

## VIII

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# Unlawful Combatancy

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Yoram Dinstein<sup>1</sup>

*Combatants and Civilians*

Under the *jus in bello*, combatants are persons who are either members of the armed forces (except medical and religious personnel) or—irrespective of such membership—who take an active part in hostilities in an international armed conflict.<sup>2</sup> The *jus in bello* posits a fundamental principle of distinction between combatants and non-combatants (i.e., civilians).<sup>3</sup> The goal is to ensure in every feasible manner that inter-state armed conflicts be waged solely among the combatants of the belligerent parties. Lawful combatants can attack enemy combatants or military objectives, causing death, injury and destruction. By contrast, civilians are not allowed to participate in the

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1. Professor Yoram Dinstein is the Charles H. Stockton Professor of International Law, US Naval War College, Newport, Rhode Island.

2. See A.P.V. ROGERS & P. MALHERBE, MODEL MANUAL ON THE LAW OF ARMED CONFLICT 29 (ICRC, 1999).

3. See Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, [1996] I.C.J. REPORTS 226, 257.

fighting. As a complementary norm, civilians “enjoy general protection against dangers arising from military operations.”<sup>4</sup>

It is not always easy to define what an active participation in hostilities denotes. Sometimes, the reference is to “direct” participation in hostilities.<sup>5</sup> But the adjective “direct” does not shed much light on the extent of participation required. For instance, a person who gathers military intelligence in enemy controlled territory and a driver delivering ammunition to firing positions are generally acknowledged as actively taking part in hostilities (although merely assisting in the general war effort does not suffice).<sup>6</sup>

A civilian may convert himself into a combatant. In fact, every combatant is a former civilian: nobody is born a combatant. In the same vein, a combatant may retire and become a civilian. But at any given point a person is either a combatant or a civilian: he cannot (and is not allowed to) be both at the same time, nor can he constantly shift from one position to the other.

Whether on land, by sea or in the air, one cannot fight the enemy and remain a civilian. Interestingly, this general norm first began coalescing in the law of sea warfare. By the time of the Declaration of Paris of 1856, Article 1 proclaimed: “Privateering is, and remains, abolished.”<sup>7</sup> Privateers were private persons (at times known as corsairs, not to be confused with pirates) who obtained official letters of marque from a government, allowing them to attack enemy merchant ships.<sup>8</sup> As the language of the Declaration of Paris indicates, it merely confirms the abolition of privateering as “an already established situation” under customary international law.<sup>9</sup> The law of land (and air) warfare ultimately adjusted to proscribe parallel modes of behavior.

Combatants can withdraw from the hostilities not only by retiring and becoming civilians, but also by becoming hors de combat. This can happen either by choice (through laying down of arms and surrendering) or by force of

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4. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 621, 651 (D. Schindler & J. Toman eds., 3rd ed., 1988) (Article 51(1)) [hereinafter *LAWS OF ARMED CONFLICT*].

5. See ROGERS & MALHERBE, *supra* note 2, at 29. Cf. Article 51(3) of Protocol I, *LAWS OF ARMED CONFLICT*, *supra* note 4, at 651.

6. See ROGERS & MALHERBE, *supra* note 2, at 29.

7. Paris Declaration Respecting Maritime Law, 1856, *LAWS OF ARMED CONFLICT*, *supra* note 4, at 787, 788.

8. See Ulrich Scheuner, *Privateering*, 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1120, 1120–1121 (R. Bernhardt ed., 1997).

9. *Id.* at 1122.

circumstances (by getting wounded, sick or shipwrecked). A combatant who is hors de combat and falls into the hands of the enemy is in principle entitled to the status of a prisoner of war. Being a prisoner of war means denial of liberty, i.e., detention for the duration of the hostilities (which may go on for many years). However, that detention has only one purpose: to preclude the further participation of the prisoner of war in the ongoing hostilities. The detention is not due to any criminal act committed by the prisoner of war, and he cannot be prosecuted and punished “simply for having taken part in hostilities.”<sup>10</sup> While his liberty is temporarily denied, the decisive point is that the life, health and dignity of a prisoner of war are guaranteed. Detailed provisions to that end are incorporated in Geneva Convention (III) of 1949.<sup>11</sup>

### *Lawful and Unlawful Combatants*

Entitlement to the status of a prisoner of war—upon being captured by the enemy—is vouchsafed to every combatant, subject to the *conditio sine qua non* that he is a lawful combatant. The distinction between lawful and unlawful combatants complements the fundamental distinction between combatants and civilians: the primary goal of the former is to preserve the latter.<sup>12</sup> The jus in bello can effectively protect civilians from being objects of attack in war only if and when they can be identified by the enemy as non-combatants. Combatants “may try to become invisible in the landscape, but not in the crowd.”<sup>13</sup> Blurring the lines of division between combatants and civilians is bound to result in civilians suffering the consequences of being suspected as covert combatants. Hence, under customary international law, a sanction (deprivation of the privileges of prisoners of war) is imposed on any combatant masquerading as a civilian in order to mislead the enemy and avoid detection.

An enemy civilian who does not take up arms, and does not otherwise participate actively in the hostilities, is guaranteed by the jus in bello not only his life, health and dignity (as is done with respect to prisoners of war), but even his personal liberty which cannot be deprived (through detention) without

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10. ALLAN ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS* 82 (1976).

11. Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949 [hereinafter GC III] reprinted in *LAWS OF ARMED CONFLICT*, *supra* note 4, at 423.

12. See Theodor Meron, *Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy*, 40 *NORDISK TIDSSKRIFT FOR INT'L RET* 47, 62 (1970).

13. Denise Bindschedler-Robert, *A Reconsideration of the Law of Armed Conflicts*, *THE LAW OF ARMED CONFLICTS: REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICT*, 1, 43 (1971).

cause. But a person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a combatant. He is an unlawful combatant.

Upon being captured by the enemy, an unlawful combatant—like a lawful combatant (and unlike a civilian)—is subject to automatic detention. But in contradistinction to a lawful combatant, an unlawful combatant fails to enjoy the benefits of the status of a prisoner of war. Hence, although he cannot be executed without trial, he is susceptible to being prosecuted and severely punished for any acts of violence committed in the course of the hostilities in which he has participated. The legal position was summed up by the Supreme Court of the United States, in the *Quirin* case of 1942 (per Chief Justice Stone):

[b]y universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.<sup>14</sup>

With the exception of the last few words, this is an accurate reflection of the *ius in bello*.

What can unlawful combatants be prosecuted and punished for? The *Quirin* judgment refers to “trial and punishment by military tribunals for acts which render their belligerency unlawful.” Admittedly, sometimes the act which turns a person into an unlawful combatant constitutes by itself an offence (under either domestic or international law) and can be prosecuted and punished as such before a military tribunal. But on other occasions the judicial proceedings may be conducted before regular courts and, more significantly, they are likely to pertain to acts other than those that divested the person of the status of lawful combatant. Even when the act negating the status as a lawful combatant does not constitute a crime *per se* (under either domestic or international law), it can expose the perpetrator to ordinary penal sanctions (pursuant to the domestic legal system) for other acts committed by him that are branded as criminal. Unlawful combatants “may be punished under the internal criminal legislation of the adversary for having committed hostile acts

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14. Ex parte *Quirin*, 317 U.S. 1, 30–31 (1942).

in violation of its provisions (e.g., for murder), even if these acts do not constitute war crimes under international law.”<sup>15</sup>

At bottom, warfare by its very nature consists of a series of acts of violence (like homicide, assault, battery and arson) ordinarily penalized by the criminal codes of all countries. When a combatant, John Doe, holds a rifle, aims it at Richard Roe (a soldier belonging to the enemy’s armed forces) with intent to kill, pulls the trigger, and causes Richard Roe’s death, what we have is a premeditated homicide fitting the definition of murder in virtually all domestic penal codes. If, upon being captured by the enemy, John Doe is not prosecuted for murder, this is due to one reason only. The *jus in bello* provides John Doe with a legal shield, protecting him from trial and punishment, by conferring upon him the status of a prisoner of war. Yet, the shield is available only on condition that John Doe is a lawful combatant. If John Doe acts as he does beyond the pale of legal combatancy, the *jus in bello* simply removes the protective shield. Thereby, it subjects John Doe to the full rigor of the enemy’s domestic legal system, and the ordinary penal sanctions provided by that law will become applicable to him.

There are several differences between the prosecution of war criminals and that of unlawful combatants.<sup>16</sup> The principal distinction is derived from the active or passive role of the *jus in bello*. War criminals are brought to trial for serious violations of the *jus in bello* itself. With unlawful combatants, the *jus in bello* refrains from stigmatizing the acts as criminal. It merely takes off a mantle of immunity from the defendant, who is therefore accessible to penal charges for any offence committed against the domestic legal system.

It is also noteworthy that, unlike war criminals (who must be brought to trial), unlawful combatants may simply be subjected to administrative detention without trial. Detention of unlawful combatants without trial was specifically mentioned as an option in the *Quirin* case (as quoted above), and the option has indeed been used widely by the United States in the war in Afghanistan (see *infra*).

Detention of unlawful combatants is also the subject of special legislation of Israel, passed by the Knesset in 2002.<sup>17</sup> This Detention of Unlawful Combatants Law defines an unlawful combatant as anyone taking part—directly or indirectly—in hostilities against the State of Israel, who is not entitled to

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15. Rosas, *supra* note 10, at 305.

16. See Yoram Dinstein, *The Distinction between Unlawful Combatants and War Criminals*, INTERNATIONAL LAW AT A TIME OF PERPLEXITY 103–116 (Essays in Honour of Shabtai Rosenne, Y. Dinstein ed., 1989).

17. See Detention of Unlawful Combatants Law, 2002, 1834 *Sefer Hahukim* [S.H.] 192.

prisoner of war status under Geneva Convention (III).<sup>18</sup> Detention is based on the decision of the chief of staff of the armed forces, on grounds of state security, but it is subject to judicial review by a (civilian) district court (both initially and every six months thereafter).<sup>19</sup> The law emphasizes that detention is just one option, and that an unlawful combatant can equally be brought to trial under any criminal law.<sup>20</sup> An important point addressed by the law is the maximum duration of the detention. An unlawful combatant can be held in detention as long as the hostilities of the force to which he belongs have not been terminated.<sup>21</sup>

*The Entitlement to Prisoner of War Status under Customary  
International Law*

Article 1 of the Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, proclaims:

[t]he laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.<sup>22</sup>

Article 2 adds a provision entitled “*Levée en masse*,” which reads in the revised 1907 version:

[t]he inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1,

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18. *Id.* (Section 2).

19. *Id.* (Sections 3, 5).

20. *Id.* (Section 9).

21. *Id.* (Sections 7–8).

22. Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, in *LAWS OF ARMED CONFLICT*, *supra* note 4, at 63, 75.

shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.<sup>23</sup>

Article 3 prescribes further: “[t]he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.”<sup>24</sup> As far as civilians who are not employed by the armed forces, yet accompany them, Article 13 stipulates:

[i]ndividuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy’s hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.<sup>25</sup>

The Hague formula thus establishes four general—and cumulative—conditions for lawful combatancy: (i) subordination to responsible command, (ii) a fixed distinctive emblem, (iii) carrying arms openly, and (iv) conduct in accordance with the *jus in bello*. In the special setting of a “*levée en masse*,” conditions (i) and (ii) are dispensed with, and only conditions (iii) and (iv) remain valid. These provisions of the Hague Regulations (like others) “are considered to embody the customary law of war on land.”<sup>26</sup>

The Geneva Conventions of 1949 retain the Hague formula, making it even more stringent. Article 4(A) of Geneva Convention (III) sets forth:

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

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

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23. *Id.* at 75–76.

24. *Id.* at 76.

25. *Id.* at 79.

26. See G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 BRIT. Y.B. INT’L L. 173, 186 (1971).

- (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.<sup>27</sup>

This language is replicated in Article 13 of both Geneva Convention (I)<sup>28</sup> and Geneva Convention (II).<sup>29</sup> Article 4(B) of Geneva Convention (III) goes on to create two further categories of persons that should be treated as prisoners of war: one relating to occupied territories (members of armed forces who have been released from detention in an occupied territory and are then

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27. Geneva Convention III, art. 4, in *LAWS OF ARMED CONFLICT*, *supra* note 4, at 430, 431.

28. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, in *LAWS OF ARMED CONFLICT*, *supra* note 4, at 373, 379–380.

29. Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, in *LAWS OF ARMED CONFLICT*, *supra* note 4, at 401, 408.



reinterned),<sup>30</sup> and the other pertaining to neutral countries (members of armed forces of belligerents who reach neutral territory and have to be interned there as required by international law).<sup>31</sup> Article 4(C) states that nothing in the above provisions affects the status of medical personnel and chaplains<sup>32</sup> who, under Article 33 of Geneva Convention (III) cannot be taken prisoners of war, but may be retained by the Detaining Power with a view to assisting prisoners of war.<sup>33</sup>

The first and foremost category of persons entitled to the status of prisoners of war covers members of the armed forces of the belligerent Parties, including all their different components. These are the regular forces of the belligerents. It does not matter what the semantic appellation of regular forces is (they may function, e.g., under the technical designation of militias); how they are structured; whether military service is compulsory or voluntary; and whether the units are part of standing armed forces or consist of reservists called to action. The distinction is between regular forces of all types, on the one hand, and irregular forces in the sense of partisans or guerrilla forces, on the other.

On the face of it, the Geneva Conventions do not pose any conditions to the eligibility of regular forces to prisoners of war status. Nevertheless, regular forces are not absolved from meeting the cumulative conditions binding irregular forces. There is simply a presumption that regular forces would naturally meet those conditions. But the presumption can definitely be rebutted. The issue came to the fore in the *Mohamed Ali* case of 1968, where the Privy Council held (per Viscount Dilhorne) that it is not enough to establish that a person belongs to the regular armed forces, in order to guarantee to him the status of a prisoner of war.<sup>34</sup> The Privy Council pronounced that even members of the armed forces must observe the cumulative conditions imposed on irregular forces, although this is not stated *expressis verbis* in the Geneva Conventions or in the Hague Regulations.<sup>35</sup> The facts of the case related to Indonesian soldiers who—at a time of a “confrontation” between Indonesia and

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30. This special category makes it “impossible for an occupying Power to deprive prisoners of war of the benefit of the convention through the subterfuge of release and subsequent arrest.” Raymond Yingling & Robert Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT’L L. 393, 405–406 (1952).

31. Geneva Convention III, art. 4(B), in *LAWS OF ARMED CONFLICT*, *supra* note 4, at 431–432.

32. *Id.* at 432.

33. *Id.* at 442–443.

34. *Mohamed Ali v. Public Prosecutor*, [1969] 1 A.C. 430, 449.

35. *Id.* at 449–450.

Malaysia—planted explosives in a building in Singapore (then a part of Malaysia) while wearing civilian clothes. The Privy Council confirmed the appellants' death sentence for murder, on the ground that a regular soldier committing an act of sabotage while not in uniform loses the entitlement to a prisoner of war status.<sup>36</sup> The earlier *Quirin* judgment—concerning German members of the armed forces who took off their uniforms when on a sabotage mission in the United States (where they had landed by submarine)—is to the same effect.<sup>37</sup>

The second category of prisoners of war under the Geneva Conventions pertains to irregular forces: guerrillas, partisans and the like, however they call themselves. This is the most problematic category, given the proliferation of such forces in modern warfare. The Geneva Conventions repeat the four Hague conditions verbatim. However, two additional conditions are implied from the *chapeau* of Article 4(A)(2): (v) organization, and (vi) belonging to a party to the conflict. One more condition is distilled in the case law from the text of the Geneva Conventions: (vii) lack of duty of allegiance to the Detaining Power.

Each of the four Hague conditions, and the additional three conditions, deserves a few words of explanation:

The first condition—of subordination to a responsible commander—is designed to exclude the possibility of activities of individuals (known in French as “*franc-tireurs*”) on their own. The operation of small units of irregular forces is permissible, provided that the other conditions are fulfilled, but there is no room for individual initiatives. John Doe or Richard Roe—especially in an occupied territory—cannot legitimately conduct a private war against the enemy.

The second condition—of having a fixed distinct emblem recognizable at a distance—is predicated on two elements. The emblem in question must meet the dual requirement of distinction (i.e., it must identify and characterize the force using it) and fixity (to wit, the force is not allowed to confuse the enemy by ceaselessly changing its distinctive emblem). The most obvious fixed distinct emblem of regular armed forces is that of a particular uniform. But irregular armed forces need not have any uniform, and suffice it for them to possess a less complex distinctive emblem: part of the clothing (like a special shirt or particular headgear) or certain insignia.<sup>38</sup>

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36. *Id.* at 451–454.

37. Ex parte *Quirin*, *supra* note 14, at 35–36.

38. JEAN DE PREUX, COMMENTARY III: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 60 (1960).

The fixed distinctive emblem must be worn throughout every military operation against the enemy in which the combatant takes part (throughout means from start to finish, namely, from the beginning of deployment to the end of disengagement), and the emblem must not be deliberately removed at any time in the course of the operation.<sup>39</sup> Still, combatants are not bound to wear the distinctive emblem when discharging duties not linked to military operations (such as training or administration).<sup>40</sup>

The condition of having a fixed distinctive emblem raises a number of questions owing to its language. Thus, it is not easy to fully understand the obligation that the distinctive emblem will be recognizable at a distance. The phraseology must be reasonably interpreted. Combatants seeking to stay alive do not attempt to draw attention to themselves. On the contrary, even soldiers in uniform are prone to use camouflage. This is a legitimate ruse of war,<sup>41</sup> as long as the combatant merely exploits the topographical conditions: the physical as distinct from the demographic landscape of civilians.<sup>42</sup> Another question is germane to night warfare. Needless to say, if the combatant does not carry an illuminated distinctive emblem, that emblem will not be recognizable at a distance in the dark. Again, it is important that the terse and imperfect wording would not overshadow the thrust of the condition, which is crystal clear. Just as regular forces wear uniforms, so must irregular forces use a fixed emblem which will distinguish them—in ordinary circumstances and in a reasonable fashion—from the civilian population. The issue is not whether combatants can be seen, but the lack of desire on their part to create the false impression that they are civilians.

It should be added that when combatants go to (or from) battle in a vehicle or a tank—and, similarly, if they sail in a vessel or fly in an aircraft—it is not enough for each individual person to carry the distinctive emblem: the vehicle or other platform must itself be properly identified.<sup>43</sup> By the same token, the external marking of the vehicle or platform does not absolve the combatants on board from having their personal distinctive emblems. As for members of the crew of a military aircraft, there is a specific provision to that effect in Article 15 of the (non-binding) 1923 Hague Rules of Air Warfare, where it is explained that this is

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39. Howard Levie, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT* 47 (Howard S. Levie ed., 1978), (Vol. 59, US Naval War College International Law Studies).

40. WALDEMAR SOLF, *Article 44, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* 241, 252 (M. Bothe et al. eds., 1982).

41. Article 37(2) of Protocol I, in *LAWS OF ARMED CONFLICT*, *supra* note 4, at 645.

42. Bindschedler-Robert, *supra* note 13, at 43.

43. DE PREUX, *supra* note 38, at 60.

required in case the members of the crew “become separated from their aircraft.”<sup>44</sup>

The third condition—of carrying arms openly—brings up similar issues as the second. Does this mean that a combatant is barred from carrying a handgun in a holster or hand grenades in a pouch? The question is patently rhetorical. Once more, what counts is not the ambiguous language but the gist of the condition. A lawful combatant must abstain from purporting to be an innocent civilian, with a view to facilitating access to the enemy by stealth. He must carry his arms openly in a reasonable way, depending on the nature of the weapon and the circumstances at hand.

The fourth condition—conduct in accordance with the *jus in bello*—is the key to lawful combatancy. Unless a combatant is willing himself to respect the *jus in bello*, he is estopped from relying on that body of law when desirous of enjoying its benefits.<sup>45</sup>

These are the original Hague conditions, endorsed by the Geneva Conventions. As mentioned, the following additional conditions are derived from the Conventions:

The fifth condition—organization—actually reinvigorates the first condition in a somewhat different way. Lawful combatants must act within a hierarchic framework, embedded in discipline, and subject to supervision by upper echelons of what is being done by subordinate units in the field.

The sixth condition—belonging to a party to the conflict—got a practical expression in the 1969 judgment of an Israeli military court in the *Kassem* case.<sup>46</sup> Here a number of people who belonged to an organization calling itself the “Popular Front for the Liberation of Palestine” crossed the Jordan River from the East Bank (the Kingdom of Jordan) to the West Bank (Israeli occupied territory) for sabotage purposes. When captured and charged with security offences, they claimed entitlement to prisoners of war status. The Israeli Military Court held that irregular forces must belong to a party to the conflict.<sup>47</sup> Since no Arab government at war with Israel had assumed responsibility for the activities of the Popular Front—which was indeed illegal in the Kingdom of Jordan—the condition was not fulfilled.<sup>48</sup> The judgment was criticized by Georg Schwarzenberger on the ground that the Geneva Conventions

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44. Hague Rules of Air Warfare, 1923, art. 15, in *LAWS OF ARMED CONFLICT*, *supra* note 4, at 207, 209.

45. See Levie, *supra* note 39, at 50–51.

46. *Military Prosecutor v. Kassem*, 42 INT’L L. R. 470 (Israel, Military Court, 1969).

47. *Id.* at 476.

48. *Id.* at 477–478.

were not meant to limit the scope of lawful combatancy under preexisting rules of international law.<sup>49</sup> However, even prior to the Geneva Conventions, the premise was that the Hague conditions apply only to combatants acting on behalf of a state party to the conflict.<sup>50</sup> It is evident that the members of an independent band of guerrillas cannot be regarded as lawful combatants, even if they observe the *jus in bello*, use a fixed distinctive emblem, and carry their arms openly. One way or another, “a certain relationship with a belligerent government is necessary.”<sup>51</sup> One can, of course, argue whether Palestinian guerrillas factually belonged at the time to a party to the conflict. But the condition itself is irrefragable.

The seventh and last condition—of non-allegiance to the Detaining Power—is not specifically mentioned in the Geneva Conventions, and is derived from the case law. The principal authority is the 1967 Judgment of the Privy Council in the *Koi* case,<sup>52</sup> in which captured Indonesian paratroopers—landing in Malaysia—included a number of Malays convicted and sentenced to death for having unlawfully possessed arms in a security zone. The question on appeal before the Privy Council was whether they were entitled to prisoners of war status. The Privy Council held (per Lord Hodson) that nationals of the Detaining Power, as well as other persons owing it a duty of allegiance, are not entitled to such status.<sup>53</sup> This was viewed by the Privy Council as a rule of customary international law.<sup>54</sup> Although the condition does not appear in the text of Article 4(A), the Privy Council found other provisions of Geneva Convention (III)—specifically Articles 87 and 100<sup>55</sup>—in which it is clearly stated that prisoners of war are not nationals of the Detaining Power and do not owe it any duty of allegiance.<sup>56</sup>

The requirement of nationality (or allegiance) has to be approached carefully. The fact that a combatant belonging to state A—captured by state B—is a national of state C, does not make any difference. A German soldier in the French Foreign Legion was entitled to a prisoner of war status in the Indo-

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49. Georg Schwarzenberger, *Human Rights and Guerrilla Warfare*, 1 ISR. Y.B. HUM. RTS. 246, 252 (1971).

50. Lester Nurick & Roger Barrett, *Legality of Guerrilla Forces under the Laws of War*, 40 AM. J. INT'L L. 563, 567–569 (1946).

51. Bindschedler-Robert, *supra* note 13, at 40.

52. Public Prosecutor v. *Koi*, A.C. 829 (1967).

53. *Id.* at 856–858.

54. *Id.* at 856–857.

55. Geneva Convention III, arts. 87 & 100, in LAWS OF ARMED CONFLICT, *supra* note 4, at 460, 464.

56. *Koi*, *supra* note 52, at 857.

China War. But such a soldier would not have been entitled to the same status if fighting in a war against Germany.

The *Koi* case occasions also a question of the law of evidence. Under Article 5 (para. 2) of Geneva Convention (III), should any doubt arise as to whether certain persons belong to any of the categories enumerated in Article 4, they enjoy the Convention's protection until their status is determined by a competent tribunal. Opinions in the Privy Council were divided as to whether the mere allegation by a defendant that he is a foreign national generates doubt in accordance with Article 5: the majority held that that was the legal position, but a minority dissented.<sup>57</sup> The more central issue is that of the burden of proof. The minority opined that the burden of proof lies on the defendant, who must show that he is entitled to prisoner of war status (and consequently that he is not a national of the Detaining Power).<sup>58</sup> The majority did not address the point. But the correct position apparently is that, once a defendant persuades the court that he is a member of the enemy armed forces, the burden of proof that he owes allegiance to the Detaining Power (and is therefore not entitled to prisoner of war status) falls on the prosecution.<sup>59</sup> Incontestably, the defendant first has to establish that he is a member of the enemy armed forces.

It is not easy for irregular forces to observe cumulatively the seven conditions catalogued or—for that matter—even the core four Hague conditions. These conditions are actually patterned after the operations of regular forces (to which they do not explicitly allude). Regular forces are organized, are subject to hierarchical discipline, and naturally belong to a party to the conflict; they have a proud tradition of wearing uniforms and carrying their arms openly; they are trained to observe the *jus in bello*; and the issue of allegiance scarcely arises. However, with irregular forces (to whom the conditions expressly refer), the position is not so simple. Even if other problems are ignored, the difficulty to meet both the (ii) and (iii) conditions (of a fixed distinctive emblem and carrying arms openly) is blatant, “since secrecy and surprise are the essence” of guerrilla warfare.<sup>60</sup> Most of the partisan (resistance) movements of World War II did not fulfil all the cumulative conditions.<sup>61</sup> From a

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57. *Id.* at 855, 865.

58. *Id.* at 864.

59. Richard Baxter, *The Privy Council on the Qualifications of Belligerents*, 63 AM. J. INT'L L. 290, 293 (1969).

60. Richard Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 328 (1951).

61. Jean Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT'L L. 462, 472 (1951).

practical standpoint, many believe that “obedience to these rules would be tantamount to committing suicide, as far as most guerrillas would be concerned.”<sup>62</sup> Still, these are the norms of the Hague Regulations, the Geneva Conventions, and customary international law.

Under the Hague Regulations, the Geneva Conventions, and customary international law, the only time that the cumulative conditions are eased is that of “levée en masse.” It must be accentuated that this category applies only to the inhabitants of unoccupied areas, so that there is no “levée en masse” in occupied territories. The idea (originating in the French Revolution<sup>63</sup>) is that at the point of invasion—and in order to forestall occupation—the civilian population takes arms spontaneously, without an opportunity to organize. This is an extraordinary situation in the course of which—for a short while and as an interim stage in the fighting—there is no need to meet all seven cumulative conditions to the status of lawful combatancy. The Hague Regulations and Geneva Conventions enumerate only two cumulative conditions: carrying arms openly and respect for the jus in bello (conditions (iii) and (iv)). It follows that there is no need to meet the two other Hague conditions of subordination to a responsible commander and using a fixed distinctive emblem (conditions (i) and (ii)). Given the postulate that there was no time to organize, condition (v) is inapplicable. Condition (vi) is also irrelevant: when the civilian population resists invasion, the problem of belonging to a party to the conflict is moot. On the other hand, it is arguable that condition (vii) of nationality (or allegiance) remains in place. In any event, the transitional phase of “levée en masse” lapses *ex hypothesi* after a relatively short duration. One of three things is bound to happen: either the territory will be occupied (despite the “levée en masse”); or the invading force will be repulsed (thanks to the “levée en masse” or to the timely arrival of reinforcements); or the battle of defense will stabilize, and then there is ample opportunity for organization.

Both the Hague Regulations and the Geneva Conventions equate the position of certain civilians—employed by or accompanying the armed forces—to that of lawful combatants as far as prisoners of war status is concerned. Evidently, the fact that a civilian is employed by or accompanies the armed forces does not turn him into a combatant. Hence, the question of the fulfilment of most of the cumulative conditions does not arise. Yet, in all instances condition (iv) must be regarded as paramount: anybody seeking the privileges of the

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62. Gerhard von Glahn, *The Protection of Human Rights in Time of Armed Conflicts*, 1 ISR. Y.B. HUM. RTS. 208, 223 (1971).

63. On the origins of the institution, see Walter Rabus, *A New Definition of the ‘Levée en Masse,’* 24 NETH INT’L L. REV. 232 (1977).



*jus in bello* must himself respect the laws from which he proposes to benefit. Condition (vii) of nationality—or allegiance—is also relevant to civilians. Should the civilian bear light arms for self-defense, condition (iii) relating to carrying the arms openly will apply.

Who should observe the seven conditions: the individual or the group of which he is a member? The issue does not arise with respect to regular troops. The assumption is that these forces collectively fulfil all the conditions, and to the extent that there is doubt in the concrete case, it affects John Doe but not an entire army. In the *Mohamed Ali* and *Koi* cases, there was no doubt that members of the armed forces of Indonesia generally wear uniforms and do not owe allegiance to Malaysia, although the defendants in the dock failed to meet these conditions (and were therefore denied prisoners of war status). However, where irregular forces are concerned, the question whether the conditions of lawful combatancy are met may relate both to a guerrilla movement collectively and to each of its members individually. The answer to the question is contingent on the various conditions.

The addressee of conditions (i), (v) and (vi) is clearly the group collectively, and not any of the members individually. It is necessary to ascertain that the group as a whole is organized, has a responsible commander and belongs to a party to the conflict. Should that be the case, the same yardsticks must be applied to all members of the group.<sup>64</sup> The reverse applies to condition (vii), directed at each member of the group rather than the group as a collective: the link of nationality is determined individually. In between are the other conditions: (ii), (iii) and (iv). Condition (ii) on a fixed distinctive emblem requires some preliminary action on the part of the group, which must adopt its identifying emblem; if it does not do that, no member of the group is capable of meeting the condition. Still, even if the group adopts a fixed distinctive emblem, that does not mean that John Doe will use it at the critical time (just as the defendants in the *Mohamed Ali* case did not wear their uniforms at the critical time). If John Doe fails to do that, his misconduct does not contaminate the entire group, but the personal consequences are liable to be dire.

As for conditions (iii) and (iv)—carrying arms openly and observance of the *jus in bello*—the present writer believes that the correct approach is that their fulfilment should be monitored primarily on an individual basis and only secondarily on a group basis. That is to say, if observance of these conditions in the individual case comes to a test in reality, John Doe has to answer for his actual behavior. However, if no opportunity for such individual verification

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64. See Draper, *supra* note 26, at 196.



presents itself—for instance, when John Doe is captured in possession of arms but before setting out to accomplish any hostile mission—it is possible to establish how the group behaves in general and extrapolate from the collectivity to the individual. If the group as a whole has a record of disrespect for the jus in bello, there is no need to accord John Doe prisoner of war status. Conversely, if the group as a whole generally acts in compliance with the jus in bello, John Doe should be allowed to benefit from doubt. It has been contested that—even if John Doe actually observes the jus in bello—he should not be deemed a lawful combatant when the group as a whole generally acts in breach of that body of law.<sup>65</sup> This is unassailable in extreme cases, like al Qaeda. But if the conduct of the members of the group is uneven, John Doe should be judged on the merits of his own case and not on the demerits of his comrades at arms.

### *The Legal Position under Protocol I of 1977*

The legal position is radically changed pursuant to Additional Protocol I of 1977. Article 43 of the Protocol promulgates:

1. The armed forces of a Party to a conflict consist of 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.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to the conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.<sup>66</sup>

By itself, Article 43 appears to follow in the footsteps of the Hague and Geneva rules, as reflected in customary international law. Indeed, it reaffirms four of the seven conditions for (lawful) combatancy: condition (i) concerning the existence of a command responsible for the conduct of its subordinates; condition (iv) about compliance with the rules of the jus in bello; condition

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65. See *id.* at 197; see also Meron, *supra* note 12, at 65.

66. Protocol I, art. 43, in LAWS OF ARMED CONFLICT, *supra* note 4, at 647.

(v) stressing the need for organization and discipline; and condition (vi) pertaining to the need to belong to a Party to the conflict.<sup>67</sup>

Unfortunately, Article 44 goes much further:

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

during each military engagement, and

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

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

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. The protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.
5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not

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67. See Jean de Preux, *Article 43*, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 505, 517 (Y. Sandoz et al. eds., ICRC, 1987).

forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

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

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

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.<sup>68</sup>

The language of this verbose text is quite convoluted, not to say obscure. But when a serious attempt is made to reconcile its disparate paragraphs with one another, a distressing picture emerges. Notwithstanding the provision of Article 43, Article 44(2) does away—for all intents and purposes—with condition (iv): whether or not in compliance with the *ius in bello*, all combatants (i.e., those taking a direct part in hostilities) are entitled to the status of lawful combatancy and to the attendant privileges of prisoners of war. Paragraph (3) of Article 44, while paying lip service to the principle of distinction, retains only a truncated version of condition (iii): the duty to carry arms openly is restricted to the duration of the battle itself and to the preliminary phase of deployment in preparation for the launching of an attack, while being visible to the enemy. The issue of visibility to the enemy is complex, implying that if the combatant neither knows nor should know that he is visible, the obligation does not apply.<sup>69</sup> It is not clear whether visibility is determined solely by the naked eye or it also includes observation by means of binoculars and even infra-red equipment.<sup>70</sup> More significantly, there is no agreement as to when deployment begins: at the original assembly point (from which the combatants proceed to their destination) or only moments before the attack is launched.<sup>71</sup> But these and other points are quite moot, since—in a most enigmatic

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68. Protocol I, art. 44, in *LAWS OF ARMED CONFLICT*, *supra* note 4, at 647–648.

69. See Jean de Preux, *Article 44*, COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 67, at 519, 535.

70. See Solf, *supra* note 40, at 254–255.

71. See DE PREUX, *supra* note 69, at 534–535.

fashion<sup>72</sup>—Paragraph (4) mandates that, albeit technically deprived of prisoners of war status, transgressors must be accorded every protection conferred on prisoners of war. Thus, in terms of practicality, condition (iii)—however circumscribed—is vitiated by Article 44. As far as condition (ii) is concerned, the sole reference to it is made in Paragraph (7), articulating an intention to not affect the practice of wearing uniforms by regular armies. Thereby, Article 44 only underscores the elimination of condition (ii) where it really counts, namely, when irregular forces take part in hostilities. In fact, the consequence is “to tip the balance of protection in favor of irregular combatants to the detriment of the regular soldier and the civilian.”<sup>73</sup> In the final analysis, it is the civilians who will suffer. “Inevitably, regular forces would treat civilians more harshly and with less restraint if they believed that their opponents were free to pose as civilians while retaining their right to act as combatants and their POW status if captured.”<sup>74</sup>

As pointed out above, the seven cumulative conditions of lawful combatancy are onerous for irregular forces. Hence, it would have made sense to alleviate the conditions to some extent. For instance, conditions (ii) and (iii) could become alternative rather than cumulative in their application, considering that when one is fulfilled the other may be looked at as redundant.<sup>75</sup> Still, the pendulum in Article 44 has swung from one extreme to the other, reducing *ad absurdum* the conditions of lawful combatancy. The outcome is that, for contracting parties to the Protocol, the general distinction between lawful and unlawful combatants becomes nominal in value.

Objections to the new legal regime created in Article 44 are among the key reasons why the leading military power of the day—the United States—declines to ratify Protocol I (while recognizing that many of its other provisions reflect customary international law),<sup>76</sup> and this negative assessment is shared by an array of other states.

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72. See Ruth Lapidoth, *Qui a Droit au Statut de Prisonnier de Guerre?*, 82 REV. GNR'L DE DROIT INT'L PUBLIC 170, 204 (1978).

73. Guy Roberts, *The New Rules for Waging War: The Case against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 129 (1985–1986).

74. Abraham Sofaer, *The Rationale for the United States Decision*, 82 AM. J. INT'L L. 784, 786 (1988).

75. See W.J. Ford, *Members of Resistance Movements*, 24 NETH INT'L L. REV. 92, 104 (1977).

76. See INTERNATIONAL AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK, 11 (2003).

### *The War in Afghanistan*

The war in Afghanistan, waged by the United States and several allied countries against the Taliban regime and the al Qaeda terrorist network—following the armed attacks of 11 September 2001—raises multiple issues germane to the status of lawful/unlawful combatancy:

1. The first problem relates to the standing of Taliban fighters. On the one hand, the Taliban regime—on the eve of the war—was in de facto control of as much as 90% of the territory of Afghanistan. On the other hand, the regime was unrecognized by the overwhelming majority of the international community. This lack of recognition does not by itself alter the legal position of combatants under customary international law. According to Article 4(A)(3) of Geneva Convention (III), members of regular armed forces professing allegiance to a government unrecognized by the Detaining Power (the paradigmatic case being that of the “Free France” forces of General De Gaulle in World War II, unrecognized by Nazi Germany<sup>77</sup>) are entitled to prisoners of war status. Yet, inasmuch as the underlying idea is the equivalence of armed forces of recognized and unrecognized governments, the latter—no less than the former—are bound by the seven cumulative conditions of lawful combatancy. The proper question, therefore, is not whether the Taliban regime was recognized, but whether the Taliban forces actually observed all these conditions.

In light of close scrutiny of the war in Afghanistan by the world media—and, in particular, the live coverage by television of literally thousands of Taliban troops before and after their surrender—it is undeniable that, whereas Taliban forces were carrying their arms openly (condition (iii)) and possibly meeting other conditions of lawful combatancy, they did not wear uniforms nor did they display any other fixed distinctive emblem (condition (ii)). Since the conditions are cumulative, members of the Taliban forces failed to qualify as prisoners of war under the customary international law criteria. These criteria admit of no exception, not even in the unusual circumstances of Afghanistan as run by the Taliban regime. To say that “[t]he Taliban do not wear uniforms in the traditional western sense”<sup>78</sup> is quite misleading, for the Taliban forces did not wear any uniform in any sense at all, Western or Eastern (nor even any special headgear that would single them out

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77. See DE PREUX, *supra* note 38, at 62.

78. Robert Cryer, *The Fine Art of Friendship: Jus in Bello in Afghanistan*, 7 J. CONF. & SEC L. 37, 70 (2002).

from civilians). All armed forces—including those belonging to the Taliban regime—are required to wear uniforms or use some other fixed distinctive emblem. If they do not, they cannot claim prisoners of war status.

The legal position seems singularly clear to the present writer. But since some observers appear to entertain doubt in the matter (perhaps because the case of governmental forces not wearing any uniform is so extraordinary), the issue could be put to judicial test. Article 5 (Second Paragraph) of Geneva Convention (III) enunciates:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>79</sup>

*Ex abundante cautela*, the United States might be well advised to have the status of Taliban forces determined by a competent tribunal. A competent tribunal for this purpose can be a military commission.<sup>80</sup>

2. The legal position of al Qaeda fighters must not be confused with that of Taliban forces. Al Qaeda fighters constitute irregular forces. They easily satisfy the requirement of belonging to a Party to the conflict (condition (vi)): in reality, in the relations between al Qaeda and the Taliban regime there were times when it appeared that “the tail was wagging the dog,” in other words, that the party to the conflict (Afghanistan) belonged to al Qaeda rather than the reverse. Incontrovertibly, al Qaeda is a well-organized group (condition (v)), with subordination to command structure (condition (i)), and in the hostilities in Afghanistan its members carried their arms openly (condition (iii)). However, apart from the fact that al Qaeda (like the Taliban regime) has declined to use a uniform or possess a fixed distinctive emblem (condition (ii)), the group has displayed utter disdain towards the *jus in bello* in brazen disregard of condition (iv).<sup>81</sup> Al Qaeda’s contempt for this paramount prerequisite qualification of lawful combatancy was flaunted in the execution of the original armed attack of 9/11. Not only did the al Qaeda terrorists, wearing civilian clothes, hijack US civilian passenger planes. The most striking aspects

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79. Geneva Convention III, art. 5, in *LAWS OF ARMED CONFLICT*, *supra* note 4, at 432.

80. See Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 *HARV. J.L. & PUB. POL’Y* 591, 619–620 (2002).

81. See Christopher Greenwood, *International Law and the ‘War against Terrorism,’* 78 *INT’L AFF’S* 301, 316 (2002).

of the shocking events of 9/11 are that (i) the hijacked planes (with their explosive fuel load) were used as weapons, in total oblivion to the fate of the civilian passengers on board; and (ii) the primary objective targeted (the World Trade Center in New York City) was manifestly a civilian object rather than a military objective.<sup>82</sup> The net result was a carnage in which some 3,000 innocent civilians lost their lives. No group conducting attacks in such an egregious fashion can claim prisoner of war status for its fighters. Whatever the lingering doubt which may exist with respect to the entitlement of Taliban forces to prisoners of war status, there is—and there can be—none as regards al Qaeda terrorists.

3. The al Qaeda involvement raises another issue. Whereas the Taliban forces were composed of Afghan (and some Pakistani) nationals, al Qaeda is an assemblage of Moslem fanatics from all parts of the world. Most of them are apparently Arabs, but some have come from Western countries, and there were at least two cases of renegade American nationals. Without delving into the question of how the United States should have handled the situation from the standpoint of its domestic—constitutional and criminal—legal system, the salient point is that, under the *jus in bello*, irrespective of all other considerations, nobody owing allegiance to the Detaining Power can expect to be treated as a prisoner of war (condition (vii)).

4. The constraints of the conditions of lawful combatancy must not, however, be seen as binding on only one party to the conflict in Afghanistan. As the hostilities progressed, it became all too evident (again, thanks to the ubiquitous TV cameras) that some US combatants—CIA agents in the field, and conceivably others—were not wearing uniforms while in combat. It must be underscored that observance by even 99% of the armed forces of a party to a conflict of the seven conditions of lawful combatancy—including the condition relating to having a fixed distinctive emblem, such as a uniform (condition (ii))—does not absolve the remaining 1% from the unshakable obligation to conduct themselves pursuant to the same conditions. Consequently, had any US combatants in civilian clothing been captured by the enemy, they would not be any more entitled to prisoner of war status than Taliban and al Qaeda fighters in a similar situation.

5. Perhaps “the primary focus of debate and controversy” in this field has been the detention of al Qaeda terrorists transferred by the United States

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82. On the principle of military objectives, see Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN, (Andru Wall ed., 2003) (Vol 79, US Naval War College International Law Studies).

from Afghanistan to Guantanamo Bay (on the island of Cuba).<sup>83</sup> Since unlawful combatants are not entitled to prisoners of war status, most criticisms against conditions of detention in Guantanamo are beside the point. However, it must be understood that—assuming that the detainees are not charged with any crime in judicial proceedings—detention (as a purely administrative measure) cannot go on beyond the termination of hostilities: hostilities in Afghanistan as regards Taliban personnel; hostilities in which al Qaeda is involved in the case of its incarcerated fighters.

### *Conclusion*

Unlawful combatancy is a matter of great practical significance in present-day international law. Unlawful combatants may be tried for violations of ordinary domestic laws and they may also be detained without trial (as long as the hostilities by the force to whom they belong go on). The seven cumulative conditions of lawful combatancy are no doubt stringent. But as the Afghanistan case amply demonstrates, the need for maintaining the distinction between lawful and unlawful combatants is as imperative as ever. Otherwise, compliance with the basic rule of distinction between civilians and combatants would be in jeopardy.

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83. Anderson, *supra* note 80, at 621.