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# The Application of Prisoner-Of-War Status to Guerrillas Under the First Protocol Additional to the Geneva Conventions of 1949

## I. INTRODUCTION

On June 10, 1977 the fourth and last session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts drew to a close.<sup>1</sup> The signing of the Final Act on that date marked the completion of the Conference's objective: to study and promulgate two draft Additional Protocols prepared by the International Committee of the Red Cross and intended to supplement the four Geneva Conventions of 1949.<sup>2</sup>

The first of the two Protocols adopted by the Conference concerns the protection of victims of international armed conflicts, and contains 102 articles and two technical annexes.<sup>3</sup> The second Protocol contains 28 articles pro-

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1. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was convened by the Swiss Federal Council. The first session of the Conference took place from February 20 to March 29, 1974 with the task of reaching a decision regarding two draft Protocols submitted by the International Committee of the Red Cross. The second session lasted from February 3 to April 18, 1975, and the third from April 21 to June 11, 1976. Finally, the fourth session, at which the final round of debates took place, met from March 17 to June 10, 1977. See *Extracts from the Final Act of the Diplomatic Conference*, 197-198 INT'L REV. RED CROSS 123, 123 (1977) [hereinafter cited as *Extracts from the Final Act*]; *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: A Summary of the Work of the Fourth Session*, 196 INT'L REV. RED CROSS 338, 338 (1977) [hereinafter cited as *Summary of the Fourth Session*].

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, [1955] 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as GPW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

3. Protocols I and II Additional to the Geneva Conventions of 1949 are *reprinted in* 197-198 INT'L REV. RED CROSS 3 (1977) [hereinafter cited as Protocol I, Protocol II].

viding for the protection of victims of non-international armed conflicts. It is designed to supplement an area of law that had been specifically covered only by Article 3 common to all four Geneva Conventions.<sup>4</sup>

The first Protocol marks a significant departure from the Geneva Conventions of 1949 in that it sets forth specific rules pertaining to the means and methods of combat.<sup>5</sup> Previously, the only such guidelines were found in the Hague Regulations of 1907,<sup>6</sup> and not the Geneva Conventions which referred only to humanitarian protections.<sup>7</sup> Thus, while the recent Protocol has been called a "charter of humanity"<sup>8</sup> and is indeed of a humanitarian character, its 102 articles present a supplementation and a clarification of a broader area of international humanitarian law applicable in armed conflicts than had been previously considered in any one document.

Articles 43 and 44 of the new Protocol combine to create new criteria for combatant and prisoner-of-war status modifying the requirements contained in Article 4 of the Geneva Convention relative to the Treatment of Prisoners of War (GPW).<sup>9</sup> These Articles remove some restrictions imposed by the GPW and no longer require that combatants wear distinctive clothing as had been the case under Article 4 of the GPW. Instead, certain combatants are now required only to distinguish themselves from the civilian populace during each military engagement and while engaged in deployment operations which are visible to the adversary preceding the launching of an attack.<sup>10</sup> This permits members of resistance and liberation movements to acquire prisoner-of-war status more easily, provided that such movements also meet other more traditional criteria for lawful combatancy<sup>11</sup> and are involved in an international conflict as defined by Article 1.<sup>12</sup> Thus, Articles 43 and 44 mark a significant change in the law of warfare by permitting guerrillas, who in the

4. Article 3 is known as the "convention in miniature" and applies "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ." See notes 46-48 *infra* and accompanying text.

5. See Graham, *The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the "Just War" Concept of the Eleventh Century*, 32 WASH. & LEE L. REV. 25, 45 (1975) [hereinafter cited as Graham]. See, e.g., *Methods and Means of Warfare*, Protocol I, *supra* note 3, arts. 35-42, pt. III, § I, pertaining to the basic rules of combat, use of new weapons, prohibition of perfidy, recognized emblems, emblems of nationality, quarter, safeguard of an enemy *hors de combat*, and occupants of aircraft.

6. Regulations to the Hague Convention IV of 1907, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter cited as Hague Regulations].

7. See generally, 1 GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY 42 (J. Pictet ed. 1960) [hereinafter cited as COMMENTARY].

8. See Pictet, *Les Nouveaux Aspects du Droit International Humanitaire*, 706 REVUE INTERNATIONALE DE LA CROIX ROUGE [R.I.C.R.] 443, 443 (1977).

9. See note 2 *supra*.

10. See § IV *infra*.

11. See § IV *infra*.

12. See § III, B *infra*.

past have not easily fallen within the traditional legal criteria and classifications,<sup>13</sup> to more easily claim the benefits of prisoner of war status.

This Comment will first provide a brief historical review of the denial of prisoner-of-war status to the guerrilla in order that Articles 43 and 44 of Protocol I may be evaluated. It will then examine the concurrent actions of the International Committee of the Red Cross and the United Nations in seeking to enhance the status of the guerrilla under international law. Finally, the author will evaluate the new criteria for prisoner of war status and explore their efficacy in serving the needs of modern warfare.

## II. THE HISTORICAL TREATMENT OF GUERRILLAS: DENIAL OF PRISONER OF WAR STATUS

### A. *The Nature of Guerrilla Warfare*

"Guerrilla warfare" refers to the type of military tactics employed rather than to the nature of the conflict itself.<sup>14</sup> Guerrilla tactics are employed in both internal and international conflicts, regardless of insurgency or belligerency status,<sup>15</sup> and may be utilized by both lawful and unlawful insurgents or belligerents.<sup>16</sup> The employment of guerrilla actions generally occurs when there is a marked inequality of forces engaged in the conflict.<sup>17</sup> In such circumstances, one of the parties to the conflict often seeks to overcome technological, economic, or manpower deficiencies by recourse to the action of unconventional forces.<sup>18</sup>

Despite these deficiencies, however, guerrilla warfare is quite effective. The

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13. See § II *infra*.

14. See Bond, *Protection of Non-Combatants in Guerrilla Wars*, 12 WM. & MARY L. REV. 787, 788 n.5 (1971) [hereinafter cited as *Protection of Non-Combatants*].

15. See generally, D. BINSCHEDLER-ROBERT, *THE LAW OF ARMED CONFLICT* 38-45 (1971), cited in *Protection of Non-Combatants*, *supra* note 12, at 788 n.5.

16. See Paust, *Law in a Guerrilla Conflict: Myths, Norms and Human Rights* 3 ISRAEL Y.B. HUMAN RIGHTS 39, 47 (1973). [hereinafter cited as Paust]. Status of belligerency is simply a question of fact dependent upon the characteristics of the conflict. Generally, publicists have recognized five criteria as evidence of *belligerency* status, where: 1) the armed conflict is accompanied by large-scale hostilities necessitating the involvement of regular forces by the established state; 2) the insurgents/belligerents occupy and control a substantial and determinate amount of territory; 3) the insurgents/belligerents establish an effective and orderly government to administer the controlled territory; 4) the insurgent/belligerent forces act under the direction of an organized and responsible civil authority and tend to observe the ordinary laws of war; 5) there exists the practical necessity for third states to define their attitude towards the conflict. See 2 L. OPPENHEIM, *INTERNATIONAL LAW* 249 (7th ed. H. Lauterpacht 1948) [hereinafter cited as L. OPPENHEIM]; L. MC NAIR, *THE LEGAL EFFECTS OF WAR* 32 (4th ed. 1966); Falk, *Janus Tormented: The International Law of Internal War*, in *INTERNATIONAL ASPECTS OF CIVIL STRIFE* 197 n.10 (J. Rosenau ed. 1964) [hereinafter cited as Falk.]

17. See generally, INT'L COMM. OF THE RED CROSS, *COMMENTARY ON THE OUTLINE OF A COURSE ON INTERNATIONAL HUMANITARIAN LAW* 36 (1976).

18. See *id.*

guerrillas' knowledge of the fighting terrain, their capacity for rapid movement, their secretive nature, and their ability to melt away into the countryside and towns while evading pursuit, and to obtain shelter, treatment, and sustenance from family and friends in the area, give them many advantages over military units using more conventional methods of warfare.<sup>19</sup> Their strategy has been generally characterized as employing dispersed and mobile groups, resorting to surprise attacks, ambushes and sabotage, and avoiding pitched battles. Therefore guerrilla tactics have been met with disapproval.<sup>20</sup>

A consensus of disapproval of guerrilla activities was reached among early international jurists such as Ayala (1582), Grotius (1612), Gentili (1620) and Pufendorf (1688). They commonly viewed such activities as acts of brigandage, the perpetrators of which were considered to be the "common enemy of all."<sup>21</sup> Their writings point out the fact that guerrilla warfare has been an experiential factor across the centuries.

Indeed, the modern name "guerrilla," meaning little war (*guerra*), had its genesis in the Spanish people's resistance to the Napoleonic occupation forces in 1809.<sup>22</sup> Guerrilla warfare later became an oft-occurring phenomenon in the United States-Mexican War (1846-1848), as well as in the Civil War.<sup>23</sup> It was during the latter conflict that General Grant issued the following order in 1862 which remarkably could have been issued a century later: "Persons acting as guerrillas *without organization and without uniform* to distinguish them from private citizens are not entitled to treatment as prisoners of war when caught and will not receive such treatment."<sup>24</sup>

The requirement that combatants were to be "organized" and "uniformed" also formed a basis for Francis Lieber's work *Instructions for the Government of the Armies of the United States in the Field* which was published the following year.<sup>25</sup> Subsequently issued by President Lincoln as an Official Army Order,<sup>26</sup> Lieber's work is considered to be the first major attempt to

19. See generally, Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, 45 BRIT. Y.B. INT'L L. 173, 177-178 (1971) [hereinafter cited as Draper].

20. See U.N. Sec'y Gen., *Respect for Human Rights in Armed Conflicts*, U.N. Doc. A/7720 53 (1969). [hereinafter cited as 1969 Report of the Sec'y General].

21. See Cowles, *Universality of Jurisdiction over War Crimes*, 33 CALIF. L. REV. 177, 188-89 n.39 (1945).

22. See 1969 Report of the Sec'y General, *supra* note 20, at 53. It is interesting to note that the guerrilla forces gave Napoleon his first crucial defeat. See Paust, *supra* note 16, at 46.

23. See Colby, *War Crimes*, 23 MICH. L. REV. 482, 502 (1925).

24. Paust, *supra* note 16, at 127. The criteria Grant viewed as necessary, *i.e.*, organization, and the requirement that soldiers be dressed in distinctive uniform, were to form part of the Brussels, Hague, and Geneva rules. See discussion *infra*, this section.

25. See note 26 *infra*.

26. U.S. Adjutant General's Office, War Dep't, General Orders No. 100, Wash., D.C., April 24, 1863. In 1862 Lieber was a Professor of Law at Columbia College and had published his general thesis of the *Instructions* under the title of *Guerrilla Parties Considered with Reference to the Laws and Usages of War*. See Draper, *supra* note 19, at 179.

codify the customary rules of land warfare prevailing at the end of the first half of the nineteenth century.<sup>27</sup> Significantly, Lieber set forth this instruction regarding guerrilla warfare:

82. 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 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 of appearance of soldiers* — such men or squads of men, are 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.<sup>28</sup>

Lieber's views later took an increasing prominence in the codification of the international law of warfare, as they came to be the basis of the proposed Declaration of Brussels in 1874,<sup>29</sup> which in turn formed much of the basis for the Hague Conferences of 1899 and 1907.<sup>30</sup>

#### B. *Codification of the International Law of Warfare*

Although their work never reached final passage, the delegates of fifteen European countries who assembled in Brussels in 1874 approved the "Project of an International Declaration concerning the Laws and Customs of War."<sup>31</sup> Article 9 listed the criteria for prisoner-of-war status which remained largely untouched until the recent Diplomatic Conference:

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

27. See, e.g., Draper, *supra* note 19, at 179.

28. Veuthey, *Military Instructions on the Treatment of Prisoners in Guerrilla Warfare*, 132 INT'L REV. RED CROSS 125 (1972) [hereinafter cited as *Military Instructions*].

29. Project of an International Declaration Concerning the Laws and Customs of War, Adopted by the Conference of Brussels, 1874, reprinted in 1 AM. J. INT'L L. SUPP. 96 (1907) [hereinafter cited as *Brussels Declaration*].

30. The Brussels Declaration formed the basis of Articles 4 to 20 of the Regulations annexed to the Hague Convention IV of 1907. See Esgain & Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, 1975 MIL. L. REV. BICENT. ISSUE 303, 305.

31. See *Military Instructions*, *supra* note 28, at 130. The texts of the proposed codification of the law of war which failed to secure adoption at Brussels in 1874 were brought forward at the First Hague Peace Conference in 1899. See Draper, *supra* note 19, at 179.

4 ) That they conduct their operations in accordance with the laws and customs of war.<sup>32</sup>

These criteria received approval in the practice of the Russian court-martial proceeding of 1904 which resulted in the conviction and sentencing to execution of two Japanese officers who had disguised themselves as peasants in order to blow up a railway bridge in Manchuria during the Russo-Japanese War.<sup>33</sup> In addition, the British experience in the Boer War (1899-1902) with substantial guerrilla involvement also strengthened the need for the above criteria.<sup>34</sup> These events helped to ensure the passage of Article 1 of the Hague Regulations of 1907<sup>35</sup> which set forth criteria for prisoner-of-war status virtually identical to the four conditions listed by the drafters of the abortive Declaration of Brussels.

Between the date of the Hague Convention in 1907 and that of the Geneva Conventions of 1949, guerrilla activities had played substantial roles in both the Italian invasion of Ethiopia in 1934 and the Spanish Civil War of 1936-9.<sup>36</sup> More importantly, perhaps, substantial resistance activities to the German occupation forces had occurred during World War II which were fresh in the minds of the representatives to the Diplomatic Conference for the Establishment of the Geneva Conventions of 1949.<sup>37</sup> After extensive debate concerning the treatment of guerrillas, the representatives at Geneva decided that such persons, as "members of organized resistance movements belonging to a Party to the conflict," should be entitled to treatment as prisoners of war provided that they also fulfilled the four criteria laid down in Brussels in 1874 and the Hague in 1907.<sup>38</sup>

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32. Brussels Declaration, *supra* note 29, art. 9.

33. See Paust, *supra* note 16, at 55.

34. *Id.*

35. See note 6 *supra*.

36. Cf. Draper, *supra* note 19, at 183.

37. See Yingling & Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 401-02 (1952) [hereinafter cited as Yingling & Ginnane].

38. See Brussels Declaration, *supra* note 29 art. 9; see also Hague Regulations, *supra* note 6, art. 1. Article 4 of the GPW, provided in relevant 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 groups 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, providing that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.

GPW, *supra* note 2, art. 4.

Thus, it is a myth that guerrilla warfare is of recent origin and that it was not considered by the drafters of international conventions.<sup>39</sup> Indeed, the conditions imposed by the GPW for treatment of members of resistance movements as prisoners of war, were deliberately drafted so as to exclude from coverage many of the people acting as "partisans" during World War II.<sup>40</sup> This was accomplished under the belief that those conditions were the minimum necessary if regular forces were to have any protection against attacks by the civilian population and if any distinction was to be made between combatants and non-combatants.<sup>41</sup>

Despite the fact that these international rules had already taken into consideration the guerrilla method of warfare, the frequent recurrence of guerrilla tactics, especially in wars of a civil character, has in recent times been viewed as rendering the earlier international rules of warfare inapplicable.<sup>42</sup> The adherents of this position believe that the law must accurately reflect community expectations rather than consist of a mere statement of often unheeded "rules" which no longer represent an accurate statement of the law.<sup>43</sup>

This position draws support from the empirical evidence of the decades following the Geneva Conventions. The evidence clearly shows that guerrilla warfare, which had been the exception, has now become the rule, while the "conventional warfare" conducted by regular armies of constituted and recognized states has become the exception.<sup>44</sup> Certainly the drafters of the Geneva Conventions could not have foreseen the extent to which armed conflicts characterized by the employment of trained and uniformed armies would be replaced in human experience by a succession of internal struggles in which guerrilla tactics constituted the primary method of warfare.<sup>45</sup> Nor could the drafters have foreseen the extent to which their attempts to make operative certain minimum humanitarian standards would be effectively ignored. For in promulgating Article 3, common to all four Geneva Conventions, the drafters sought to obviate any necessity for defining civil war or requiring that any status of belligerency be obtained before the humanitarian protections of that article were made applicable in internal war.<sup>46</sup> Moreover, Article 3 was

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39. The exposure of this myth is the thesis of Paust, *supra* note 16.

40. See Yingling & Ginnane, *supra* note 37, at 402.

41. *Id.*

42. See Higgins, *Internal War and International Law*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, CONFLICT MANAGEMENT 82 (C. Black & R. Falk eds. 1971) [hereinafter cited as Higgins]. Falk, *supra* note 16, at 185-92.

43. See Higgins, *supra* note 42, at 82.

44. See *Military Instructions*, *supra* note 28, at 134.

45. See DePue, *The Amended First Article to the First Draft Protocol Additional to the Geneva Conventions of 1949—Its Impact Upon Humanitarian Constraints Governing Armed Conflict*, 75 MIL. L. REV. 71, 71-72 (1977) [hereinafter cited as DePue].

46. See Firmage, *Summary and Interpretation*, in THE INTERNATIONAL LAW OF CIVIL WAR 415 (R. Falk ed. 1971); see also M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 624 (1959) [hereinafter cited as M. GREENSPAN]. Common Article 3 provides:



designed to set forth established law that was independent of contractual obligations<sup>47</sup> and whose provisions were to apply automatically without any condition of reciprocity.<sup>48</sup>

Despite these intentions, however, examination of the reception of Article 3 into the general practice of states evidences a virtual unanimity of choice not to apply its provisions. There have been numerous violations of Article 3 in Malaya, the Hungarian Revolt of 1956, the Mau-Mau movement in Kenya, and the Katanga Rebellion in the Congo.<sup>49</sup> Moreover, neither the United Kingdom in the cases of Kenya, Malaya and Cyprus, nor the French in the case of Algeria were even willing to concede unequivocally that the conflicts were covered by Article 3, much less by the entire Conventions.<sup>50</sup>

As a result of this practice, there developed a recognition that the extant norms governing the conduct of such armed conflicts were unable to balance effectively the competing needs of both the guerrilla and the civilian for humanitarian protections from the ravages of war. It was this recognition

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture;
  - (b) taking of hostages;
  - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

47. See M. GREENSPAN, *supra* note 46, at 624.

48. See COMMENTARY, *supra* note 7, at 48.

49. Cf. Note, *The Geneva Convention and the Treatment of Prisoners of War in Vietnam*, 80 HARV. L. REV. 851, 857 (1967) [hereinafter cited as *Treatment of Prisoners*].

50. See Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict"*, 71 COLUM. L. REV. 37, 52 (1971); Higgins, *supra* note 42, at 90-92; DePue, *supra* note 45, at 83-84.

which ultimately led to the convening of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in February of 1974.

### III. THE DIPLOMATIC CONFERENCE

#### A. *Laying the Groundwork*

The recognition of the inability of international law to protect the victims of internal conflicts prompted the International Committee of the Red Cross (ICRC) to seek ways to strengthen the Geneva Conventions.<sup>51</sup> Meeting in Vienna in 1965, the 20th International Red Cross Conference issued Resolution No. 31 which urged the "continuance of efforts to strengthen means of rendering assistance to victims of internal conflicts."<sup>52</sup> Four years later, this time meeting in Istanbul, the 21st International Red Cross Conference set in motion the background studies leading to the Diplomatic Conference of 1974.<sup>53</sup> Conference Resolution No. 17 urged "the study of measures to augment Common Article 3,"<sup>54</sup> while Resolution No. 18 requested "the study of legal status of participants in non-international conflicts."<sup>55</sup>

Contemporaneously with these developments, the United Nations General Assembly was seeking similar measures designed to augment the Geneva Conventions. Providing the fillip behind this movement was Resolution No. 23 of the International Conference on Human Rights held at Teheran in 1968,<sup>56</sup> which requested the General Assembly to invite the Secretary-General to study "steps which should be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts" and "the need for additional humanitarian conventions . . . to ensure the better protection of civilians, prisoners and combatants . . ." <sup>57</sup> This resolution was accepted by the General Assembly which invited the Secretary-General to

51. The International Committee of the Red Cross (ICRC), a private international organization headquartered in Geneva, and entirely Swiss in its direction, has historically considered itself the guardian of the Geneva Conventions of 1949. Cf. Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L. J. 1, 5 (1975) [hereinafter cited as Baxter].

52. See DePue, *supra* note 45, at 72.

53. See note 1 *supra*.

54. See DePue, *supra* note 45, at 72.

55. *Id.* In September 1968 the ICRC informed representatives of the National Red Cross (Red Crescent, Red Lion and Sun) Societies that it was launching a new effort to reaffirm and develop humanitarian law applicable in armed conflicts. See Graham, *supra* note 5, at 28.

56. Resolution XXIII, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41, at 18 (1968).

57. See Agenda item 115, Respect for Human Rights in Armed Conflicts: Report of the Sec'y General, annotated preliminary list of items to be included in the Provisional Agenda of the 32nd Regular Session of the General Assembly. U.N. Doc. A/32/92-134, at 224 (1977). [hereinafter cited as Provisional Agenda].

undertake the study, in consultation with the International Committee of the Red Cross and other interested international organizations.<sup>58</sup>

Other actions taken by the General Assembly indicate its willingness to see prisoner-of-war status extended to guerrillas participating in wars of liberation from racist, alien or colonialist occupation. Several resolutions adopted by the General Assembly at its twenty-third session demonstrate this position.<sup>59</sup> In its resolution on apartheid, for example, the General Assembly declared that "freedom fighters should be treated as prisoners of war under international law, particularly the Geneva Convention Relative to the Treatment of Prisoners of War . . . ."<sup>60</sup> Similarly, in regard to the question of territories under Portuguese administration, the General Assembly called upon Portugal "to ensure the application to that situation of the Geneva Convention Relative to the Treatment of Prisoners of War . . . ."<sup>61</sup>

As if competing with the General Assembly,<sup>62</sup> the ICRC convened a Conference of Government Experts in 1971 for the purpose of reinforcing and extending the international humanitarian law of war.<sup>63</sup> However, as a result of complaints that there had been insufficient representation from developing states, the ICRC convened a second Conference of Government Experts in 1972 which was attended by 77 governmental representatives.<sup>64</sup>

Prior to the second Conference of Government Experts, the ICRC legal staff had prepared two draft Protocols to supplement the Geneva Conventions of 1949.<sup>65</sup> As revised during the second Conference, these Protocols formed

58. G.A. Res. 2444 (XXIII), Dec. 16, 1968, 23 U.N. GAOR, Supp. (No. 18) 50, U.N. Doc. A/7218 (1969). See Provisional Agenda, *supra* note 57, at 224; see also Baxter, *supra* note 57, at 5.

59. Resolution 2383 (XXIII) on the question of Southern Rhodesia; 2395 (XXIII) on the question of Territories under Portuguese administration; 2396 (XXIII) on the policies of apartheid of the Government of South Africa; 2446 (XXIII) on measures to achieve the rapid and total elimination of all forms of racial discrimination in general and the policy of apartheid in particular.

60. G.A. Res. 2396 (1968). See note 58 *supra*; cf. DePue, *supra* note 45, at 88-89.

61. G.A. Res. 2395 (1968). See note 58 *supra*; cf. DePue, *supra* note 45, at 89, n.84.

62. R.R. Baxter, for instance, cites "a certain conflict" between the General Assembly and the ICRC. See Baxter, *supra* note 51, at 5. J. Miramanoff-Chilikine found a "constructive competition" and a "narrow collaboration" between these international organizations. See Miramanoff-Chilikine, *Conférence Diplomatique sur la Reaffirmation et le Développement du Droit International Humanitaire Applicable dans les Conflits Armés*, 10 REVUE BELGE DU DROIT INTERNATIONAL [R.B.D.I.] 36, 39 (1974) [hereinafter cited as Miramanoff-Chilikine].

63. The Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts met in Geneva in May and June of 1971.

64. Invitations were extended to all parties signatory to the Geneva Conventions of 1949. See U.S. Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts — First Session 1-2, Report (June 10, 1974) (available at Harvard Law School library) [hereinafter cited as Report of U.S. Delegation — First Session]; see also 1969 Report of the Sec'y General, *supra* note 20, at para. 213.

65. INT'L COMM. OF THE RED CROSS, 1-2 CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS (1972). [hereinafter cited as CONFERENCE OF GOVERNMENT EXPERTS]. The

the basic documents for the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

### B. *The Internationalization of Internal Wars*

The ICRC submitted the two draft protocols to the Diplomatic Conference. Protocol I was intended to supplement and clarify the four Geneva Conventions of 1949 insofar as they applied to *international* conflicts. All matters concerning *internal* conflicts were to be exclusively within the province of Protocol II. However, from the outset of the Conference there emerged a strong movement for the position that wars of national liberation primarily internal in scope were to be treated as if they were international conflicts.<sup>66</sup> This movement drew support from several resolutions of the United Nations which had focused on the conflicts in Portuguese Africa, Palestine, South Africa and Rhodesia.<sup>67</sup>

The proponents of the internationalization of wars of national liberation first displayed their strength in dealing with a preliminary procedural issue before the Diplomatic Conference — which political entities were to be represented at the Conference was a question. Representatives of the African National Congress, Angola National Liberation Front, Mozambique Liberation Front, Palestine Liberation Organization, Panafricanist Congress, People's Movement for the Liberation of Angola, Seychelles People's United Party, South West African People's Organization, Zimbabwe African National Union and Zimbabwe African People's Union all sought to participate in the Conference.<sup>68</sup> On the strength of the votes of a developing bloc of countries, these political entities were invited to participate fully in the deliberations of the Conference but were not permitted to vote.<sup>69</sup> In addition, representatives of Guinea-Bissau, which had acceded to the Geneva Conventions, and the Provisional Revolutionary Government of South Vietnam (PRG), which had purported to deposit an instrument of accession to the Geneva Conventions,<sup>70</sup> also sought invitations to the Conference. Guinea-Bissau was invited and given full voting privileges, while the PRG's proposed participation was defeated by a single vote.<sup>71</sup>

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ICRC also convened its own experts in conference, and consulted numerous other parties, individual and collective, prior to the convening of the second Conference. See Miramanoff-Chilikine, *supra* note 62, at 39.

66. Report of U.S. Delegation — First Session, *supra* note 64, at 6.

67. See notes 59-61 and accompanying text.

68. Report of U.S. Delegation-First Session, *supra* note 64, at 29.

69. *Extracts from the Final Act*, *supra* note 1, at 123.

70. Article 129 of the GPW provides, for example, that "it shall be open to any *power* in whose name the present Convention has not been signed, to accede to this Convention. GPW, *supra* note 2, art. 129 (emphasis added). The question becomes one of interpreting what constitutes a "power."

71. In the most dramatic vote of the Conference, the proposal to invite the PRG to participate

The governmental delegations then turned their attention to the substantive matters before the Conference,<sup>72</sup> but the increasing pressure to provide enhanced status for wars of national liberation again was asserted. This pressure culminated in the passage of an amended Article 1 of Protocol 1 which makes certain that wars of national liberation are to be deemed "international" armed conflicts and therefore subject to the provisions of the Geneva Conventions of 1949 as well as the new Protocol.<sup>73</sup>

Article 1 provides in relevant part:

1. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply to the situations referred to in Article 2 common to those Conventions.
2. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>74</sup>

These two paragraphs effectively transform certain internal conflicts, previously considered to be matters of domestic jurisdiction, into international conflicts.<sup>75</sup>

This, of course, has a substantial impact on the protections to be accorded to the individuals involved in these conflicts. Before reaching discussion of those protections however, it is necessary to indicate some interpretational difficulties which may arise from the above language.

First, the incorporation of Protocol I in Article 1 of the United Nations Charter and the Declaration on Friendly Relations may be misconstrued as sanctioning the use of force by certain "peoples" seeking to achieve an inherent right.<sup>76</sup> However, neither the U.N. Charter nor the Declaration

was defeated by a vote of 37 to 38 with 33 abstentions after strong lobbying by the U.S. for as many adverse votes as possible. See Report of U.S. Delegation-First Session, *supra* note 64, at 5; see also DePue, *supra* note 45, at 92-93; Baxter, *supra* note 51, at 9-10.

72. *E.g.* Determining the basic rules of the methods and means of warfare.

73. Article 1 was adopted by a vote of 70 to 21 with 13 abstentions. See U.S. Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts — Second Session, February 3-April 18, 1975, Report (1975) (available at Harvard Law School library) [hereinafter cited as Report of U.S. Delegation — Second Session].

74. Protocol I, *supra* note 3, art. 1.

75. See generally, Graham, *supra* note 5, at 44.

76. See *id.* at 40-41.

specifically grant or intend such a right. The Declaration on Friendly Relations, for example, speaks only to the validity of *defensive* actions on the part of a people seeking self-determination.<sup>77</sup>

Second, additional difficulty may develop in determining the point at which fighting between a government and a "peoples" becomes an "armed conflict" of an international character in terms of Article 1. It would seem that various traditional and "motivational" criteria might be involved in such a determination, with consideration given to the more conventional criteria including: the scale of the hostilities; the amount of territory effectively controlled; and the establishment by the "peoples" of an orderly government;<sup>78</sup> as well as the "motivational" factor of whether or not there was legitimate cause for rebellion.<sup>79</sup> Such criteria will unfortunately raise the expectation that subjective appraisals of each conflict will be made by future adversaries, each side characterizing the conflict according to its own self-interests.<sup>80</sup>

Third, the correct interpretation and scope to be given to "armed conflicts in which peoples are fighting against racist regimes," poses yet another problem. According to a U.S. delegate to the Diplomatic Conference, the references to "colonial domination" and "racist regimes" were directed essentially to Southern Africa — to South Africa, Namibia (South West Africa), Rhodesia, and the Portuguese colonies, such as Angola and Mozambique — and primarily reflected the concerns of the members of the Organization of African Unity. The reference to "peoples fighting against . . . alien occupation"<sup>81</sup> referred to the Palestinians. Such a subordination of legal and humanitarian considerations for short-term political goals in isolated geopolitical settings is an obvious defect in the Protocols.

77. The Declaration provides in pertinent part:

Every state has the duty to refrain from any forcible action which deprives peoples in accordance with the provisions of the Charter of their right to self-determination and freedom and independence. *In their actions against resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations.*

G.A. Res. 2625, 25 U.N. GAOR, Supp. (No 28) 121, U.N. Doc. 28 (A/8028) (1970) (emphasis added), cited in Graham *supra* note 5, at 40-41. The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with other states. Convention on Rights and Duties of States, Dec. 26, 1933 art. 1, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19.

78. 2 L. OPPENHEIM, *supra* note 16, at 249. Note that this determination would lack two of the traditional criteria for "international" status: 1) that the rebellious forces act under the direction of an organized and responsible civil authority and tend to observe the ordinary rules of war; and 2) that there exists a practical necessity for third states to define their attitude toward the conflict.

79. As this determination ultimately passes judgment on the political objectives of the rebels, it is antithetical to traditional international law which made a distinction between international and non-international armed conflicts on the basis of a "geomilitary scale." See Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AM. J. INT'L L. 77, 80 (1975). [hereinafter cited as Forsythe].

80. Cf. Baxter, *supra* note 45, at 16; DePue, *supra* note 39, at 95-97.

81. See Baxter, *supra* note 45, at 12.

This subordinating methodology also has the effect of denying to the victims of other types of internal struggles any additional humanitarian protections from Protocol I. For instance, the inclusive nature of the listing in Article 1 does nothing to aid those victims of civil wars that are neither anti-colonialist, alien nor racist. Moreover, Article 1 of the Second Protocol applicable to internal conflicts<sup>82</sup> has established a threshold so high as to make it unlikely that Protocol II will be applied to all but full-scale belligerencies.<sup>83</sup> Thus, as one eminent observer has pointed out, "[b]y substituting political for objective criteria, the amended First Article effectively deprives the victims of unpopular noninternational struggles of any added humanitarian protection."<sup>84</sup>

For these reasons, the United States and other Western powers have declared that the first article represents the introduction of *jus ad bellum* into *jus in bello*, *i.e.*, the introduction of norms about the *initiation* of war (just war concepts) into the law regulating the *process* of war.<sup>85</sup> As a result, the head of the United States Delegation asserted that Article 1 remains a serious threat to American accession to the Protocol.<sup>86</sup> Nevertheless, the strong vote of confidence this measure received at the Conference indicates that it will undoubtedly become valid treaty law. Just as the customary international law which evolved during the nineteenth century reflected the political preferences of the European nations and the United States, so too the rules expressing the political preferences of a majority of states at the recent Diplomatic Conference will undoubtedly become valid treaty law and may also evolve into customary law.<sup>87</sup>

Given the recognition by the Diplomatic Conference of the legality of the

82. Article 1 of Protocol II *supra* note 3, provides in relevant part:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 . . . shall apply to all armed conflicts which are not covered by Article 1 of the Protocol (I) and which took place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups, which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.

83. Protocol II, *supra* note 3, art. 1; see DePue, *supra* note 45, at 98-99; see also Report of U.S. Delegation - Second Session, *supra* note 73, at 8.

84. See DePue, *supra* note 45, at 98.

85. See Forsythe, *supra* note 79, at 80-81; see generally Graham, *supra* note 5.

86. See Aldrich, *Establishing Legal Norms Through Multilateral Negotiation — The Laws of War*, 11 INT'L LAW. 107, 108 (1977) [hereinafter cited as Aldrich].

87. See generally, Bond, *Amended Article I of Draft Protocol I to the 1949 Geneva Conventions: The Coming of Age of the Guerrilla*, 32 WASH. & LEE L. REV. 65, 68 (1975) [hereinafter cited as Bond]. Note that two somewhat similar views emerged from the representatives of the European powers who met in Brussels in 1874 to codify the law of war. Those countries with great armies urged that the status of lawful belligerency should attach only to organized forces and that members of a *levee en masse* should meet the requirements of other combatants. The smaller powers, because of their relatively small organized forces were reluctant to limit in any way the right of inhabitants in occupied territory to rise up and defend their country. See Nurick & Barrett, *Legality of Guerrilla Forces Under the Laws of War*, 40 AM. J. INT'L L. 563, 565 (1946).

use of force by various individuals or states in order to achieve certain political goals, it is important to examine the degree to which individuals are afforded added protection under the new Protocol. If certain conflicts formerly viewed as "internal" were to be accorded an "international" status while prisoner-of-war status were denied to insurgent fighters, this would negate the humanitarian purpose of the Diplomatic Conference, and provide the insurgents with little incentive to abide by the new rules themselves.<sup>88</sup> Therefore, this Comment will examine the new criteria for the prisoner-of-war protections offered by the new Protocol and evaluate them in light of the humanitarian and pragmatic considerations which underline the international law of warfare.

#### IV. ARTICLES 43 AND 44 OF PROTOCOL I.

##### A. *Liberalized Conditions for Prisoner-of-War Status*

As was the case with the movement for "internationalizing" certain internal conflicts in the United Nations, the philosophy expressed in the General Assembly Resolution 3103 (XXVIII), *Basic Principles of the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*<sup>89</sup> was a harbinger of the enhanced status that guerrillas were to be accorded at the Diplomatic Conference. One of the Resolution's provisions is of particular importance:

4. The combatants struggling against colonial and alien domination and racist regimes captured as prisoners are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.<sup>90</sup>

Implicit in this provision is the General Assembly's rejection of Article 4 of the Geneva Conventions which lists several conditions precedent for entitlement to prisoner-of-war status.<sup>91</sup> The phrase "[t]he combatants" suggests that all combatants regardless of their compliance with the Article 4 criteria were to be

88. For a discussion on the relation of reciprocity to these issues, see notes 157-59 *infra* and accompanying text.

89. G.A. Res. 3103 (XXVIII) (Dec. 12, 1973).

90. *Id.* It is noteworthy that the incumbent government was prohibited from using contract combatants in defending itself:

The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.

*Id.*, art. 5.

91. See note 38 *supra* and accompanying text.



given prisoner-of-war *status* (and then) the provisions of the GPW will apply to their *treatment*.<sup>92</sup>

While adopting these ideas in spirit, the representatives at the Diplomatic Conference refrained from a wholesale abdication of the Article 4 criteria of the GPW, adopting those requirements which they understood to be essential to protect the civilian populace and which would also allow a broader class of combatants to be accorded prisoner-of-war treatment. As promulgated by these representatives, two key articles of Protocol I list the new requirements for combatant and prisoner-of-war status. Combatants are defined by Article 43, which is entitled "Armed forces" and provides in pertinent part:

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 of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.<sup>93</sup>

Prisoner-of-war status is granted under Article 44, which is entitled "Combatants and Prisoners of War" and provides in relevant part:

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner 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 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 . . .<sup>94</sup>

These provisions indicate that many of the former conditions for entitle-

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92. Such a view is in accordance with the preamble of Res. 3103, that "colonial people have the inherent right to struggle *by all necessary means* at their disposal against colonial powers and alien domination in the exercise of their right of self-determination . . . ." G.A. Res. 3103, *supra* note 89 (emphasis added).

93. Protocol I, *supra* note 3, art. 43.

94. Protocol I, *supra* note 3, art. 44.

ment to prisoner-of-war status have been largely retained. Six conditions were required to be met by irregular fighters which were impliedly present in Article 1 of the Hague Regulations of 1907 and made explicit in Article 4 of the GPW of 1949.<sup>95</sup> These six conditions required irregular combatants to:

- 1) belong to an organized group;
- 2) belong to a Party to the conflict;
- 3) be commanded by a person responsible for his subordinates;
- 4) have a fixed distinctive sign;
- 5) carry their arms openly; and
- 6) conduct their operations in accordance with the laws and customs of war.<sup>96</sup>

Only the need for the fourth condition has been abandoned, with respect to guerrillas, as such combatants are no longer required to wear clothing distinctive from that worn by the populace at large.<sup>97</sup>

However, the requirement that irregular fighters, *e.g.* guerrillas, "conduct their operations in accordance with the laws and customs of war" may produce difficulty under Protocol I. This is because a reading of either Article 43 or 44 separately might yield a different result than if the two provisions were read together. On one hand, Article 43 mandates that "armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."<sup>98</sup> On the other hand, Article 44 states that "violations of the rules of international law . . . shall not deprive a combatant of his right to be a combatant or . . . a prisoner of war, [except where he fails to distinguish himself by carrying arms openly in accordance with Article 44, paragraph 3]."<sup>99</sup> Where, for example, it is prohibited under customary international law to kill or wound those who have surrendered,<sup>100</sup> the former provision would not permit combatancy status to be granted to those engaging in such a practice. Furthermore, since prisoner-of-war status is granted only to *combatants* under Article 44, the former Article would prevent their entitlement to prisoner-of-war status as well.<sup>101</sup> However, the latter Article would seem to permit the application of prisoner-of-war status despite the violations of basic customary law.

95. *Cf.* Draper, *supra* note 19, at 195-96.

96. GPW, *supra* note 2, art. 4.

97. With respect to regular armies, however, Article 44, paragraph 7 states that "[t]his 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." GPW, *supra* note 2, art. 44, para. 7.

98. Protocol I, *supra* note 3, art. 43, para. 1; *see* note 93 *supra* and accompanying text.

99. Protocol I, *supra* note 3, art. 44, para. 2.

100. Hague Regulations, *supra* note 6, art. 23(c).

101. Article 44 which permits prisoner-of-war status to be accorded to certain guerrillas, speaks only to combatants. *See* note 94 *supra* and accompanying text.

It is submitted that these two provisions are properly reconciled by making the legal distinction between individual and collective responsibility.<sup>102</sup> The requirements of Article 43, *i.e.*, organization, responsible command, and compliance with the laws and customs of war, are applicable to the group *collectively*, and not to the *individual* members.<sup>103</sup> Thus, where the overwhelming majority of the individual members of the group comply with the laws of warfare, the members of that group are deemed to be combatants. Under Article 44 therefore, the individual who fails to comply with the laws of war does not forfeit his right to combatant status, or upon capture, prisoner-of-war status.<sup>104</sup> However, he is liable to be tried, as a *prisoner of war*, for violations of international law.<sup>105</sup>

Significantly, the Article 43 and 44 requirements for combatant and prisoner-of-war status apply to both regulars and irregulars alike. However, in the effort to develop a single standard for entitlement to prisoner-of-war status which would be applicable to both groups, concern developed that such a rule would encourage uniformed regular armies to dress in civilian clothes.<sup>106</sup> Therefore, paragraph 7 of Article 44 was drafted to provide that “[t]his 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>107</sup> Furthermore, paragraph 3 of Article 44 reads, “combatants are obliged to distinguish themselves from the civilian population,” except where, “owing to the nature of the hostilities an armed combatant cannot so distinguish himself [but must carry arms openly at key moments.]”<sup>108</sup>

The latter provision marks an exception to the general requirement of a combatant’s distinction from the civilian population during all phases of military operations. This exception is of utmost importance since it combines with other provisions of Articles 43 and 44 to carve out more liberalized

102. This distinction was drawn by Draper, *supra* note 19, at 196-97; Meyrowitz, *Le Statut des Saboteurs dans le Droit de la Guerre*, 1966 MIL. L. WAR REV. 5, 133-34.

103. Note that Article 43 is entitled “armed forces” which is also suggestive of group, as opposed to individual, responsibilities.

104. Protocol I, *supra* note 3, art. 44, para. 2. Several representatives at the Diplomatic Conference suggested that it should be clearly stated that, if a group of combatants announced that it would not respect the laws and in fact consistently violated them, all members of the group should forfeit their right to p.o.w. status. Others argued, however, that such behavior was unlikely given the requirements of what is now Article 43. See U.S. Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts — Third Session, April 21 - June 11, 1976, Report 121 (1976) (available at Harvard Law School library) [hereinafter cited as Report of U.S. Delegation — Third Session].

105. GPW, *supra* note 2, art. 85, provides: “Prisoners of war prosecuted under the law of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.”

106. See Report of U.S. Delegation - Third Session, *supra* note 104, at 120.

107. See *id.*

108. GPW, *supra* note 2, art. 44, para. 3; see note 94 *supra* and accompanying text.

criteria for the guerrilla's entitlement to prisoner-of-war status than were present under the GPW. Therefore, this study will examine the new criteria in terms of the rationale for their retention, modification or elimination of the GPW requirements in light of the humanitarian and pragmatic purposes of Protocol I.

### B. *Examination of Criteria for Prisoner-of-War Status*

Under Protocol I, guerrilla forces must meet five criteria, four collectively and one individually, in order to claim properly prisoner-of-war status: They must collectively: (1) be of a Party to a conflict; (2) be organized; (3) be under a command responsible to that Party for the conduct of its subordinates; (4) be subject to an internal disciplinary system which shall enforce compliance with the rules of international law applicable in armed conflict;<sup>109</sup> and a combatant must, as an individual, (5) carry 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.<sup>110</sup>

Of these five criteria, only the fifth appears to present the pure case where the criterion is solely related to status identification, as to some degree the others have the effect of using prisoner-of-war status as a lever to assure conformity with the laws of warfare.<sup>111</sup> However, criteria not directly related to status identification have typically informed states in their decision making. Suggestive of this practice has been the view of the United States Department of Defense that organized guerrilla forces should be accorded prisoner-of-war status, but must meet among others, the requirements of having a recognizable system of command and of conforming to the existing laws of war.<sup>112</sup> The promulgation of these requirements and others in Protocol I indicates that chivalrous and pragmatic norms continue to play a strong role in the law of warfare, and should provide guidance in the interpretation of the new requirements.

#### 1. "Of a Party to a Conflict"

The first of the new requirements, *i. e.*, that armed forces be "of a Party to a conflict," differs somewhat from the language of Article 4 of the GPW, which requires that resistance movements belong to a Party to the conflict.<sup>113</sup> The

109. GPW, *supra* note 2, art. 43, para. 1; *see* note 93 *supra* and accompanying text.

110. GPW, *supra* note 2, art. 44, para. 3; *see* note 94 *supra* and accompanying text.

111. *Cf.* DePue, *supra* note 45, at 120.

112. *See* Prugh, *Current Initiatives to Reaffirm and Develop International Humanitarian Law Applicable in Armed Conflicts*, 8 INT'L LAW. 262, 265 (1974) (extracts from a statement made by Major General Prugh, the Judge Advocate General, Department of the Army, on Behalf of the Department of Defense, before the Foreign Affairs Committee of the House of Representatives, Sept. 20, 1973) [hereinafter cited as Prugh].

113. GPW, *supra* note 2, art. 4, para. 1 (emphasis added).

language is as follows: "belonging to a party to the conflict." The omission of the word "belonging" marks an important change in the status of guerrilla movements. Formerly, it was necessary for such movements to at least have a *de facto* link with a belligerent state.<sup>114</sup> It was considered to be inadequate that the group merely received logistic support in food, clothing, stores, weaponry and transport, from such a Party.<sup>115</sup> However, certain recent conflicts have demonstrated the difficulty of establishing the international responsibility of the State to which the movements were linked.<sup>116</sup> It was therefore proposed that the criterion of "belonging to a Party" be changed to that of the political motive found to be at the base of the activity of the movement, so as to distinguish it from an armed group seeking only private interests.<sup>117</sup> Thus, under Article 43, the terms "of a Party to a conflict" might, in certain cases, apply to the movement itself.<sup>118</sup>

## 2. Organization

The second of the new requirements that "[t]he armed forces of a Party to a conflict [shall] consist of all organized armed forces, groups and units"<sup>119</sup> merely repeats the rule of GPW Article 4. The requirement of organization is designed to prevent irregular fighters from operating on their own since individuals dispatched on special missions by groups or on personal initiative are normally engaged in intelligence or sabotage assignments which are sufficient to require the recognition of wide retaliatory powers vested in their captors.<sup>120</sup> However, if the individual captive belongs to a group whose organization is not prejudiced by his solo venture, and he himself does not conceal his identity as a combatant,<sup>121</sup> is not a marauder or spy, and is not following the orders of

114. See Meyrowitz, *La Guerilla et le Droit de la Guerre: Problèmes Principaux*, 7 R.B.D.I. 56, 59 (1971); 6 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 65, at 10, 17.

115. See Draper, *supra* note 19, at 200.

116. See Fraleigh, *The Algerian Revolution as a Case Study in International Law*, in THE INTERNATIONAL LAW OF CIVIL WAR 195 (R. Falk ed. 1971).

117. See 6 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 65, at 110; Veuthey, *Règles et Principes de Droit International Humanitaire Applicables dans la Guerilla*, 7 R.B.D.I. 505, 511 (1971).

118. See 6 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 65, at 100; U.N. Sec'y-General, *Respect for Human Rights in Armed Conflicts*, U.N. Doc. A/8052, paras. 214, 230 & 231 (1970) [hereinafter cited as 1970 Report of the Sec'y-General].

119. GPW, *supra* note 2, art. 43, para. 1; see note 93 *supra* and accompanying text.

120. See Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323 (1951), reprinted in 1975 MIL. L. REV. BICENT. ISSUE 487, 508 [hereinafter cited as 'Unprivileged Belligerency']; see also Draper, *supra* note 19, at 20.

121. A member of armed forces who operates as a concealed fighter, *e.g.*, as a civilian, engaged on a solitary mission, is not entitled to p.o.w. status under article 4 of the GPW. See *Muhammad Ali and Another v. Public Prosecutor*, [1968] 3 ALL E.R. 488 (P.C.) in which members of the armed forces of Indonesia, while in civilian clothing, placed a bomb in an office building in Singapore, which, upon explosion, killed three civilians. On appeal, their sentence of death from the trial court was upheld, because the appellants had forfeited their rights under the GPW by engaging in sabotage in civilian clothes.

the group,<sup>122</sup> then he may properly claim entitlement to be treated as a prisoner of war under Article 44.<sup>123</sup>

### 3. *Responsible Command*

The third criterion for combatant and prisoner-of-war status under the first Protocol requires that armed forces are to be "under a command responsible to [the Party to a conflict] for the conduct of its subordinates."<sup>124</sup> This marks a significant departure from the language of Article 4 of the GPW which requires that the armed forces be "commanded by a person responsible for his subordinates."<sup>125</sup>

The Article 4 language required modification for at least two reasons: first, the necessity of an individual commander was not easily met in those guerrilla movements which operated under a collegial authority; second, the structure of the guerrilla movement and of its command were very often closely guarded secrets, unknown to most of the fighters.<sup>126</sup> Therefore the expression "to be commanded by a *person* responsible for *his* subordinates" was changed to read "a command responsible . . . for . . . *its* subordinates."<sup>127</sup> This criterion is understood to necessitate only a *commanding authority* whose leadership is recognized by subordinates and who (which) is able therefore to assume responsibility for their acts.<sup>128</sup> It should be noted, however, that the essential aim of such a condition is not status identification, but of having a command capable of ensuring respect for the laws and customs of war.<sup>129</sup>

### 4. *Respect for the Rules of War*

Respect for the laws and customs of war constitutes the fourth requirement necessary to be fulfilled by a group in order to entitle its members to combatant and prisoner-of-war status. Specifically, Article 43 requires that "[s]uch armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in

122. See Draper, *supra* note 19, at 200, where it is noted that special missions by groups of irregular fighters are normally intelligence or sabotage assignments which would probably debar the group from having combatant and hence prisoner-of-war status.

123. Such an individual may draw protection from article 45 of Protocol I which provides that "a *person* who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war . . ." Protocol I, *supra* note, art. 45. (emphasis added); see notes 148-51 *supra* and accompanying text.

124. GPW, *supra* note 2, art. 43, para. 1; see note 93 *supra* and accompanying text.

125. GPW, *supra* note 2, art. 4, para. A(2).

126. See 1970 Report of the Sec'y-General, *supra* note 118, at para. 176.

127. *Id.* (emphasis added).

128. See 6 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 65, at 13; see also Potapov, *Reaffirmation and Development of International Humanitarian Law*, 190 INT'L REV. RED CROSS 3,111(1970).

129. See 6 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 65, at 13; see also 1970 Report of the Sec'y-General, *supra* note 118, para. 176; *cf. id.* at para. 191 (b).

armed conflict."<sup>130</sup> This provision refers to the respect of the laws and customs of war by the group as a whole, whether or not individual members fulfill this condition.<sup>131</sup> Thus, the anomalous situation develops that if a majority of the group fails to comply with the laws of war, e.g., fails to give quarter in violation of Article 40 of Protocol I, then the individual member of that group, although not participating in the violation himself, will not be entitled to combatant or prisoner-of-war status.<sup>132</sup> The converse would also hold, and would be equally anomalous.<sup>133</sup> However, such a criterion, while not essential to the determination of entitlement to prisoner-of-war status, does serve the humanitarian and pragmatic purpose of providing guerrillas with an incentive to comply with the laws of war.

##### 5. *Carrying Arms Openly*

The fifth of the new requirements for prisoner-of-war status is directed to the individual combatant, who, owing to the nature of hostilities, cannot distinguish himself from the civilian population. Such a combatant will retain that status provided that 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.<sup>134</sup> Since the guerrilla commonly seeks to overcome technological, economic, or manpower deficiencies, the exception to the normal requirement of distinguishing clothing "owing to the nature of the hostilities," will undoubtedly become the rule in guerrilla warfare.<sup>135</sup>

However, the condition of "carrying arms openly" is essentially related to the condition of identifiability.<sup>136</sup> Thus, most of the experts consulted by the ICRC advocated abandoning the requirement of a fixed distinctive sign; some proposing to replace it with the present requirement that the struggle be carried on openly, *i.e.*, without the combatants concealing their weapons.<sup>137</sup> This position was endorsed by the United Nations Secretary-General in his second Report on the Respect of Human Rights in Armed Conflicts which accepted the view that the more important condition of carrying arms openly could replace that of wearing a fixed distinctive sign.<sup>138</sup>

130. GPW, *supra* note 2, art. 43, para. 1; *see* note 93 *supra* and accompanying text.

131. *See* 6 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 65, at 14, *citing* 1970 Report of the Sec'y-General, *supra* note 118 at para. 179.

132. *See* Draper, *supra* note 19, at 204-05.

133. *See generally* 6 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 65, at 13-14.

134. GPW, *supra* note 2, art. 44, para. 3; *see* note 94 *supra* and accompanying text.

135. *But see* note 107 *supra*, (the Protocol's effort to maintain the status quo with respect to the regular soldier's wearing of a uniform).

136. *Cf.* Draper, *supra* note 19, at 203.

137. *See* 6 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 65, at 11.

138. *See* 1970 Report of the Sec'y-General, *supra* note 18, at 122.

Significantly, the abandonment of the distinctive clothing criteria in certain hostilities may not constitute as radical a departure from the former requirements as might initially appear. The Second Report of the Secretary-General, for example, noted that the requirement of carrying arms openly in operations preparatory to combat would encompass the "infiltration into enemy lines" but not "ancillary activities such as information-gathering and propaganda among citizens."<sup>139</sup> In addition, implicit in such a rule is the condition that the combatant knows, or should know, that he is visible.<sup>140</sup> Furthermore, the feigning of civilian, non-combatant status is explicitly prohibited as an act of perfidy under another Article of the first Protocol.<sup>141</sup>

The legal effect of failure to disclose is discussed further in paragraph 4 of Article 44. This paragraph is the result of a last minute compromise worked out during the third session of the Diplomatic Conference between the West, which sought to deny prisoner-of-war status to combatants failing to wear distinctive clothing, and those countries desiring the extension of such status to guerrillas regardless.<sup>142</sup> As finally adopted at the fourth session, paragraph 4 provides a separate but equal status for those combatants taken prisoner while failing to display arms openly "during each military engagement and preceding attack when engaged in deployment operations . . . visible to the adversary."<sup>143</sup> Such fighters are not to be prisoners of war, as they have forfeited combatant status, but nevertheless shall benefit from procedural and substantive protections equivalent to those accorded to prisoners of war by the GPW and Protocol I.<sup>144</sup> They could be subject therefore to punishment for the perfidious act of feigning civilian status, to which a prisoner of war would not be subject, while retaining equivalent procedural and substantive safeguards otherwise granted to p.o.w.'s generally. This paragraph codifies the practice in South Vietnam and Algeria, for example, where both traditionally attired soldiers and many guerilla groups were given a *de facto* prisoner-of-war status.<sup>145</sup>

139. *Id.*

140. See Report of U.S. Delegation — Third Session, *supra* note 104, at 122.

141. Protocol I, *supra* note 3, art. 37(1)(c). Note, however, that the final sentence of paragraph 3 of article 44 reads: "Acts which comply with the requirements of this paragraph shall not be considered perfidious . . ." *Id.*, art. 44, para. 3. This was designed to make clear that those who comply with the requirements of paragraph 3 cannot be punished through the concept of perfidy for "feigning civilian status." See Report of U.S. Delegation — Third Session, *supra* note 104, at 122.

142. See Aldrich, *supra* note 86, at 108-09.

143. Protocol I, *supra* note 3, art. 44, para. 4. The outcome of the vote on Article 44 was 66 in favor of the present text, 2 against, and 18 abstentions. This text is viewed as the best possible compromise "if proper account were to be taken of the legal requirements and reality." *Summary of the Fourth Session*, *supra* note 1, at 342.

144. See Report of U.S. Delegation — Third Session, *supra* note 104, at 123; DePue, *supra* note 45, at 121 n.176.

145. See Forsythe, *Three Sessions of Legislating Humanitarian Law: Forward March, Retreat, or Parade Rest?*, 11 INT'L LAW. 131 (1977).



## 6. *Other Protections*

Guerrillas also draw increased protection from paragraph 5 of Article 44. This provision ensures that a combatant who is taken prisoner while not engaged in an attack or deployment operation shall retain his rights as a combatant and as a prisoner of war regardless of past violations of the rule of disclosure under paragraph 3.<sup>146</sup> This provision is designed to prevent captors from any efforts to find or falsify past histories as to deprive the prisoners of their protections.<sup>147</sup>

In addition to the protections under Article 44, guerrillas claiming prisoner-of-war status shall be presumed entitled to such status under Article 45. That Article provides that one who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war if he claims such status, or if he appears entitled to such status, or if the Party on which he depends claims such status on his behalf.<sup>148</sup> It further provides that where there is doubt as to his entitlement to prisoner-of-war status, he shall continue to have such status and the protections it affords under the GPW and the Protocol until his status has been determined by a competent tribunal.<sup>149</sup> Therefore, the captor may not frustrate the humanitarian purpose of the Protocol by denying prisoner-of-war status to a captive whose entitlement to such status is uncertain.<sup>150</sup> Article 45 additionally provides that a person who is not considered to be a prisoner of war and who is to be tried for a criminal offense arising out of the hostilities may assert his entitlement to prisoner-of-war status and have that question adjudicated anew by a judicial tribunal.<sup>151</sup>

Thus, the criteria for prisoner-of-war status and the mechanism for asserting such status have been broadened so as to encompass more combatants. Given the Protocol's purpose of "the protection of victims in international armed conflicts,"<sup>152</sup> the new criteria are properly designed to further this end relative to the combatants.

In order for the new criteria to receive acceptance however, it must appear as a practical matter that the benefits to be received by the application of the new criteria outweigh the costs to be incurred thereby. It therefore, becomes

146. See note 144 *supra*.

147. See Report of U.S. Delegation — Third Session, *supra* note 104, at 123.

148. Protocol I, *supra* note 3, art. 45, para. 1.

149. *Id.* Such a tribunal may be administrative in nature. See Report of U.S. Delegation — Third Session, *supra* note 104, at 15.

150. This carries over the rule from GPW, *supra* note 2, art. 5(a), which provides: Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories listed in Article 4 (for p.o.w. status) such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

151. See Report of U.S. Delegation — Third Session, *supra* note 104, at 15-16.

152. See *Summary of the Fourth Session*, *supra* note 1, at 338.

necessary to evaluate the viability and the effectiveness of the new criteria in serving the needs of modern warfare by means of a cost-benefit analysis.

C. *Evaluation of the New Criteria: Cost-Benefit Analysis*

A necessary result of the characterization in Article 1 of the conflicts waged by selected national liberation movements as wars of international character is the need for the rules governing the treatment of those participating in such conflicts to encompass as broad a class of combatants as possible.<sup>153</sup> The new criteria under Articles 43 and 44 represent an effort to liberalize the conditions to be fulfilled for prisoner-of-war status so as to meet that need. One important benefit which might accrue from the liberalized criteria is the extension of the humanitarian protections of prisoner-of-war treatment to greater numbers than before.

A less altruistic and more pragmatic benefit may also result from the liberalized criteria. Since these criteria were designed to permit increased numbers of guerrilla combatants to qualify for prisoner-of-war status, this will likely provide guerrillas with an incentive to abide by the laws of war, if only to obtain prisoner-of-war status for themselves.<sup>154</sup>

In order to receive the protections afforded by the GPW and the new Protocol, guerrilla movements must themselves comply with their provisions to the extent they are viewed as necessary by the opposing party to the conflict. This follows from the fact that Article 94 of the first Protocol permits only a Party to the Geneva Conventions to accede to the new document. Moreover, it is unlikely that a guerrilla movement will possess the capacity to become a Party thereby binding itself to follow its provisions. Therefore, in order to find that a conflict between a Party to the Protocol and a guerrilla movement is covered by the Protocols one must look to Article 96 of that instrument. Paragraph 2 of Article 96 provides:

When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which is not bound by it, *if the latter accepts and applies the provisions thereof.*<sup>155</sup>

A clear obligation is imposed upon guerrilla movements participating in

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153. See DePue, *supra* note 45, at 122.

154. See *id.*

155. This is substantially equivalent to Article 2 common to all four Geneva Conventions, *supra* note 2, which provides:

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

wars of liberation to apply the rules of international warfare as codified in Protocol I. This provision therefore is repugnant to an interpretation of Protocol I as imposing a unilateral obligation on the incumbent Party to apply its provisions. Thus, despite the language of Article 1 that "[t]he High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances,"<sup>156</sup> the obligations under the Protocol are conditional upon mutual compliance.<sup>157</sup>

It is submitted that Protocol I's imposition of the concept of reciprocity will further the humanitarian aims of that instrument in those cases where the guerrilla movement is capable of applying its provisions. By conditioning application of prisoner-of-war status upon the guerrillas' complying with the laws of war, it will provide an incentive for guerrilla movements to enforce compliance with the Protocol, enhancing the treatment of their captives. Reciprocity will also have the salutary effect of enhancing the signatory state's compliance with the laws of warfare in the expectation that its opponents are working towards the same goal. Furthermore, considerations of pragmatism dictate that one of the most important forces which exists for compliance with the laws of war be brought to bear in an effort to give effect to language which has been poorly received in the actual practice of states.<sup>158</sup>

In many cases, however, guerrilla movements may be unwilling to meet the new criteria for prisoner-of-war status. It is not unreasonable to assume that most guerrillas will choose not to comply with all of the conditions under Articles 43 and 44. For example, the requirement of a combatant's carrying arms openly while engaged in a deployment operation preparatory to an attack will likely not be followed since secrecy and surprise are the essence of such warfare.<sup>159</sup>

Moreover, it is probable that many guerrilla movements will be incapable of complying with the laws of war. As regards their taking prisoner those who have laid down their arms, for example, the long distance patrol fighting behind enemy lines is not equipped to detain and evacuate prisoners.<sup>160</sup> Although Article 41, paragraph 3 of the Protocol provides:

156. Protocol I, *supra* note 3, art. 1, para. 1.

157. Others maintain the opposite view. See, e.g., Fujita, *La Guerre de Liberation Nationale et le Droit International Humanitaire*, 53 REVUE DE DROIT INTERNATIONAL 81, 124 (1975) [hereinafter cited as Fujita]. Note also that the Vienna Convention on the Law of Treaties, May 23, 1978, U.N. Doc. A/Conf. 39/27, art. 60, para. 5, would not permit material breach by one party to a humanitarian treaty to release the other party from its obligations.

158. See generally Baxter, *Forces for Compliance with the Law of War*, 58 PROC. AM. SOC. INT'L L. 82 (1964).

159. See 'Unprivileged Belligerency', *supra* note 120, at 492; Draper, *supra* note 19, at 214.

160. See generally Report of U.S. Delegation — Third Session, *supra* note 104, at 14. Note that under the Hague Regulations it is forbidden: "(c) to kill or wound an enemy, who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;" "(d) to declare that no quarter will be given." Hague Regulations, *supra* note 6, art. 23.

When persons entitled to protection as prisoners of war have been captured but cannot be evacuated, they shall be released and all feasible precautions should be taken to ensure their safety . . . .<sup>161</sup>

guerrillas may likely be forced to ignore this rule in order to preserve the secrecy that is a prerequisite to their own return to safety.

Similarly, guerrillas may be incapable of properly classifying combatant and non-combatant prisoners. This conclusion follows from the reality that the guerrilla has neither training in classification and interrogation of prisoners as to their status nor access to other information which might disprove the prisoner's involvement with acts of warfare.<sup>162</sup>

Where the guerrilla forces do properly take opposing combatants prisoner, they will encounter great difficulty in complying with the host of regulations governing the treatment of prisoners under the GPW. Such provisions require in part: that the quarters of p.o.w.'s be equivalent to those of the detaining power;<sup>163</sup> that the food rations shall be sufficient in quantity, quality and variety so as to prevent weight loss or the development of nutritional deficiencies;<sup>164</sup> and that medical inspections of prisoners of war shall be held at least once a month.<sup>165</sup> Guerrilla movements typically relying upon mobility for military effectiveness will probably lack the logistical, administrative and judicial apparatus to meet these and other requirements.<sup>166</sup>

However, the inability of guerrilla movements to meet the requirements for treatment of prisoners of war has not been met with complete disapproval. For example, those states who have urged that special consideration should be given to liberation movements, have argued that the guerrillas must not be constrained by legal principles which would prevent them from achieving their goals.<sup>167</sup> They further urge that as a practical matter the guerrillas cannot be held to the same standards of conduct demanded of established states.<sup>168</sup> In addition, these states may point to the many obligations imposed by the Protocol

161. See Report of U.S. Delegation — Third Session, *supra* note 104, at 14.

162. The recent revised Army Subject Schedule 27-1 states that "[c]ombat soldiers do not determine the status of any captured person. All persons captured or detained should be evacuated to the detainee collecting point where proper authorities can classify them." *Quoted from, Protection of Non-Combatants, supra* note 14, at 794.

163. GPW, *supra* note 2, art. 25.

164. GPW, *supra* note 2, art. 26.

165. GPW, *supra* note 2, art. 31.

166. The GPW, *supra* note 2, also requires, *inter alia*, that prisoners of war shall be provided adequate premises for preparing their own food (art. 26); that the detaining power shall bear all costs in the prisoners' treatment (art. 31); that adequate facilities for religious services will be provided (art. 34); that adequate premises and necessary equipment will be provided for recreation (art. 38); that all p.o.w.'s shall be paid according to a sliding wage scale (art. 60); that prisoners of war shall be allowed to send and receive mail (art. 71); and that no sentence is to be given or carried out without recognized judicial guarantees (arts. 99-108).

167. See Graham, *supra* note 5, at 41.

168. *Id.* Note that military necessity is not considered to be a defense to failure to meet the GPW criteria: "[M]ilitary necessity cannot justify disregard of prohibitions themselves embodying a consensus as to what is necessary." *Treatment of Prisoners, supra* note 49, at 858.

and the Geneva Convention as being unrealistic with regard to underdeveloped countries and guerrilla movements generally. Those countries whose prison facilities are normally inadequate will have a difficult time meeting their requirements; *a fortiori* guerrilla movements will also encounter difficulty.<sup>169</sup> Thus, these states view derogations from the mutual obligations under the Protocol and the Geneva Conventions as permissible despite their obvious abrogation of many of the humanitarian goals of the Protocol.

Unfortunately, the mutual obligations of opposing sides to a conflict to apply all the provisions of the Protocol may also be abrogated through either party's reservations to certain provisions. For example, were a party to issue a reservation to the "separate but equal status" for war violators presently provided in Article 44, grave consequences could result, as the detaining party's view of the "justness" of the captive's cause could dictate the quality of treatment. Fear of this possibility arises from several writings which on the one hand consider national liberation warriors as entitled to prisoner-of-war treatment, but on the other hand, assert that members of colonialist or racist forces are war criminals to be condemned for resisting the liberation movements.<sup>170</sup>

This idea has already received the sanction of the Soviet bloc reservation to Article 85 of the GPW. That Article provides that prisoners of war prosecuted and convicted for pre-capture offenses retain all the benefits afforded to p.o.w.'s but may be punished for their particular crime as *prisoners of war*.<sup>171</sup> The Soviet states have all issued reservations to this Article believing that prisoners of war convicted of war crimes should be treated as *common criminals*.<sup>172</sup> Similarly, those peoples fighting a "colonialist" or "racist" state may refuse to grant prisoner-of-war treatment to their captives. This would undoubtedly weaken the effect of the Protocol since a reservation to Article 44 as a practical matter would also destroy the non-reserving party's incentive to apply that Article. It should be noted however that the first Protocol itself may weaken prior efforts to codify the international law of war. The necessity for the promulgation of a supplement to the Geneva Conventions reveals that there is an inadequacy within the prior rules which should be remedied. Immediate ratification of the new Protocol by the signatories to the Geneva Conventions therefore becomes necessary. Were some but not all parties to the Geneva Conventions of 1949 to accede to the Protocol, the community of the

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169. Professor Bond has also viewed derogation from some of these obligations as permissible, finding support in the lack of moral condemnation which would accrue in the case of certain violations. See Bond, *supra* note 87, at 76-78.

170. See Ginsburg, *Wars of National Liberation and the Modern Law of Nations — The Soviet Thesis*, 29 LAW & CONTEMP. PROB. 910, 920 (1964), cited in DePue, *supra* note 45, at 100.

171. This is similar to article 44, paragraph 2 of Protocol I. However, the new provision is viewed as only applying until final conviction. See Report of U.S. Delegation — Third Session, *supra* note 104, at 121.

172. See Graham, *supra* note 5, at 55.

Geneva Convention states would be weakened by the fact that different states would be bound by different treaty obligations.<sup>173</sup> Thus, if a lengthy period of time was to elapse before the world community's acceptance of the Protocols took place, legal chaos might ensue in a conflict governed only by the then weakened Geneva Conventions.<sup>174</sup>

There is a possibility that the United States and a number of other Western powers will find the Protocol unacceptable, in light of their historic opposition to the broadening of the range of conflicts subject to international rules of warfare.<sup>175</sup> This, of course, would lessen the stature of any international agreement on the law of war because the weight such agreements carry is largely a function of both the military capabilities of the signatories and of the number of states accepting their provisions.<sup>176</sup> As Professor Baxter candidly notes, "[n]ew Protocols to which preponderantly developing countries and Eastern European countries are parties will be of little utility."<sup>177</sup>

Additional cause for fear of the non-universality of the Protocol's appeal is the extent to which much of the West was apparently alienated by the frequent subordination of legal issues to political ones at the Diplomatic Conference.<sup>178</sup> The action of many states in pursuing short-term political goals at the expense of maintaining the integrity of law may frighten off other States from becoming parties to the new Protocol.<sup>179</sup>

These particular objections are directed largely against Article 1, providing for the internationalization of certain internal wars, rather than against the new Articles presenting criteria for prisoner-of-war status.<sup>180</sup> Significantly, Articles 43 and 44 have the apparent support of the United States. They were adopted as a result of a compromise proposed by the United States delegation in order to reach agreement with the communist nations regarding the proper criteria for prisoner-of-war status and the legal consequences for failure to meet such criteria.<sup>181</sup> These articles should also be attractive to other states questioning accession since the basis of the compromise was the "separate but equal treatment" provision whereby the procedural and substantive protec-

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173. See generally Baxter, *supra* note 51, at 25.

174. Because the effect of the first article of Protocol I is to transform certain internal conflicts into conflicts of an international character, the importance of common Article 3 of the Geneva Conventions and Protocol II, which govern internal wars, is substantially undercut. Therefore, some states no longer view Protocol II as serving any useful purpose. See Graham, *supra* note 5, at 44-45.

175. See generally Bond, *supra* note 87, at 73; cf. Baxter, *supra* note 51, at 24-26.

176. See generally Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y. B. INT'L L. 275, 277 (1976).

177. Baxter, *supra* note 51, at 25.

178. Several authors have expressed this concern. See Forsythe, *supra* note 79, at 77; cf. Baxter, *supra* note 51; Graham, *supra* note 5.

179. See Baxter, *supra* note 51, at 25.

180. See § III, B *supra*.

181. See Aldrich, *supra* note 86, at 108-09.

tions under the Protocol and the Conventions are extended even to those failing to qualify for prisoner-of-war status.<sup>182</sup>

Nevertheless, one of the criteria for prisoner-of-war status may yet pose an obstacle to states' accession. Specifically, the Article 44 criterion which allows abandonment of the requirement of distinctive clothing is likely to meet objection as causing a loss of protection to the civilian population. Indeed, this is a cost which must be weighed against the obvious benefits this provision holds for the guerrilla.

In guerrilla warfare especially, non-combatants and combatants look discouragingly alike. Since the new criteria may have the unfortunate effect of encouraging guerrilla combatants to dress as civilians, this may in turn prove costly to the civilian populations. As a consequence of the blurred distinctions, many innocent civilian lives may be taken in the belief that the "enemy" is hiding behind civilian status.<sup>183</sup> Moreover, since the new criteria do not confine lawful combatancy status to those maintaining the overall outward appearance of combatants, this may implicate the whole of a "peoples" in the warfare. For, as one commentator notes, "the soldier who has reason to believe that a wide-eyed child may be carrying a grenade, or who suspects that an old woman sitting on the stoop makes bombs, does not think of these people as allied nationals, let alone innocent civilians."<sup>184</sup>

The cost of providing incentives for guerrilla movements through liberalized prisoner-of-war criteria also may be increased as the incumbent state brings counter-guerrilla units into the fray.<sup>185</sup> As a practical matter, clandestine fighters who conduct operations in civilian dress expose themselves and their peoples to overly harsh actions by the incumbent states.<sup>186</sup> Such units have typically injured civilian populations in the past by waging war against the enemy's infrastructure: destroying homes, villages and property which were believed to aid the guerrillas. Similarly, numerous civilian victims may be added to the overall destruction in the future as a result of the more liberalized criteria.

However, Protocol I contains several measures designed to protect the civilian population from the effects of counter-guerrilla actions. Under the Protocol the parties to a conflict are required to "direct their operations only against military objectives,"<sup>187</sup> since the "civilian population as such, shall

182. See notes 142-45 *supra* and accompanying text.

183. See 6 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 65, at 25.

184. Bond, *Protection of Non-Combatants*, *supra* note 14, at 789.

185. Such combatants if "necessary" under Protocol I, article 44(c) would qualify for prisoner-of-war status. See text accompanying note 94. *But see* notes 107-08 *supra* and accompanying text.

186. See Prugh, *supra* note 112, at 266; Fujita, *supra* note 157, at 82; Draper, *supra* note 16, at 206.

187. Protocol I, *supra* note 3, art. 48.

not be a lawful object of attack."<sup>188</sup> Additionally, the military strategists of such parties are required to take all feasible precautions in planning the methods of attack in order to prevent the loss of civilian life.<sup>189</sup> Finally, an affirmative duty is placed on the parties to remove the civilian population from the vicinity of military objectives to the extent possible.<sup>190</sup> If properly heeded these safeguards should be effective in adequately protecting the civilian population.

#### D. *Evaluation*

In balancing the various costs and benefits to be derived from the more liberalized conditions for prisoner-of-war status under Articles 43 and 44, it is apparent that the needs of modern warfare are now more properly fulfilled than before. This conclusion obtains for several reasons. First, because the methods of warfare commonly known to the drafters of the Geneva Conventions, *i. e.*, the employment of uniformed armies operating in fixed battle lines, have given way to warfare commonly characterized by guerrilla tactics, the legal structure must necessarily adapt itself to the practice of states. Second, where national liberation movements are assimilated with international entities, the same rules should govern the obligations and entitlements of both groups. Third, those rules should be designed to encompass as broad a class of combatants as possible in order to extend fully their humanitarian and pragmatic purpose. Therefore, Articles 43 and 44 further this design by permitting guerrillas to obtain more easily prisoner-of-war status, whereby the whole panoply of protections under the Protocol and the GPW will govern their treatment. Supported by new rules extending increased protections to the civilian population, the benefits to be obtained by liberalized criteria for prisoner-of-war status outweigh the costs.

It must be understood, however, that this conclusion rests partially on the basis of Article 1's assimilation of certain national liberation movements with international entities, and that a different conclusion would obtain if this were not so. It is submitted that Article 1 inadequately serves the needs of modern warfare because national liberation movements will not likely possess the capacity to implement the Protocol and the Geneva Conventions. Nevertheless, given the inclusion of these movements in the Protocol, it is necessary to extend the obligations and protections to their combatants. In so doing, Articles 43 and 44 strike the proper balance between humanitarianism and pragmatism.

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188. Protocol I, *supra* note 3, art. 51(2).

189. Protocol I, *supra* note 3, art. 57.

190. Protocol I, *supra* note 3, art. 58.



## V. CONCLUSION

Articles 43 and 44 of Protocol I provide liberalized criteria for combatancy and prisoner-of-war status. Essentially requiring that the combatant distinguish himself by carrying arms openly during military deployments and engagements, the new criteria are designed to balance the military needs of guerrilla fighters with humanitarian concerns for the civilian populace.

The guerrilla fighter is benefited by the new criteria as they permit him to qualify for prisoner-of-war status with less danger to himself. The better opportunity for prisoner-of-war status will provide the guerrilla with an incentive to comply with the laws of warfare. This compliance, in turn, benefits everyone affected by the hostilities.

Against these advantages must be weighed the cost to the civilian population. In theory, the civilian population should benefit from criteria which are designed to deter combatants from concealing their arms and feigning non-combatant status. In practice, however, the launching of guerrilla tactics from a non-segregated civilian populace might lead to the loss of many civilian lives. Nevertheless, it is hoped that the substantive protections of Articles 48 through 58 will be effective in preventing the civilian population from any unnecessary suffering.

Implicit in the above conclusions, however, is the condition precedent that guerrilla movements will be able to fulfill their obligations under the Protocol and the Geneva Conventions. On this point the author is not optimistic. Even assuming the guerrilla movements' willingness to apply those instruments, it is highly unlikely that they will possess the financial resources necessary to provide the administrative machinery required for the proper treatment of prisoners of war and civilian detainees. It is feared that the inability of guerrillas to incur these reciprocal obligations will have the unfortunate effect of engendering the neglect of many of the substantive provisions of the Protocol and the Geneva Conventions it seeks to supplement.

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