

## The legal situation of “unlawful/unprivileged combatants”

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While the discussion on the legal situation of unlawful combatants is not new, it has nevertheless become the subject of intensive debate in recent publications, statements and reports following the US-led military campaign in Afghanistan. Without dealing with the specifics of that armed conflict, this article is intended to shed some light on the legal protections of “unlawful/unprivileged combatants” under international humanitarian law.<sup>1</sup> In view of the increasingly frequent assertion that such persons do not have any protection whatsoever under international humanitarian law, it will consider in particular whether they are a category of persons outside the scope of either the Third Geneva Convention (GC III)<sup>2</sup> or the Fourth Geneva Convention (GC IV) of 1949.<sup>3</sup> On the basis of this assessment the applicable protections will be analysed. Before answering these questions, a few remarks on the terminology would seem appropriate.

### Terminology

In international armed conflicts, the term “combatants” denotes the right to participate directly in hostilities.<sup>4</sup> As the Inter-American Commission has stated, “the combatant’s privilege (...) is in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives.”<sup>5</sup> Consequently (lawful) combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peacetime. They can be prosecuted only for violations of international humanitarian law, in particular for war crimes. Once captured, combatants are entitled to prisoner-of-war status and to benefit from the protection of the Third Geneva Convention. Combatants are lawful military targets. Generally speaking, members of the armed forces (other

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than medical personnel and chaplains) are combatants. The conditions for combatant/prisoner-of-war status can be derived from Article 4 of GC III and from Articles 43 and 44 of PI, which developed the said Article 4.<sup>6</sup>

Generally speaking, a civilian is any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of GC III and Article 43 of PI (see PI, Article 50). Under the law governing the conduct of hostilities, as contained especially in Articles 48 *et seq.* of PI, and under customary international law, civilians are entitled to general protection against the dangers arising from military operations; in particular they may not be made the object of an attack. Except for the relatively rare case of a *levée en masse*, civilians do not have the right to participate directly in hostilities. If they nevertheless take direct part, they remain civilians but become lawful targets of attacks for as long as they do so. Their legal situation once they find themselves in enemy hands will be the crux of the following analysis.

Whereas the terms “combatant”, “prisoner of war” and “civilian” are generally used and defined in the treaties of international humanitarian law, the terms “unlawful combatant”, “unprivileged combatant/belligerent” do not appear in them. They have, however, been frequently used at least since the beginning of the last century in legal literature, military manuals and case law. The connotations given to these terms and their consequences for the applicable protection regime are not always very clear.

For the purposes of this article the term “unlawful/unprivileged combatant/belligerent” is understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy. This seems to be the most commonly shared understanding.<sup>7</sup> It would include for

<sup>1</sup> This article does not address protection deriving from other bodies of law, in particular human rights law.

<sup>2</sup> Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

<sup>3</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

<sup>4</sup> See Article 43(2) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (PI).

<sup>5</sup> Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 68.

<sup>6</sup> Article 44 of PI sets the standard for parties to the Protocol. Its status under customary international law is more doubtful.

<sup>7</sup> See for example G. Aldrich, “The Taliban, Al Qaeda, and the determination of illegal combatants”. *American Journal of International Law*, Vol. 96, 2002, p. 892; Report on Terrorism and Human Rights, *op. cit.* (note 5), para. 69.

example civilians taking a direct part in hostilities, as well as members of militias and of other volunteer corps — including those of organized resistance movements — not being integrated in the regular armed forces but belonging to a party to conflict, provided that they do not comply with the conditions of Article 4A (2) of GC III. In the following text, for reasons of convenience, only the term “unlawful combatant” will be used.

If a person who has participated directly in hostilities is captured on the battlefield, it may not be obvious to which category that person belongs. For such types of situations Article 5 of GC III (PI, Article 45) provides for a special procedure (competent tribunal) to determine the captive’s status.

The notion “unlawful combatant” has a place only within the context of the law applicable to international armed conflicts as defined in the 1949 Geneva Conventions and Additional Protocol I. The law applicable in non-international armed conflicts does not foresee a combatant’s privilege (i.e. the right to participate in hostilities and impunity for lawful acts of hostility).<sup>8</sup> Once captured or detained, all persons taking no active/direct part in hostilities or who have ceased to take such a part come under the relevant provisions of international humanitarian law (i.e. Article 3 common to the four Geneva Conventions, and Additional Protocol II, in particular Articles 4-6), as well as the relevant customary international law.<sup>9</sup>

<sup>8</sup> See also Report on Terrorism and Human Rights, *op. cit.* (note 5), para. 70.

<sup>9</sup> This may clearly be seen from the following excerpts (emphasis added):

GC I-IV, common Art. 3: “(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. (...)”

PII, Art. 2: “1. This Protocol *shall be applied without any adverse distinction* founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as ‘adverse distinction’) *to all persons affected by an armed conflict* as defined in Article 1.

2. At the end of the armed conflict, *all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict*, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.”

PII, Art. 4 (1): “*All persons who do not take a direct part or who have ceased to take part in hostilities* (...)”

PII, Art. 5 (1): “shall be respected as a minimum with regard to *persons deprived of their liberty for reasons related to the armed conflict*, whether they are interned or detained”

PII, Art. 6 (1): “This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.”

The protective rules apply regardless of the way in which such persons have participated in hostilities (e.g. in accordance with IHL or not; in accordance with national law or not; etc.). Nor does it matter whether the person was a member of an armed rebel group, a member of the armed forces of a State or a civilian who (temporarily) took a direct/active part in hostilities.

### **The legal protection of unlawful combatants under GC IV**

Given that unlawful combatants as defined in the previous section do not meet the conditions to qualify as prisoners of war and thus are not protected by GC III, this analysis will first examine whether unlawful combatants fall within the personal scope of application of GC IV. It will then consider to what particular protections they are entitled once they are in enemy hands. Lastly, the implications of the law on the conduct of hostilities will be briefly discussed.

In accordance with the rules of interpretation of international treaties, the main focus will be on the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".<sup>10</sup> Subsidiarily, the *travaux préparatoires* and legal writings will also be analysed.

#### **Personal field of application of GC IV as defined in Article 4 thereof**

The personal field of application of GC IV is defined in the following terms. Article 4 (1) specifies:

"Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

This definition seems all-embracing. According to this paragraph *any person* would be protected once he/she finds himself/herself in the hands of a Party to a conflict or occupying Power. Only nationals of that Party/Power are excluded.<sup>11</sup> The very broad wording of the paragraph, read in isolation, would not only include civilians but even members of the armed forces.<sup>12</sup>

The scope of application is, however, reduced by specific exceptions. The following persons are excluded by the subsequent paragraphs of Article 4:

<sup>10</sup> Art. 31 of the Vienna Convention on the Law of Treaties.

<sup>11</sup> The provisions of Part II are, however, wider in application, as defined in Article 13.

<sup>12</sup> J. Pictet (ed.), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, (hereinafter *Commentary IV*), p. 46.

According to its paragraph 2:

- “Nationals of a State which is not bound by the Convention” are not protected (this is a highly theoretical restriction, since the 1949 Conventions have virtually universal participation);
- “Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State,” are not protected “while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are”.

For the latter exception the wording is not absolutely clear. According to the ICRC Commentary to Article 4 of GC IV — which is confirmed by the *travaux préparatoires* — the following distinction is required:

On the territory of belligerent States nationals of a neutral or co-belligerent State, so long as the State in question has normal diplomatic representation in the State in whose territory they are, are excluded. In occupied territories nationals of a co-belligerent State, so long as the State in question has normal diplomatic representation in the occupying State, are excluded. However, in this situation, nationals of neutral States are protected persons and the Convention is applicable to them. Its application in this case does not depend on the existence or non-existence of normal diplomatic representation.<sup>13</sup>

According to Article 4 (4), GC IV does not protect persons protected by GC I-III.

A textual interpretation of the Conventions can only lead to the conclusion that all persons who are not protected by GC I-III, thus also persons who do not respect the conditions which would entitle them to POW status/treatment, are covered by GC IV provided that they are not:

- nationals of a State which is not party to the Convention;
- nationals of the Party/Power in which hands they are; or
- nationals of a neutral State (only if they are in the territory of a belligerent State) or co-belligerent State with normal diplomatic representation (for details see the foregoing quotation from the ICRC Commentary).

<sup>13</sup> *Commentary IV, op. cit* (note 12), p. 46. Commentaries concerning the draft Convention, Final Record of the Diplomatic Conference of 1949 (hereinafter Final Record), Vol. II A, p. 814. See also the explanation by the Swiss Rapporteur at the Diplomatic Conference, who confirmed that interpretation, Final Record, Vol. II A, p. 793. See also the statement by the US, *ibid.*, p. 794.

The fact that a person has unlawfully participated in hostilities is not a criterion for excluding the application of GC IV. On the contrary, Article 5 of GC IV, which allows for some derogations — under strict conditions — from the protections of GC IV, uses the term “protected persons” with regard to persons detained as spies or saboteurs as well as persons definitely suspected of or engaged in activities hostile to the security of the State/Occupying Power. Both the concepts of “activity hostile to the security of the State/Occupying Power” and of “sabotage”<sup>14</sup> certainly encompass direct participation (without entitlement) in hostilities. Thus, this article would apply in particular to persons who do not fulfil the criteria of GC I-III and take a direct part in hostilities, i.e. persons labelled “unlawful combatants”.<sup>15</sup>

A further argument for the application of GC IV to “unlawful combatants” can be drawn from Article 45 (3) of PI. The provision reads as follows:

“Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.”

This provision of Additional Protocol I, which was adopted by consensus,<sup>16</sup> contains an implicit confirmation of our interpretation of GC IV that “unlawful combatants” are protected persons under GC IV if they fulfil the above-mentioned nationality criteria. By stating in Article 45 (3) of PI that “any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in

<sup>14</sup> See E. Rosenblad, “Guerrilla warfare and international law”. *Revue de droit pénal militaire et de droit de la guerre*, 1973, pp. 110 *et seq.* Rosenblad further states: “A saboteur, who is [sic] unlawful combatant, is on the one hand punished in accordance with the Civilians Convention. Granted that he is a “protected person” (Article 4) and that in this capacity he shall be unconditionally “treated with humanity” (third paragraph of Article 5). A protected person can, however, if ‘imperative reasons of security’ make this necessary, be subjected to assigned residence or to internment (Article 78). Furthermore, the Occupying Power can under certain circumstances retain a saboteur without judgement (second paragraph of Article 5) and, in the case of prosecution, sentence him to death (second paragraph of Article 68).”

<sup>15</sup> See F. Kalshoven, “The position of guerrilla fighters under the law of war”. *Revue de droit pénal militaire et de droit de la guerre*, 1972, p. 72, for guerrilla fighters whom he defines as persons (taking a direct part in hostilities) not regarded as prisoners of war, *ibid.*, pp. 65, 69.

<sup>16</sup> CDDH/SR.41, O.R. Vol. VI, p. 155.

accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol”, it recognizes that GC IV is in fact applicable to some categories of unlawful combatants — otherwise the formulation “who does not benefit from more favourable treatment in accordance with the Fourth Convention” would be meaningless. The second sentence of that paragraph (“In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention”) implicitly recognizes that especially unlawful combatants in occupied territory (i.e. protected persons participating directly in hostilities in occupied territory without being entitled to POW status) are protected by GC IV. If unlawful combatants in occupied territories were not covered by GC IV, there would be no reason to restrict the scope of its Article 5.<sup>17</sup>

Further support for our interpretation may also be found in Military Manuals. For example in the US Military Manual FM 27-10, *The Law of Land Warfare*, 1956, pp. 31, 98 *et seq.*, the law is developed as follows (emphasis added):

“72. Certain Persons in Occupied Areas

Persons in occupied areas not falling within the categories set forth in Article 4 [GC III], who commit acts hostile to the occupant or prejudicial to his security are subject to a special regime [reference is made to the provisions of GC IV, Part III, Section III] ...

73. Persons Committing Hostile Acts Not Entitled To Be Treated as Prisoners of War

*If a person is determined by a competent tribunal, acting in conformity with Article 5 [GC III] not to fall within any of the categories listed in Article 4 [GC III], he is not entitled to be treated as a prisoner of war. He is, however, a “protected person” within the meaning of Article 4 [GC IV]. ...*

247. Definition of Protected Persons

[quotation of GC IV, Art. 4]

*Interpretation. Subject to qualifications set forth in paragraph 248, those protected by [GC IV] also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war.*

<sup>17</sup> See in this regard M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, pp. 261 *et seq.*

## 248. Derogations

### a. Domestic and Occupied Territory

[reference is made to GC IV, Art. 5]

b. Other Areas. Where, in territories other than those mentioned in a. above, a Party to the conflict is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person is similarly not entitled to claim such rights and privileges under [GC IV] as would, if exercised in favour of such individual person, be prejudicial to the security of such a State."

See also the British Manual Part III—The Law of War on Land, 1957, n° 96:

«Should regular combatants fail to comply with these four conditions [of GC III, Art. 4], they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture. Thus regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war. But they would appear to be entitled, as a minimum, to the limited privileges conferred upon civilian spies or saboteurs by the Civilian Convention, Art. 5. (...) Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies."

### Travaux préparatoires

The issue of persons qualifying as unlawful combatants, as defined for the purposes of this article, was touched upon in two committees dealing with GC III and GC IV. On the basis of the Final Records it is difficult to reach a definite conclusion, although there might be good reason to believe that "unlawful combatants" meeting the nationality criteria of Article 4 of GC IV are protected by GC IV (and that this protection is subject to derogations). The difficulty of reaching a positive conclusion lies in the fact that first of all, the recorded statements can hardly be considered representative, since they reflect only the views of some delegations. Secondly, they were made in different committees and at different stages of the negotiations; in particular, some statements relating to GC III were made at a time when Article 5 of GC IV had not yet been proposed. Thirdly, the terms "unlawful combatants"/"unprivileged belligerents" were generally not used; instead, references are found to persons violating the laws of war, saboteurs and spies. In Committee II, discussing GC III, the underlying view seems primarily to have been that "unlawful combatants" should not be entitled to the same protection as prisoners of war, nor to all the protections accorded to



“peaceful” civilians,<sup>18</sup> but that they should be entitled to a humane treatment and not be summarily executed.<sup>19</sup>

The draft Convention III, as approved by the International Red Cross Conference in Stockholm and submitted to the Diplomatic Conference of 1949, contained the following paragraph in Article 3 defining POWs:

“The present Convention shall also provide a minimum standard of protection for any other category of persons who are captured or detained as the result of an armed conflict and whose protection is not specifically provided for in any other Convention.”

The ICRC delegate Mr Wilhelm explained this paragraph as follows:

“The ICRC was uncertain which category of persons it was desired to cover. The present Conference was engaged in framing a Convention to protect members of armed forces and similar categories of persons, such as members of organized resistance movements, and another convention to protect civilians. Although the two Conventions might appear to cover all the categories concerned, irregular belligerents were not actually protected. It was an open question whether it was desirable to give protection to persons who did not conform to the laws and customs of war; but in view of the fact that isolated cases might arise which deserved to be taken into account, it would appear necessary to provide for a general clause of protection, similar to the one contained in the Hague Convention of 1907, to which the Soviet Delegate had referred. It did not however seem expedient to introduce this conception into an Article, the main object of which was to define clearly all the categories of persons who should be protected by the present Convention [III].”<sup>20</sup>

<sup>18</sup> See for example Colonel Hodgson (Australia): “In his opinion, the rights of the State in relation to certain persons such as spies, saboteurs, fifth columnists and traitors, had been insufficiently defined. (...) It was desirable to provide for the necessary exceptions to the rules for protection contained in the Convention.” (Committee III (Civilians), 2nd meeting, 26.4.1949), Final Record, Vol. II A, p. 622.

<sup>19</sup> Wilhelm (ICRC), Cohn (Denmark), Final Record, Vol. II A, p. 433; Brigadier Page (UK): “The whole conception of the Civilians Convention was the protection of civilian victims of war and not the protection of illegitimate bearers of arms, who could not expect full protection under rules of war to which they did not conform. Such persons should no doubt be accorded certain standards of treatment, but should not be entitled to all the benefits of the Convention. (...) To sum up, the United Kingdom Delegation considered that (...) civilians who violated those rules should cease to be entitled to the treatment provided for law-abiding citizens. The United Kingdom Delegation would not however oppose any reasonable proposal to ensure that such civilians were humanely treated.” (Committee III (Civilians), 2nd meeting, 26.4.1949), Final Record, Vol. II A, p. 621; General Dillon (USA): “Clearly, the persons not enumerated in Article 3 [Art. 4 GC III] were not to be deprived of all rights”. Final Record, Vol. II A, p. 409.

<sup>20</sup> Final Record, Vol. II A, p. 433.

From this statement, three essential points can be singled out:

First, Mr Wilhelm interpreted the Stockholm drafts of GC III and IV as not protecting irregular belligerents or "persons who did not conform to the laws and customs of war". This is rather surprising, given that the personal scope of application of GC IV was very broadly defined,<sup>21</sup> unless he meant that such persons might be covered by the personal field of application but that the substantive provisions did not really accord protection (if he limited his statement to unlawful combatants on the battlefield as defended nowadays in the legal literature by, for example, Baxter, Draper and Kalshoven).

Second, he recognized the need for minimum protection of such persons, which can be derived from the Martens Clause.

Third, this protection should not be spelled out in a convention dealing with POWs.

The Danish delegate responded by saying that "it was not a question of granting the persons referred to in the paragraph the same rights and privileges as those of prisoners of war, but simply of affording "a minimum of protection", "of preventing such persons from being subjected to inhuman treatment or summarily shot".<sup>22</sup>

Other delegates were not opposed to providing a minimum of protection, but could not agree that such a protection clause be introduced in GC III. Thus the proposed paragraph 3 of draft Article 3 [GC III, Art. 4] was not retained.<sup>23</sup> Instead the Conference essentially agreed upon what became the substance of Article 5 of GC III (i.e. protection as POWs for "persons resisting the enemy" until a competent tribunal determines their status). The second part of the latter proposal, which read: "Even in cases where the decision of the above-mentioned authorities would not allow these persons to benefit under the present Convention, they shall nevertheless remain under the safeguard and rule of the principles of International Law as derived

<sup>21</sup> "Persons protected under the present Convention are those who, at a given moment and in whatever manner, find themselves, in the case of a conflict or occupation, in the hands of a Power of which they are not nationals; (...) Persons such as prisoners of war, the sick and wounded, the members of medical personnel, who are subject to other international conventions, remain protected by the said conventions." Art. 3, *Revised and New Draft Conventions for the Protection of War Victims*, texts approved and amended by the XVIIth International Red Cross Conference, Geneva, 1948, pp. 114-115.

<sup>22</sup> Final Record, Vol. II A, p. 433.

<sup>23</sup> Final Record, Vol. II A, p. 480.

from the usages prevailing among civilized nations, of human rights and the demands of the public conscience”, was likewise not retained.<sup>24</sup> In the end, the Danish delegate only asked as cited in the quotation below, for the Summary Record to mention that his view regarding interpretation of Article 3 had met with no objections.<sup>25</sup> The Committee’s discussions were summarized as follows in the Report to the Plenary Assembly:

“Certain Delegations wished to extend the application of the Convention to cover still other categories of persons. They had particularly in mind civilians who had taken up arms to defend their life, their health, their near ones, their livelihood, under an attack which violated the laws and conditions of war and desired to ensure that such civilians falling into enemy hands should not be shot after summary judgment but should be treated according to the provisions or at least the humanitarian principles of the Convention. Numerous possible solutions of this problem were carefully considered but in the end a majority of the Committee came to the conclusion that it would be difficult to take the course proposed without the risk of indirectly weakening the protection afforded to persons coming under the various categories of Article 3 [GC III, Art. 4]. One Delegation pointed out, in particular, that the acceptance of the proposed extension would be tantamount to rejecting the principles generally accepted at The Hague, and recognized in the Prisoner of War Convention. It was, according to the views of this Delegation, essential that war, even illegal war, should be governed by those principles. Nevertheless, another Delegation asked that the Summary Record should mention that no objections had been raised, during the discussion in the Special Committee, against his view that Article 3 should not be interpreted in such a way as to deprive persons, not covered by the provisions of Article 3, of their human rights or of their right of self-defence against illegal acts.”<sup>26</sup>

In the plenary debates on Article 5 of GC III (decision by a competent tribunal in case of doubt) the issue of persons not fulfilling the conditions to qualify as POWs, but participating nevertheless in hostilities (i.e. unlawful combatants), arose again. Captain Mouton (Netherlands), arguing in favour of

<sup>24</sup> Final Record, Vol. III, p. 63.

<sup>25</sup> Final Record, Vol. II A, p. 481.

<sup>26</sup> Final Record, Vol. II A, p. 562. The last two sentences of the Report to the Plenary Assembly, which touch upon separate issues but were nevertheless intermingled, gave rise to controversy in the Plenary. See Final Record, Vol. II B, p. 268.

a court decision instead of a decision by a “competent authority”, claimed that the latter approach would mean “in practice that (...) the military commander on the spot ... decides whether a person who has fallen into his hands comes under Article 3 [GC III] or does not belong to Article 3. (...) It means that if he decides that he does not belong to Article 3 he will be considered to be a *franc tireur* and be put against the wall and shot on the spot.” Mr. Morosov (USSR) responded: “Where is it laid down that any person not protected by Article 3 should be shot? I do not know of any law to this effect, and I do not know of anybody who would wish to devise a clause of that kind. ... If a person is not recognized as a prisoner of war under the terms of Article 3, such a person would then be a civilian and would enjoy the full protection afforded by the Civilians Convention.” The Dutch delegate did not accept that view and said: “That persons who do not fall under Article 3 are automatically protected by other Conventions is certainly untrue. The Civilian Convention, for instance, deals only with civilians under certain circumstances; such as civilians in an occupied country or civilians who are living in a belligerent country, but it certainly does not protect civilians who are in the battlefield, taking up arms against the adverse party. These people, if they do not belong to Article 3, and if they fall into the hands of the adverse party, might be shot (...).”<sup>27</sup>

To sum up, in the debates on GC III one statement (Russia) is recorded that GC IV automatically applies when the conditions of Article 4 of GC III are not met. The efforts by the Danish delegation focused on ensuring a minimum of protection for civilians resisting an aggressor in the exercise of self-defence without fulfilling the conditions of a *levée en masse*. The Dutch delegation rejected the Russian view as regards civilians on the battlefield taking up arms against the adverse party. Their statement can, however, be interpreted as implying that civilians taking up arms against the enemy in occupied territory or in enemy territory protected by GC IV.

The discussions in connection with GC IV must be assessed against this background. The drafting history of GC IV seems to support the view that “unlawful combatants” fulfilling the nationality criteria of its Article 4 are protected, but that the protection is subject to derogations. While certain delegations took the view that GC IV should not protect persons violating the laws of war, saboteurs and spies (who would be unlawful combatants<sup>28</sup> — although the

<sup>27</sup> Final Record, Vol. II B, pp. 271 *et seq.*

<sup>28</sup> The term “sabotage” in a military context has been said to denote acts committed in order to damage or destroy the infrastructure material of the enemy, “lines of communication” and “military installations” (GC IV, Articles 64 and 68). See Rosenblad, *op. cit.* (note 14), p. 109.

term was never used in the Final Record),<sup>29</sup> other delegations disagreed.<sup>30</sup> As stated by the Australian delegate, “two schools of thought had become evident during the discussion — that of those delegations which wished for a broad and ‘elastic’ Convention, and that of those which wanted a restricted Convention.”<sup>31</sup> In order to overcome the divergent views the Committee adopted, as a compromise, draft Article 3A (which became Article 5 of GC IV). This provision treated persons violating the laws of war, saboteurs and spies as “protected persons”, but allowed States in certain circumstances to deprive such persons of some of the protections of GC IV.<sup>32</sup> This compromise solution was finally adopted overwhelmingly by the Diplomatic Conference.<sup>33</sup>

**29** *Commentary IV, op. cit* (note 12), p. 52 (“Some people considered that the Convention should apply without exception to all the persons to whom it referred, while to others it seemed obvious that persons guilty of violating the laws of war were not entitled to claim its benefits. These divergent views had not been expressed [during preliminary discussions], however, and the problem did not arise until after the Stockholm Conference. It arose then because the Conference had adopted a definition of protected persons which covered those who committed hostile acts without being members of the regular combatant forces.”).

**30** Mr. Castberg (Norway): “Saboteurs could not of course claim protection under the Prisoners of War Convention; they should nevertheless be protected against criminal treatment and torture.” Mr. Söderbolm (Sweden) and Mr. Dahl (Denmark) supported this view. Colonel Du Pasquier (Switzerland) remained somewhat ambiguous in saying “In regard to the legal status of those who violated the laws of war, the Convention could not of course cover criminals or saboteurs. Moreover, Article 55 [Art. 64 of GC IV] and those following established the principle that an occupying Power was entitled to lay down penal regulations to protect its troops. On the other hand, Article 29 [Arts 31/32 of GC IV] and those following fixed the limits of such penal legislation and in particular prohibited torture and the taking of hostages.” He was in favour of the revised form of Article 3 as drawn up by the International Committee of the Red Cross [which would have covered unlawful combatants! Therefore, the Italian delegate Mr. Maresca, while expressing support for the ICRC proposal, suggested that a clause be added providing that protected persons were under an obligation not to act in such a way as to violate the rules of war.]. General Schepers (Netherlands) agreed with the Scandinavian delegates. (Committee III (Civilians), 2nd meeting, 26.4.1949), Final Record, Vol. II A, pp. 621 *et seq.*

**31** Final Record, Vol. II A, p. 622.

**32** See Final Record, Vol. II A, p. 796; Commentaries concerning the draft Convention, *ibid.*, p. 814: “Modern warfare does not take place on the battlefield alone; it also filters into the domestic life of the belligerent; enemy secret agents penetrate into the inner workings of the war machine, either to spy or to damage its mechanism. [...] Many Delegations have therefore felt the fear that, under cover of the protection offered by our convention, spies, saboteurs or other persons dangerous to the State may be able to abuse the rights which it provides for them. The Delegations have considered it their duty to prevent the guarantees of the Convention acting to the advantage of surreptitious activities. The idea has thus arisen that, with respect to persons who are a secret threat to the security of the State, the benefit of the Convention should be restricted to a certain extent. Owing to the very great difficulty in tracking down these underground activities, it is intended to allow the State a free hand in its defence measures without imposing any obligations under the Convention other than the duty to ensure humane and legal treatment. It was these considerations which resulted in Article 3A [Art. 5 of GC IV] (...)”

**33** Final Record, Vol. II B, pp. 377, 384: 31 votes in favour, 9 abstentions (GC IV, Art. 4); 25 votes in favour, 9 against, 6 abstentions (GC IV, Art. 5).

If the interpretation expressed by the UK delegate<sup>34</sup> of the initial draft of GC IV's Article 4<sup>35</sup> is correct (“[i]n its present form, Article 3 would mean that persons who were not entitled to protection under the Prisoners of War Convention would receive exactly the same protection by virtue of the Civilians Convention, so that all persons participating in hostilities would be protected, whether they conformed to the laws of war or not”), and since no fundamental changes were made to that draft text, there are strong reasons to believe that in the end delegations accepted that GC IV is applicable to unlawful combatants if they fulfil the conditions set forth in Article 4 thereof. The aim of a somewhat reduced protection for such persons is achieved by means of its Article 5, which was inserted at a later stage and allows for derogations for the types of persons often referred to as unlawful combatants. In short, the drafting history of GC IV — in particular the UK statement cited above — justifies the conclusion that it covers unlawful combatants and that the extent of this coverage is subject to the limitations outlined in its Article 5. The drafting history as a whole — namely the discussions on GC III and IV — shows that the issue of persons not fulfilling the conditions to qualify as POWs but participating nevertheless in hostilities was controversial at the time. There are no indications that — contrary to the adopted wording of its Article 4 — there was general agreement that GC IV should not cover “unlawful combatants”. Its broad personal scope of application was finally accepted, despite obvious hesitations, by the Diplomatic Conference. The price for this was the insertion of Article 5.

### Legal literature

In legal writings divergent opinions are expressed about the applicability of GC IV to unlawful combatants. A number of authors clearly share our view that GC IV does cover unlawful combatants if they fulfil the nationality

<sup>34</sup> Brigadier Page (UK), Committee III (Civilians), 2nd meeting, 26.4.1949, Final Record, Vol. II A, p. 621.

<sup>35</sup> “Persons protected under the present Convention are those who, at a given moment and in whatever manner, find themselves, in the case of a conflict or occupation, in the hands of a Power of which they are not nationals; (...) The provisions of Part II are, however, wider in application, as defined in Article II. Persons such as prisoners of war, the sick and wounded, the members of medical personnel, who are subject to other international conventions, remain protected by the said conventions.” Art. 3, *Revised and New Draft Conventions for the Protection of War Victims*, texts approved and amended by the XVIIth International Red Cross Conference, Geneva, 1948, pp. 114-115.

criteria.<sup>36</sup> Baxter apparently limits the scope of application of GC IV to unlawful combatants who operate in occupied territory.<sup>37</sup> The fact that he does not extend the protection to unlawful combatants operating in the territories of the parties to a conflict (Part III, Section 1) and in enemy territory (Part III, Section 2) is not consistent, given that the definition of protected persons is the same. Despite the clear indications in the wording of GC IV, some legal commentators seemingly do not recognize the applicability of GC IV to unlawful combatants at all.<sup>38</sup> However, they do not give any legal reasoning for their position. It is merely asserted that GC IV does not cover unlawful combatants; an analysis of its Article 4 is not provided. When these authorities refer to case law (in particular *ex parte Quirin*<sup>39</sup>), it is case law that predates GC IV. Considering that the issue was simply not specifically regulated in any instrument of international humanitarian law before the adoption of GC IV, this approach is somewhat doubtful. More recent case law correctly adopts a rather different view. In the *Delalic* case, the ICTY found that:

**36** K. Ipsen, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, p. 301; H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, Dartmouth, Aldershot, 2nd ed., 1998, p. 137; E. David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2nd ed., 1999, pp. 397 *et seq.*; Bothe, Partsch and Solf, *op. cit.* (note 17), pp. 261 *et seq.*; Aldrich, *op. cit.* (note 7), p. 893, footnote 12; G.I.A.D. Draper, "The status of combatants and the question of guerrilla warfare". *British Yearbook of International Law*, 1971, p. 197 (recognizes the applicability of GC IV to persons who do not fulfil the conditions of GC III, Art. 4, but participate in hostilities in enemy territory or in occupied territory, within the limits of GC IV, Art. 5); Rosenblad, *op. cit.* (note 14), p. 98 (recognizes the applicability of GC IV to members of organized resistance movements who do not fulfil the conditions of GC III, Art. 4, within the limits of GC IV, Art. 5); Kalshoven, *op. cit.* (note 15), p. 71 (recognizes the applicability of GC IV to persons who do not fulfil the conditions of GC III, Art. 4, but participate in hostilities in enemy territory or in occupied territory. In situations other than fighting in enemy territory or occupied territory, "the guerrilla fighter who falls into enemy hands will not enjoy the full protection extended to protected persons in occupied territory. It is submitted, however, that he will not be entirely without protection. The principle expounded in Article 3 for non-international armed conflict provide at the same time a minimum below which belligerents may not go in other situations either (...) To my mind, the strongest argument in favour of this thesis lies precisely in the element of their foreign nationality and, hence, allegiance to the opposite Party from the one which holds them in its power."

**37** R.R. Baxter, "So-called 'unprivileged belligerency': Spies, guerrillas, and saboteurs". *British Yearbook of International Law*, 1951, pp. 328 *et seq.*, 343 *et seq.*; R.R. Baxter, "The duties of combatants and the conduct of hostilities (Law of The Hague)", in Henry Dunant Institute and UNESCO (ed.), *International Dimensions of Humanitarian Law*, Martinus Nijhoff, The Hague, 1988, pp. 105 *et seq.*

**38** For example I. Detter, *The Law of War*, Cambridge University Press, 2000, p. 136; R.K. Goldmann/B.D. Tittemore, "Unprivileged combatants and the hostilities in Afghanistan: Their status and rights under international humanitarian and human rights law". <http://asil.org/taskforce/goldman.pdf>, p. 38; C. Greenwood, "International law and the "war against terrorism". *International Affairs* 2002, p. 316; Report on Terrorism and Human Rights, *op. cit.* (note 5), para. 74.

**39** 317 U.S. 1, 63 S.Ct. 2 (1942).

"271. [...] If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, *provided that its article 4 requirements are satisfied.*"<sup>40</sup>

In 1949, GC IV was adopted in the knowledge of the problems associated with unlawful combatants (see the discussions during the Diplomatic Conference). It is therefore in our view hardly defensible to maintain that unlawful combatants were generally excluded from the scope of application of GC IV, contrary to the rather comprehensive wording of its Article 4. The same would be true of claims that there is coexisting customary international law which comprehensively covers unlawful combatants and would constitute a sort of *lex specialis* (the US Manual quoted above would be contrary to such a rule of customary international law!). In this connection it should also be recalled that the drafters of PI apparently had an understanding of the scope of application of GC IV which would include at least certain types of unlawful combatants.

#### Substantive protections for unlawful combatants under GC IV

With regard to the treatment of protected persons, GC IV provides for various standards of protection depending on the situation in which they find themselves in the hands of another Party/Power. Part III thereof defines the material scope of protection for protected persons within the meaning of GC IV's Article 4. Its first section contains provisions common to the territories of the parties to conflict and to occupied territories. These include:

rules on humane treatment; special protection for women; non-discrimination; prohibition of the use of protected persons as human; prohibition of coercion and of corporal punishment, torture, etc.; individual responsibility; and prohibition of collective punishment, pillage, reprisals and hostage taking.

This section is followed by specific provisions on the treatment of aliens in the territory of a party to conflict (Section II), which deal *inter alia* with:

the right to leave the territory; the treatment of persons in confinement; the right to individual/collective relief, to medical attention and to

<sup>40</sup> ICTY, Judgment, *The Prosecutor v. Delalic et al.*, IT-96-21-T, 16 November 1998, para. 271 (emphasis added).



practise their religion; employment; measures of control, i.e. assigned residence and internment, and the procedure to be followed; and transfer to another Power.

Section III, on protected persons in occupied territory, includes rules on: deportation and transfers; children; labour; food and medical supplies for the population; hygiene and public health; relief operations; penal legislation; penal procedure; treatment of detainees; and security measures.

Section IV contains regulations for the treatment of internees, *inter alia* on: places of internment; food and clothing; hygiene and medical attention; religious, intellectual and physical activities; personal property and financial resources; administration and discipline; relations with the outside; penal and disciplinary sanctions; transfers of internees; deaths; and release, repatriation and accommodation in neutral countries.

Article 79 of that section stipulates that protected persons may not be interned, except in accordance with the provisions of Articles 41-43 (aliens in the territory of a party to conflict) and Articles 68 and 78 (protected persons in occupied territory).

Since unlawful combatants are protected by GC IV if they fulfil the nationality criteria set out in Article 4 thereof, the above forms of protection also apply to them. In addition to the general protections of Part III, Section 1, applicable to the territories of Parties to the conflict and to occupied territories, specific protections are foreseen for unlawful combatants operating in occupied territory and for unlawful combatants in enemy territory. These protections may, however, be subject to derogations under Article 5 of GC IV (see below).

The fact that GC IV only provides for different *specific* protections to aliens in the territory of an enemy party to the conflict and persons in occupied territory, who are in the hands of the adverse party, may have led some experts to conclude that the situation of unlawful combatants in the zone of military operations (at the front/on the battlefield in their own country, which is not occupied) was not taken into account in the drafting of GC IV, and in particular of Articles 4 and 5.<sup>41</sup>

If, however, the interpretation of GC IV's Article 6 proposed in the Commentary edited by J.S. Pictet is accepted, this approach would be difficult to defend:

<sup>41</sup> See A. Rosas, *The Legal Status of Prisoners of War*, Helsinki, Suomalainen Tiedeakatemia, 1976, p. 411; Baxter, "Unprivileged belligerency", *op. cit.* (note 37), pp. 329 *et seq.*

"It follows from this that the word "occupation". as used in the Article, has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. (...) The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left."

Under the foregoing interpretation, every person who fulfils the nationality criteria as set out above and is captured while enemy armed forces are present (from the moment of invasion until the withdrawal) would be protected by the provisions of GC IV (Part III, Sections I, III and IV).

This interpretation of the concept of occupation, however, is not universally shared. The German Military Manual for example states: "Occupied territory does not include battle areas, i.e. areas which are still embattled and not subject to permanent occupational authority (area of invasion, withdrawal area)." In the commentary to that provision of the manual it is further explained: "The law of occupation is not applicable until the armed forces invading a foreign country have established actual control over a certain territory (after invasion), and ceases to apply when they no longer have such control (after withdrawal). The rules are intended to apply in stable situations."<sup>42</sup> Similarly, the distinction proposed by Draper, Baxter and Kalshoven<sup>43</sup> can be of significance only if they have a different understanding of occupation, which for them would probably require a minimum control of territory for some time by the adverse party.

As a consequence of that interpretation, persons who fulfil the nationality criteria as set out above, and who find themselves in enemy hands in battle areas where no actual control has been established, would not be covered by the provisions of Part III, Sections III and IV, of GC IV. They would

<sup>42</sup> H.P. Gasser, in Fleck (ed.), *op. cit* (note 36), p. 528.

<sup>43</sup> See footnotes 30 and 31.

be protected by the rather general provisions of GC IV, Part II,<sup>44</sup> and should also come within the protections of its Part III, Section I.<sup>45</sup>

But what will their protection be once they are taken from the battle area to enemy territory or occupied territory, or if the battle area itself becomes occupied territory (i.e. foreign troops have established actual control)? Does it matter that these persons were not in enemy territory or occupied territory at the time they were captured? The normal reflex would possibly be that the law applicable to the place where they are held should apply, i.e.:

- Part III, Sections I, III and IV, of GC IV for persons who end up in occupied territory;
- Part III, Sections I, II and IV, of GC IV for persons who end up in enemy territory.

The very broad wording of Article 4 of GC IV points in that direction by specifying that the Convention protects “those who, *at a given moment and in any manner whatsoever*, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power”.<sup>46</sup> Support for our position

**44** Provisions on:

- the establishment of hospital and safety zones and neutralized zones;
- the conclusion of agreements for the evacuation of especially vulnerable categories of persons;
- the protection of civilian hospitals;
- the protection of medical personnel;
- the protection of transports of sick and wounded civilians and other especially vulnerable categories of persons on land, by sea or by air;
- the free passage of aid consignments;
- the special protection of children;
- permission to exchange family news; and
- facilitating enquiries relating to missing family members.

For the purpose of this article they are not relevant because they do not regulate the treatment/detention/prosecution of protected persons.

**45** In addition Art. 3 common to GC I-V, the application of which is recognized in any type of armed conflict as a matter of customary international law (see the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14 at p. 114, para. 218), would also apply, as well as other minimum guarantees which will be discussed below.

**46** In the *Rajic* case (Review of the Indictment, *Prosecutor v. Ivica Rajic*, IT-95-12-R61, paras. 35-37), the ICTY held that: “The International Committee of the Red Cross’s Commentary on Geneva Convention IV suggests that the protected person requirement should be interpreted to provide broad coverage. The Commentary states that the words ‘at a given moment and in any manner whatsoever’ were ‘intended to ensure that all situations and all cases were covered’. International Committee of the Red Cross, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 47 (Geneva 1958) (...). At page 47 it further notes that the expression ‘in the hands of’ is used in an extremely general sense.

It is not merely a question of being in enemy hands directly, as a prisoner is ... In other words, the expression ‘in the hands of’ need not necessarily be understood in the physical sense; it simply means that the person is in territory under the control of the Power in question.”

may be found in the Commentary edited by Pictet, which states: "The Article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances: travellers, tourists, people who have been shipwrecked and even, it may be, spies or saboteurs."<sup>47</sup>

However, those authors who agree that GC IV is applicable to unlawful combatants in occupied territory or in enemy territory do not further pursue that line of thought. They seem to limit the specific protections of GC IV to unlawful combatants operating in occupied territory or in enemy territory at the time of their capture.<sup>48</sup> In the words of Draper: "If they were *operating in neither type of territory*, their position is far from clear and their protection is speculative."<sup>49</sup>

If that approach is agreed with, there should be no doubt that at least Article 75 of PI and Article 3 common to GC I-IV do as customary international law provide for a minimum of protection.

### Derogations

The rights and privileges defined in particular in Part III of GC IV are not absolute. Article 5 of GC IV provides for derogations in specific circumstances:

"Where in the territory of a Party to the conflict, the latter is satisfied that an individual *protected person is definitely suspected of or engaged in activities hostile to the security of the State*, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, *be prejudicial to the security of such State*.

Where in occupied territory an individual *protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power*, such person shall, in those cases where

<sup>47</sup> Commentary IV, *op. cit* (note 12), p. 47.

<sup>48</sup> Draper, *op. cit* (note 36), p. 197; Baxter, "Unprivileged belligerency", *op. cit* (note 37), pp. 328 and 343 *et seq.*; Baxter, "Duties of combatants". *op. cit* (note 37), pp. 105 *et seq.*; Kalshoven, *op. cit* (note 15), pp. 70 *et seq.*, 73; Rosas, *op. cit* (note 41), pp. 411 *et seq.* In one of its publications the ICRC has also chosen such a formulation, which could point to such an interpretation: "thus guerrillas who do not meet these conditions [of GC III, Art. 4] and who operate in occupied territory are protected by Geneva Convention IV". *Rules Applicable in Guerrilla Warfare*, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May – 12 June 1971, Paper submitted by the International Committee of the Red Cross, Geneva, January 1971, p. 19.

<sup>49</sup> Draper, *op. cit* (note 36), p. 197.

absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.” (Emphasis added.)

On reading this article it could be taken to apply in particular to persons who take a direct part in hostilities without fulfilling the criteria of GC I-III, i.e. such persons as are labelled “unlawful combatants”.<sup>50</sup> As pointed out above, both the concepts of “activity hostile to the security of the State/Occupying Power” and of “sabotage”<sup>51</sup> certainly do encompass direct participation in hostilities (without being entitled thereto).

Article 5 contains the following distinction:

- in the territory of a Party to conflict, such persons are not entitled to claim such rights and privileges under GC IV as would, if exercised in the favour of such individual person, be prejudicial to the security of such State;<sup>52</sup>
- in occupied territory, such persons are, in those cases where absolute military security so requires, regarded as having forfeited rights of communication under GC IV.

<sup>50</sup> See Kalshoven, *op. cit* (note 15), p. 72, for guerrilla fighters whom he defines as persons (taking a direct part in hostilities) not regarded as prisoners of war, *ibid.*, pp. 65, 69.

<sup>51</sup> See references in note 10.

<sup>52</sup> As for possible derogations under para. 1, *Commentary IV, op. cit* (note 12), p. 55, indicates the following: “The rights referred to are not very extensive in the case of protected persons under detention; they consist essentially of the right to correspond, the right to receive individual or collective relief, the right to spiritual assistance from ministers of their faith and the right to receive visits from representatives of the Protecting Power and the International Committee of the Red Cross. The security of the State could not conceivably be put forward as a reason for depriving such persons of the benefit of other provisions — for example, the provision in Article 37 that they are to be humanely treated when they are confined pending proceedings or subject to a sentence involving loss of liberty, or the stipulation in Article 38 that they shall receive medical attention, if their state of health so requires. Furthermore, it would be really inhuman to refuse to let a chaplain visit a detained person who was seriously ill. Torture and recourse to reprisals are of course prohibited. It should, moreover, be noted that this provision cannot release the Detaining Power from its obligations towards the adverse Party. It remains fully bound by the obligation, imposed on it by Article 136, to transmit to the official Information Bureau particulars of any protected person who is kept in custody for more than two weeks. This is not, in fact, a right or privilege of the protected person, but an obligation of the Detaining Power.”

Apart from problems of interpretation of concepts such as "definitely suspected"<sup>53</sup>, "hostile to the security of the State". "such rights and privileges ... as would be prejudicial to the security of such State". "absolute military security so requires", the meaning of Article 5 (2), which gives a right to derogate only from the provisions relating to communication, is rendered somewhat unclear by paragraph 3, according to which "in each case" (i.e. both in the situations referred to in paragraph 1 and in those referred to in paragraph 2) the protected persons "shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention".<sup>54</sup> If only provisions relating to communication can be derogated from, why is there a need to indicate as minimum protections humane treatment and fair trial?<sup>55</sup>

The two categories of non-derogable protections include: the right to "humane treatment" as defined in Articles 27 and 37, and thus the prohibition of torture and ill-treatment;<sup>56</sup> as well as the fair trial rights contained in Articles 71-76,<sup>57</sup> which are made applicable to internees in non-occupied territory by Article 126 in the event of criminal proceedings.<sup>58</sup>

### Minimum guarantees under customary international law

As we have seen, the protection of unlawful combatants under GC IV depends on whether they fulfil the nationality criteria set out in Article 4.

<sup>53</sup> As far as suspicion is concerned, it is important to emphasize that "[t]he suspicion must not rest on a whole class of people; collective measures cannot be taken under this Article; there must be grounds justifying action in each individual case". *Commentary IV, op. cit* (note 12), p. 55. See also Final Record, Vol. II A, p. 815 (Committee III report to the Plenary).

<sup>54</sup> Rosas, *op. cit* (note 41), p. 412.

<sup>55</sup> See debate at the Diplomatic Conference between the representatives of the USSR and the UK, Final Record, Vol. II B, pp. 379 *et seq.*

<sup>56</sup> GC IV, Art. 32. See also Final Record, Vol. II A, p. 815 (Committee III report to the Plenary): "The third paragraph defines what was left somewhat vague by the first two paragraphs. It confirms the obligations of the State as regards humane treatment and correct penal procedure; it does nothing to weaken the force of the prohibition of torture or brutal treatment." See also the findings of the ICTY in the *Delalic* case, which were adopted "in order to determine the essence of the offence of inhuman treatment [under the Geneva Conventions], the terminology must be placed within the context of the relevant provisions of the Geneva Conventions and Additional Protocols". It considered the prohibition of inhuman treatment in the context of GC II, Art. 12; GC III, Arts 13, 20 and 46; GC IV, Arts 27 and 32; GC I-IV, common Art. 3; PI, Art. 75; and PII, Arts 4 and 7; according to which protected persons "shall be humanely treated". Any conduct contrary to the behaviour prescribed in these provisions shall constitute inhuman treatment.

<sup>57</sup> *Commentary IV, op. cit* (note 12), p. 58.

<sup>58</sup> *Ibid.*, Art. 126, p. 497; Kalshoven, *op. cit* (note 15), p. 72. Otherwise common Article 3 would be the basis, *Commentary IV, op. cit* (note 12), Article 5, p. 58.

The question remains as to how far the protections of GC IV are supplemented by other rules of international law and to what extent such rules apply to unlawful combatants who do not fulfil those criteria.

The minimum guarantees applicable to all persons in the power of a party to conflict are defined nowadays in Article 75 of PI. The scope of application is defined as follows:

“1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.”

This article clearly ensures that no person in the power of a Party to an international armed conflict is outside the protection of international humanitarian law.<sup>59</sup> It defines the minimum standards that apply to any such person and thus increases existing protection, for example in the situations referred to in Article 5 of GC IV. As pointed out above, Article 45 (3) of PI explicitly recognizes the application of Article 75 to unlawful combatants.

The said Article 45<sup>60</sup> not only contains an implicit confirmation of our interpretation of the personal field of application of GC IV but, in connection with Article 75 of PI, it supplements the protection of unlawful combatants. This is done in two ways:

First, Article 45 (3) in conjunction with Article 75 provides for a minimum of protection for those unlawful combatants not covered by GC IV because they do not fulfil the nationality criteria of GC IV's Article 4 and — if the interpretation defended by Baxter, Draper and Kalshoven is followed

<sup>59</sup> See statement by the ICRC at the Diplomatic Conference of 1974-1977, CDDH/III/SR.43, OR Vol. XV, pp. 25 *et seq.*; Finland, *ibid.*, p. 27, Belgium, *ibid.*, p. 31, Holy See, *ibid.*, p. 34.

<sup>60</sup> This paragraph does not cover combatants who are denied prisoner-of-war status by application of paragraph 4 of Article 44 (i.e. members of the armed forces who do not comply with the minimum standards of distinction). The latter in fact continue to come within the scope of the procedural guarantees of the Third Convention, whereas the provision under consideration here concerns persons who are refused these guarantees.

— for those who fall into enemy hands in the battle area.<sup>61</sup> Previously, these types of unlawful combatants were protected solely on the basis of common Article 3 as customary international law or of the Martens Clause.

Second, for those unlawful combatants who are protected by GC IV it complements that protection by defining minimum guarantees which must be respected in all circumstances. More specifically:

(1) For unlawful combatants in enemy hands on enemy territory, Article 75 of PI specifically ensures that various judicial guarantees are respected (para. 4). Before the adoption of PI this was possible only on the basis of common Article 3 as customary international law<sup>62</sup> or of GC IV's Article 126.<sup>63</sup> In addition, Article 75 of PI lays down other protections in relation to treatment (paras 1 and 2) and to arrest, detention and internment (para. 3), which in certain cases increase the protections contained in Part III, Sections I, II and IV, of GC IV.

(2) For unlawful combatants in enemy hands in occupied territory, Article 75 PI adds a few more judicial guarantees, such as the presumption of innocence. The protections in relation to treatment, arrest, detention and internment are supplemented. In addition, Article 45 (3) of PI restricts the possibility for derogations under GC IV's Article 5.

This interpretation is largely shared by Bothe, Partsch and Solf in their commentary on PI:

“Paragraph 3 applies the safeguards and protections of Art. 75 to any person who has taken part in hostilities, but who is not entitled to prisoner-of-war status or treatment, and who does not qualify for more favourable treatment under the Fourth Convention. This class of persons includes: members of the armed forces who forfeit both entitlement to prisoner-of-

<sup>61</sup> See also the ICRC's commentary on the Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (October 1973), on draft Article 65 [Art.75 of PI]: “The purpose of this draft is to rectify an omission in the existing treaty law; on the one hand, persons who are not protected by the First, Second and Third Conventions are not necessarily always protected by the Fourth Convention, as is shown by its Article 4; on the other hand, Article 5 of the Fourth Convention relating to derogations is fairly difficult to interpret and appears to restrict unduly the rights of the persons protected.”. pp. 81 *et seq.*

<sup>62</sup> “[T]he following acts are and shall remain prohibited at any time and in any place whatsoever (...) (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 (...)”

<sup>63</sup> “The provisions of Articles 71 to 76 inclusive shall apply, by analogy, to proceedings against internees who are in the national territory of the Detaining Power.”



war status and treatment [e.g. spying under PI, Art. 46, or failure to distinguish themselves from the civilian population, as required by PI, Art. 44 (3)], nationals of States not bound by the Fourth Convention, nationals of the Detaining Power, and nationals of a neutral or co-belligerent State with which the Detaining Power maintains normal diplomatic relations [see the exclusions based on nationality in GC IV, Art. 4], spies, and mercenaries. Notwithstanding the derogations permitted by Art. 5 of the Fourth Convention, this paragraph also makes the protections of Art. 75 the minimum humanitarian standard applicable to civilians protected under the Fourth Conventions who participate directly in hostilities in the territory of a Party to the conflict or in any other area other than occupied territory. In occupied territory it virtually neutralizes the derogations permitted under Art. 5 of the Fourth Convention except for persons held as spies.”<sup>64</sup>

See also the ICRC Commentary on Article 45 of PI:

“In armed conflict with an international character, a person of enemy nationality who is not entitled to prisoner-of-war status is, in principle, a civilian protected by the Fourth Convention, so that there are no gaps in protection. However, things are not always so straightforward in the context of the armed conflicts of Article 1 (General principles and scope of application), paragraph 4, as the adversaries can have the same nationality. Moreover, the concept of alien occupation often becomes rather fluid in guerrilla operations as no fixed legal border delineates the areas held by either Party, and this may result in insurmountable technical difficulties with regard to the application of some of the provisions of the fourth Convention. This is one of the reasons why the paragraph under consideration here provides that in the absence of more favourable treatment in accordance with the fourth Convention, the accused is entitled at all times to the protection of Article 75 of the Protocol (Fundamental guarantees). This rule is confirmed in paragraph 7 (b) of the said Article 75. However, it is also possible that, without being denied the protection of the fourth Convention, the accused may fall under the scope of Article 5 of the same Convention, which lays down some important derogations. In this case the guarantees of Article 75 (Fundamental guarantees) continue to apply in their entirety. Finally, the latter also apply to the person concerned when the

<sup>64</sup> Bothe, Partsch and Solf, *op. cit.* (note 17), pp. 261 *et seq.*

fourth Convention as a whole applies to him, whenever the treatment resulting from this would be more favourable to him, whether or not the crimes of which he is accused are grave breaches of the Conventions or the Protocol (Article 75 — Fundamental guarantees, paragraph 7 (b)). This also applies, for example, to aliens in the territory of a Party to the conflict who may have taken part in hostilities against this Party, as the fourth Convention does not indicate what judicial guarantees they are entitled to.”<sup>65</sup> (Emphasis added.)

The protections of PI, Article 75, now constitute customary international law.<sup>66</sup> Most of the authors who do not seem to recognize the applicability of GC IV to unlawful combatants share the view that Article 75 of PI is applicable to unlawful combatants.<sup>67</sup> The authors who limit the applicability of GC IV to some types of unlawful combatants equally recognize the applicability of the said Article 75 to all unlawful combatants.<sup>68</sup> Those authors who wrote before the adoption of PI recognized that some minimum humanitarian guarantees apply to all unlawful combatants. They derived those guarantees either from Article 3 common to GC I-IV, Article 5 (3) of GC IV or the Martens Clause, depending on whether they accepted the applicability of GC IV to unlawful combatants or not.<sup>69</sup>

### Penal prosecution of unlawful combatants

It is generally accepted that unlawful combatants may be prosecuted for their mere participation in hostilities, even if they respect all the rules of international humanitarian law.<sup>70</sup> National legislation must, however, first

<sup>65</sup> Commentary on Art. 45, in Y. Sandoz, Ch. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff, Geneva, 1987, no. 1761. See also Commentary on Art. 51, in *ibid.*, no. 1942.

<sup>66</sup> See Greenwood, *op. cit* (note 38), p. 316; Report on Terrorism and Human Rights, *op. cit* (note 5), para. 76; Aldrich, *op. cit* (note 7), p. 893.

<sup>67</sup> Report on Terrorism and Human Rights, *op. cit* (note 5), para. 74; Y. Dinstein, “The distinction between unlawful combatants and war criminals”, in Y. Dinstein (ed.), *International Law at a Time of Perplexity*, 1989, p. 112.

<sup>68</sup> Ipsen, in Fleck (ed.), *op. cit* (note 36), p. 301; McCoubrey, *op. cit* (note 36), p. 137; David, *op. cit* (note 36), pp. 397 *et seq.*; Bothe, Partsch and Solf, *op. cit* (note 17), pp. 261 *et seq.*; Aldrich, *op. cit* (note 7), p. 893, footnote 12.

<sup>69</sup> G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, Vol. II, Stevens, London, 1968, pp. 115 *et seq.*; Draper, *op. cit* (note 36), p. 197; Rosenblad, *op. cit* (note 14), p. 98; Kalshoven, *op. cit* (note 15), p. 71.

<sup>70</sup> C. Rousseau, *Le droit des conflits armés*, A. Pedone, Paris, 1983, p. 68; Dinstein, *op. cit* (note 67), p. 105; *Commentary IV*, *op. cit* (note 12), p. 50; Kalshoven, *op. cit* (note 15), pp. 73 *et seq.*

provide for such a possibility.<sup>71</sup> If unlawful combatants furthermore commit serious violations of international humanitarian law, they may be prosecuted for war crimes.<sup>72</sup> In any such proceedings they are entitled to fair trial guarantees as contained in GC IV if applicable (i.e. if they comply with the nationality requirements of its Article 4), or at least to those contained in Article 75 of PI, which reflects customary international law. There seems to be general agreement that once in the hands of the enemy they may not be executed/punished without proper trial.<sup>73</sup> It is interesting to note that Dinstein considerably limits the competence of a capturing State to punish unlawful combatants for mere participation in hostilities when he claims “[a]n unlawful combatant may be put on trial only for an act committed in the course of the same mission that ended up in his capture by the adversary. (...) Hence, should the enemy capture [him] at a later stage, it may not prosecute him for the misdeeds of the past.”<sup>74</sup> Thus, Dinstein applies to unlawful combatants the rules of the Hague Regulations relating to spies. This restriction has also been included in Article 44 (5) of PI (which stipulates that “[a]ny combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities”) for members of the armed forces who have not distinguished themselves from the civilian population as required by that article’s paragraph 3.<sup>75</sup>

<sup>71</sup> Dinstein, *op. cit.* (note 67), p. 114; Kalshoven, *op. cit.* (note 15), p. 73.

<sup>72</sup> Baxter, “Unprivileged Belligerency”, *op. cit.* (note 37), p. 344.

<sup>73</sup> Draper, *op. cit.* (note 36), pp. 197-198; Baxter, “Unprivileged Belligerency”, *op. cit.* (note 37), pp. 336, 337, 340; Baxter, “Duties of Combatants”. *op. cit.* (note 37), pp. 105 *et seq.*; Schwarzenberger, *op. cit.* (note 69), pp. 115 *et seq.*; M.H.F. Clarke, T. Glynn and A.P.V. Rogers, “Combatant and Prisoner of War Status”, in M.A. Meyer (ed.), *Armed Conflict and the New Law: aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, British Institute of International and Comparative Law, London, 1989, p. 125; Rousseau, *op. cit.* (note 70), p. 68; Dinstein, *op. cit.* (note 67), p. 112; Kalshoven, *op. cit.* (note 15), pp. 73 *et seq.*

<sup>74</sup> Dinstein, *op. cit.* (note 67), p. 112.

<sup>75</sup> See Commentary on Art. 44, in Sandoz, Swinarski and Zimmermann (eds), *op. cit.* (note 65), nos. 1721 *et seq.* (footnotes omitted):

“The Rapporteur explains this provision as follows:

‘Paragraph 5 is an important innovation developed within the Working Group. It would ensure that any combatant who is captured while not engaged in an attack or a military operation preparatory to an attack retains his rights as a combatant and a prisoner of war whether or not he may have violated in the past the rule of the second sentence of paragraph 3. This rule should, in many cases, cover the great majority of prisoners and will protect them from any efforts to find or to fabricate past histories to deprive them of their protection.’

Thus only a member of the armed forces captured in the act can be deprived of his status as a combatant and of his right to be a prisoner of war. For paragraph 4 to be applicable, it is necessary that the violation was

### “Protections” of unlawful combatants in the conduct of hostilities

Only the civilian population and individual civilians enjoy general protection against dangers arising from military operations. They are protected against direct attacks, unless and during the time that they take a direct part in hostilities. A civilian is any person who does not belong to “one of the categories of persons referred to in Article 4 (A) (1),<sup>76</sup> (2),<sup>77</sup> (3)<sup>78</sup> and (6)<sup>79</sup> of the Third Convention and in Article 43 of this Protocol” (i.e. members of the armed forces). Thus for the purposes of the law on the conduct of hostilities, there is no gap.<sup>80</sup> Either a person is a combatant or a civilian. Given that unlawful combatants by definition do not fulfil the criteria of either Article 4 (A) (1), (2), (3) and (6) of GC III or Article 43 of PI, this means that they are civilians. For such time as they directly participate in hostilities they are lawful targets of an attack. When they do not directly par-

committed at the time of capture or directly before the capture. The link in time between violation and capture must be so close as to permit those making the capture to take note of it themselves. Thus this is a case of ‘*flagrante delicto*’. There is no doubt that this is, ‘*mutatis mutandis*,’ analogous to the situation of the spy, and consequently there is some relationship with the concept of an unprivileged belligerent. Like a spy, the combatant who does not carry his arms openly must be caught in the act for the sanction to be applicable to him. Similarly, like him, the combatant who is captured while he is not committing this breach, does not incur any responsibility for acts which he committed previously. However, it should be noted that in contrast to espionage, which is not prohibited by the law of armed conflict, but is merely made punishable, it is prohibited in the Protocol for a combatant not to carry his arms openly, and in principle the Protocol makes him responsible for this. However, in practical terms the adversary cannot do anything against him as a matter of criminal law unless he has surprised him ‘*flagrante delicto*’ at the moment of capture. The prohibition exists, but the sanction can only be applied under this condition. A combatant who commits this breach preserves, at least temporarily, his status as a combatant, and his right to prisoner-of-war status. If he is captured while he is not committing this breach, he is a prisoner of war and punishment can only be meted out in accordance with paragraph 2.”

**76** Members of regular armed forces.

**77** Members of militias and volunteer corps, including organized resistance movements, not included in the regular armed forces.

**78** Members of regular armed forces of a non recognized government/authority.

**79** *Levée en masse*.

**80** For the different approaches in GC IV and PI see Commentary on Art. 50, in Sandoz, Swinarski and Zimmermann (eds), *op. cit* (note 65), no. 1908: “Article 4 of the fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War contains a definition of the persons protected by that Convention against arbitrary and wanton enemy action when they are in the power of the enemy; this is the main object of the Convention. However, Part II, entitled “General protection of populations against certain consequences of war” has a wider field of application; according to Article 13, that Part covers “the whole of the populations of the countries in conflict”. That definition is close to the definition of the civilian population given in Article 50 of the Protocol under consideration here.”

ticipate in hostilities they are protected as civilians and may not be directly targeted. It must be stressed that the fact that civilians have at some time taken direct part in the hostilities does not make them lose their immunity from direct attacks once and for all.<sup>81</sup>

If unlawful combatants who have laid down their arms or no longer have means of defence surrender at discretion, they must not be killed or wounded.<sup>82</sup> It is likewise prohibited to declare that no quarter will be given.<sup>83</sup>

### Conclusion

As this article has shown, it can hardly be maintained that unlawful combatants are not entitled to any protection whatsoever under international humanitarian law. If they fulfil the nationality criteria of GC IV's Article 4, they are clearly protected by that convention. The fact that a person has unlawfully participated in hostilities is not a criterion for excluding the application of GC IV, though it may be a reason for derogating from certain rights in accordance with Article 5 thereof. The specific protections of GC IV depend on the situation in which such persons find themselves in enemy hands. They are most extensive if unlawful combatants are in enemy hands in occupied territory. For those in enemy hands in enemy territory the protections of international humanitarian law are also quite well developed, whereas on the battlefield, where no actual control is established — depending on the interpretation of occupation — they may be the least developed. The guarantees contained in Article 75 of PI constitute the minimum protections that apply to all persons, including unlawful combatants, in the hands of a Party to an international armed conflict, irrespective of whether they are covered by GC IV or not.

<sup>81</sup> See Art. 51 (3) PI: "Civilians shall enjoy the protection afforded by this Section, unless and *for such time as* they take a direct part in hostilities" (emphasis added). Commentary on Art. 51, in Sandoz, Swinarski and Zimmermann (eds.), *op. cit* (note 65), no. 1944; Bothe, Partsch and Solf, *op. cit* (note 17), p. 301.

<sup>82</sup> Art. 23 (c) 1907 Hague Regulations. See also ICRC, *Rules Applicable in Guerrilla Warfare*, *op. cit* (note 48), p. 19.

<sup>83</sup> Art. 23 (d) 1907 Hague Regulations. See also ICRC, *Rules Applicable in Guerrilla Warfare*, *op. cit* (note 48), p. 19; Kalshoven, *op. cit* (note 15), pp. 67 *et seq.*

## Résumé

### ***La situation juridique des « combattants illégaux »***

*Knut Dörmann*

Dans cet article, l'auteur examine les protections juridiques que le droit international humanitaire accorde aux « combattants illégaux » – question dont l'intérêt a été vivement relancé à la suite des opérations militaires menées par les États-Unis en Afghanistan au lendemain des événements du 11 septembre. Comme le terme « combattants illégaux » ne figure pas dans les traités de droit international humanitaire, des questions ayant trait à la situation juridique de cette catégorie de personnes et aux protections auxquelles elles ont droit ne cessent de se poser. Le terme s'applique généralement à toutes les personnes qui participent directement aux hostilités sans y être autorisées et qui, lorsqu'elles tombent au pouvoir de l'ennemi, n'ont pas droit au statut de prisonnier de guerre. Ces « combattants illégaux » n'étant par conséquent pas protégés par la III<sup>e</sup> Convention de Genève de 1949, l'auteur s'efforce avant tout de répondre à la question controversée de savoir si cette catégorie de combattants relève du champ d'application particulier de la IV<sup>e</sup> Convention de Genève de 1949. Partant de là, il expose les différents types de protection particulière applicables aux « combattants illégaux ».