coalition Provisional Authority, Order Number 3 (Revised) (Amended), (order entered into force Dec 31, 2003), at [http://www.iraqcoalition.org/regulations/20031231\\_CPAORD3\\_REV\\_AMD\\_.pdf](http://www.iraqcoalition.org/regulations/20031231_CPAORD3_REV_AMD_.pdf) (last visited Oct. 1, 2005) (site scheduled to be taken down on June 30, 2006).

175. For descriptions and analyses of guerrilla warfare, see Johnie Gombo, *Understanding Guerrilla Warfare* (1990), at <http://www.globalsecurity.org/military/library/report/1990/GJ.htm> (last visited Sept. 21, 2005) (providing an overview of the nature of guerrilla warfare) and Lopez, *supra* note 9, at 928–29 (1994) (addressing the challenge of distinguishing combatant and civilian status during guerrilla warfare as defined under the Geneva Convention).

#### D. *Compliance with International Law as Mitigation at Sentencing*

In cases where parole is either not offered or inappropriate, such as cases of death or serious injury, allowing evidence of the unlawful combatant's compliance with the uniform requirement and other requirements of the combatancy criteria could be used as mitigation evidence at sentencing in any trial to which the unlawful belligerent was subject. Louise Doswald-Beck has urged such a course of action. In looking for an incentive approach to encouraging compliance, she has written "[t]he carrot could be, for example, allowing respect of international law rules to be used in mitigation of sentence when such persons are tried in national courts."<sup>176</sup>

Such a measure would have to be sufficiently publicized and would be less effective with trials that took place after the conflict, but may still have some effect on the mind of the unlawful combatants. The amount of mitigation provided would obviously be of significance as well. This, however, would be a matter of judicial decision and likely out of the power of the lawful combatants.

There is precedent for allowing compliance with the law of war as mitigating circumstances at trials. In the Nuremburg Trials after World War II, there are at least two examples of the Tribunal mitigating punishments based on attempts to comply with the law of war.<sup>177</sup> This would act as an incentive for the unlawful combatants by providing them at least the possibility of a mitigated sentence at trial. As mentioned above, because the current state of the law provides for no benefits at trial for those who do not achieve full combatant status, many unlawful combatants will be compelled to fight to the death rather than surrender without hope for a fair or mitigated sentence. Following this pattern established at Nuremburg may provide incentives to do otherwise.

On the other hand, allowing mitigation at sentencing is a small price to pay for the ability to identify the unlawful combatant. The difference between sending someone to jail for a short period as opposed to a longer period is generally of little significance to the invader or occupier. By the time the unlawful combatant is released from even his

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176. DOSWALD-BECK, *supra* note 72, at 56.

177. See *United States of America v. Flick*, 9 L.R.T.W.C. 1, 29 (1949); *United States of America v. List*, 11 T.W.C. 757, 1300 (Nuremburg Military Trib. 1948). See generally William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 492-93 (1997) (describing numerous examples of sentences mitigated by the Nuremburg Tribunals).

mitigated sentence, it is likely that the insurgency will have been overcome and the government will firmly be in place or the invader will have been repelled and the old government reinstated.

### *E. No Death Penalty*

If convicted at trial despite any potentially mitigating testimony concerning an unlawful belligerent's wearing of a uniform, he may face punishments as severe as death, depending on his actions. Both the GCC<sup>178</sup> and GPW<sup>179</sup> allow for the death penalty under certain circumstances. The language of article 68 of the GCC is particularly appropriate as it deals specifically with unlawful belligerents. It states in pertinent part:

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.<sup>180</sup>

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178. See GCC, *supra* note 43, art. 68.

179. See GPW, *supra* note 43, art. 100:

Prisoners of war and the Protecting Powers shall be informed, as soon as possible, of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend. The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

The first paragraph establishes two threshold questions before the death penalty can be considered for an unlawful combatant in an occupation: the type of crime and the law of the country occupied. Both are questions that would be resolved by the detaining power or tribunal before which the unlawful belligerent appears. The examples of crimes listed are precisely the type of acts unlawful combatants do and therefore represents little limitation on the use of the death penalty.<sup>181</sup>

Historically, summary execution was used as an option for violations of the law of war<sup>182</sup> and trial, conviction, and execution by a military tribunal is still lawful.<sup>183</sup> Customary international law also allows for the use of the death penalty,<sup>184</sup> though that is a trend that may be changing.<sup>185</sup> One hundred and thirteen countries still allow the death penalty, though it has not been used in some of those countries for more than ten years.<sup>186</sup> There are certainly circumstances where the death penalty is a sentencing option for convicted unlawful belligerents.

However, Thomas McDonnell has made the argument that the death penalty in the case of terrorism is counterproductive. He argues that using the death penalty against terrorists would lead to greater terrorism, less cooperation from our allies, and greater danger to our military and

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*Id.*

180. GCC, *supra* note 43, art. 68.

181. See Deputy Secretary of Defense Paul Wolfowitz, Testimony as Delivered to the Senate Armed Services Committee on the Transition in Iraq (June 25, 2004), in U.S. Dep't of Defense Info., June 25, 2004, available at LEXIS, News File (addressing terrorist attacks and security issues in Iraq).

182. See Lieber Code, *supra* note 24, arts. 20–25, 37, at 6–8; Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 192 n.94 (2000).

183. See Norman L. Greene et al., *Capital Punishment in the Age of Terrorism*, 41 CATH. LAW. 187, 205 (2001).

184. See, e.g., Heather Anne Maddox, *After the Dust Settles: Military Tribunal Justice for Terrorists After September 11, 2001*, 28 N.C. J. INT'L L. & COM. REG. 421, 453 (2002) (quoting the 1940 U.S. War Department Rules of Land Warfare); Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 408 n.215 (1999); Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1, 35 (1992).

185. See Elizabeth A. Reimels, Comment, *Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty—The U.S. Wants to Play the International Human Rights Game, But Only if It Makes the Rules*, 15 EMORY INT'L L. REV. 303, 321 (2001) (arguing that the juvenile death penalty is a violation of customary international law and that the drafters of the International Covenant on Civil and Political Rights equated the right to life with the abolition of the death penalty).

186. See Amnesty International, *Facts and Figures on the Death Penalty*, at <http://web.amnesty.org/pages/deathpenalty-facts-eng> (last modified Sept. 27, 2005) (last visited Oct. 1, 2005).

civilians abroad.<sup>187</sup> These same arguments may also hold true with unlawful combatants. It is important to note that none of the three operating international criminal tribunals is authorized to administer the death penalty.<sup>188</sup>

Removing the death penalty as a possible punishment would create an incentive for at least a certain number of unlawful belligerents who might meet the two criteria of the GCC or otherwise be subject to the death penalty under customary international law or domestic law. Being protected from the death penalty may mean long prison sentences, but it may also mean eventual release through changing circumstances, such as success of the insurgency or international pressure.<sup>189</sup> As with other proposals, it would have to be publicized in advance for greatest effect, and strictly adhered to when circumstances were appropriate.

For the lawful belligerents, the major detractor from such an incentive is the issue of continued incarceration and its continuing logistical requirements. However, that can serve as a visible reminder of the veracity of the incentive and also of the penalties of fighting against the lawful forces, whereas killing the unlawful belligerent may make him a martyr to other like-minded noncombatants contemplating illegal activities.

*F. If the Movement Results in International Armed Conflict and the Fighter Gets Subsequent Combatant Status, the Prior Lawful Warlike Actions Are Also Covered by Combatant Immunity*

Finally, one of the greatest incentives that can be given to unlawful combatants to encourage them to wear uniforms is that if the movement they are fighting for at some point obtains combatant status, their prior actions would be covered by combatant immunity, so long as they would have been lawful if they had been combatants at the time. In other words, if an unlawful combatant conducts himself lawfully by abiding by the laws of war in how he engages in hostile activity, and does not qualify for combatant status only because of his non-

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187. See Thomas M. McDonnell, *The Death Penalty—An Obstacle to the “War Against Terrorism”?*, 37 VAND. J. TRANSNAT’L L. 353, 400–417 (2004).

188. See Nora V. Demleitner, *The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform?: The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 143–44 (2002).

189. See, e.g., *Zimbabwe; President Arrives in New York for UN Assembly*, AFR. NEWS, Sep. 12, 2002, available in LEXIS, News File (discussing international pressures to release freedom fighters); Ken Adelman, *Open the Doors to Burma; Engage Its Military Leaders in Dialogue*, WASH. TIMES, May 21, 2002, at A21.

compliance with one of the other three criteria, he would be given combatant immunity if his organization does eventually receive combatant status.

A battlefield fighter's status is determined at the time he is captured.<sup>190</sup> Once that determination is made, it is generally not reconsidered unless there is some new evidence found that would change that status. Recognition as combatants for members of his organization could be such information that would cause a reconsideration of an unlawful combatant's status, and grant him combatant's status. For example, assume that an unlawful combatant is part of an irregular force that is fighting an invading force but doesn't meet the requirements of combatant status because the force is not complying with the laws of war, due to most of the fighters not fighting in uniforms. However, this particular battlefield fighter was fighting in a distinctive emblem that was subsequently adopted by the rest of his group and his group was then recognized as complying with the four combatant status criteria and given combatant status. Because the unlawful fighter was in uniform at the time of his capture, his status ought to be revisited and he ought to be given combatant status.

This incentive adds value to the prior proposals advocating holding in abeyance the execution of any punishment until the conflict is resolved and the disallowance of the death penalty. Because the determination may change over time, not executing the punishment, particularly the death penalty, is important because the unlawful fighter's status may change.

This provides obvious incentives for the unlawful belligerent. If he believes that he deserves combatant status but his fellow fighters simply have not got all the pieces of combatancy put together yet, he has a concrete incentive to wear a uniform. This argument is an especially important incentive to groups that are fighting in an internal armed conflict where combatant status does not apply<sup>191</sup> but where the group

190. Canestaro, *supra* note 21, at 112–13 (describing the U.S. Supreme Court's treatment of Nazi Saboteurs in *Ex parte Quirin*, 317 U.S. 1, 37 (1942)).

191. See *supra* note 55; see also Lopez, *supra* note 9, at 917:

The growing number of fatalities and atrocities in recent civil wars highlights the inadequacy of the legal protections afforded to civilians, combatants, and peacekeepers under existing international humanitarian law. Although civil wars present the same horrors as international ones, they are governed by only a few, largely ineffective provisions in the Geneva Conventions of 1949 and their Additional Protocols of 1977. These provisions offer little protection to combatants and civilians in conventional civil wars, resulting in an unfortunate disparity between the protections afforded during international and internal conflicts.



believes that it will achieve sufficient recognition in the future to be given combatant status.

For the lawful forces, not only does it allow easier targeting since the fighter is now in uniform, but it also will act as an incentive for groups to comply with all the requirements of combatant status. The opportunity for eventual combatant status and combatant immunity will have a powerful influence on prospective battlefield fighters and will be a great encouragement to distinguish themselves on the battlefield.<sup>192</sup>

## V. CONCLUSION

Today's battlefields are populated by noncombatants as well as combatants. Among those on the battlefield are many who do not meet all four requirements of article 4 of the GPW and therefore do not qualify for combatant status. Current international law requires a force to meet all four requirements before granting any privileges. Without this privilege of combatant status, these groups of "unlawful belligerents" have no incentive to comply with any of the four criteria of combatancy. This all-or-nothing approach is designed to encourage groups to attempt to achieve combatant status. Instead, it acts as a disincentive for groups who cannot meet all four criteria to attempt compliance with any of the four requirements, including wearing a fixed distinctive emblem to help distinguish them from the local populace.

The disincentive for unlawful belligerent groups to distinguish themselves is counterproductive to the modern attempts to protect non-combatants and to require combatants to refrain from military operations that would adversely affect non-combatants. If soldiers cannot distinguish who the enemy is, and if that enemy attacks from civilian crowds, it is impossible to expect soldiers to not respond in self-defense, thereby putting innocent noncombatants at risk. This can be remedied by offering incentives for the unlawful combatants to distinguish themselves by wearing uniforms. Providing incentives to motivate unlawful combatants to wear uniforms can be achieved by offering some benefits that they would not otherwise qualify for unless they distinguish themselves, thus, making themselves targets and

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*Id.* (citations omitted); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 182 (2000); cf. Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 1, 5-6 (2002) (discussing the portions of international law that have become applicable to internal armed conflicts).

192. Jinks, *supra* note 58, at 438.

allowing the lawful forces to better protect the civilian populace. These intermediate privileges include immunity from prosecution for speech or association crimes connected with political beliefs; abeyance on trial and execution of punishment until conflict is resolved; offering parole, including immunity for weapons crimes not resulting in death or injury; disallowance of the death penalty; and if the movement which the fighter is a part of eventually achieves combatant status, the fighter's prior lawful warlike actions will also be covered by combatant immunity. Granting these privileges will provide real incentives to unlawful combatants. Equally, the ability to distinguish the enemy that will flow from having unlawful combatants wear uniforms is certainly worth the exchange for privileges granted. Granting this intermediate recognition for partial compliance with the requirements of combatancy is a solution whose time has come.

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