

UNPRIVILEGED BELLIGERENTS: “YOU CAN’T TELL THE PLAYERS WITHOUT A SCORECARD”

BY

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USAWC CLASS OF 2010

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U.S. Army War College, Carlisle Barracks, PA 17013-5050

Report Documentation Page

Form Approved
OMB No. 0704-0188

Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

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| 1. REPORT DATE 25 MAR 2010 | 2. REPORT TYPE | 3. DATES COVERED | | | |
| 4. TITLE AND SUBTITLE Unprivileged Belligerents: 'You Can't Tell the Players Without a Scorecard' | | 5a. CONTRACT NUMBER | | | |
| | | 5b. GRANT NUMBER | | | |
| | | 5c. PROGRAM ELEMENT NUMBER | | | |
| 6. AUTHOR(S) Harrold McCracken | | 5d. PROJECT NUMBER | | | |
| | | 5e. TASK NUMBER | | | |
| | | 5f. WORK UNIT NUMBER | | | |
| 7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) U.S. Army War College ,122 Forbes Ave.,Carlisle,PA,17013-5220 | | 8. PERFORMING ORGANIZATION REPORT NUMBER | | | |
| 9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) | | 10. SPONSOR/MONITOR'S ACRONYM(S) | | | |
| | | 11. SPONSOR/MONITOR'S REPORT NUMBER(S) | | | |
| 12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited. | | | | | |
| 13. SUPPLEMENTARY NOTES | | | | | |
| 14. ABSTRACT see attached | | | | | |
| 15. SUBJECT TERMS | | | | | |
| 16. SECURITY CLASSIFICATION OF: | | | 17. LIMITATION OF ABSTRACT | 18. NUMBER OF PAGES 28 | 19a. NAME OF RESPONSIBLE PERSON |
| a. REPORT unclassified | b. ABSTRACT unclassified | c. THIS PAGE unclassified | | | |

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USAWC STRATEGY RESEARCH PROJECT

UNPRIVILEGED BELLIGERENTS: “YOU CAN’T TELL THE PLAYERS WITHOUT A SCORECARD”

by

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CARLISLE BARRACKS, PENNSYLVANIA 17013

ABSTRACT

AUTHOR: Colonel Harrold J. McCracken

TITLE: Unprivileged Belligerents: “You Can’t Tell the Players without a Scorecard”

FORMAT: Strategy Research Project

DATE: 25 March 2010 **WORD COUNT:** 6,414 **PAGES:** 28

KEY TERMS: Geneva Convention, Prisoner-of-War, International Humanitarian Law

CLASSIFICATION: Unclassified

The current “war on terror”, has showcased a gap in international law. The proper handling of persons who are not members of sovereign militaries, and who do not conduct themselves in accordance with accepted practices for the conduct of military operations, such as the Taliban or Al Qaeda, are critical issues. The international community has recognized that there are individuals on battlefields who are neither lawful combatants nor civilians. However, neither treaty-based nor customary international humanitarian law (IHL) has defined who they are or the treatment they should receive upon capture. Throughout history, however, these persons have existed and have been labeled in various ways: unprivileged belligerents, unlawful enemy combatants, terrorists, spies, brigands, and a host of other descriptions. This paper will explore the proper treatment of unprivileged belligerents under international humanitarian law. The essay will attempt further to define this person under international law, and argue for a new international convention to deal with that person.

UNPRIVILEGED BELLIGERENTS: “YOU CAN’T TELL THE PLAYERS WITHOUT A SCORECARD”

On November 13, 2009, US Attorney General Eric Holder announced that the United States Justice Department would try Khalid Sheikh Mohammed, Walid Muhammed Salih, Mubarak Bin Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Al Hawsawi, detainees at the Guantanamo Bay Detention Facility (GTMO) in Cuba, in United States federal courts:

Today, I am announcing that the Department of Justice will pursue prosecution in federal court of the five individuals accused of conspiring to commit the 9/11 attacks.¹

All had taken part in the planning and execution of the September 11, 2001 attacks on the World Trade Center and Pentagon, and the plane that crashed in the fields of Pennsylvania, which was likely headed toward the White House or US Capital.² He also announced that the United States military would try the alleged mastermind of the October 12, 2000 *USS Cole* bombing.³ Abd al-Rahim al-Nashiri, and four other GTMO detainees would be tried before military commissions:

Further, I have decided to refer back to the Department of Defense five defendants to face military commission trials, including the detainee who was previously charged in the *USS Cole* bombing.⁴

Attorney General Holder, in consultation with United States Defense Department officials, examined a number of factors in making this decision:

Because many cases could be prosecuted in either federal courts or military commissions, that protocol sets forth a number of factors – including the nature of the offense, the location in which the offense occurred, the identity of the victims, and the manner in which the case was investigated – that must be considered. In consultation with the Secretary of Defense, I looked at all the relevant factors and made case by case decisions for each detainee.⁵

Some American politicians were quick to criticize the decision, made as a result of President Obama's commitment to close GTMO.⁶ Other politicians praised or honestly questioned it.⁷ The Obama administration has subsequently revisited the choice of forum.⁸

Implicit in the multitude of media reports and analyses was the fundamental question in this "war on terror", of these individuals' status, under international humanitarian law (IHL).⁹

International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.¹⁰

Does IHL recognize these persons as combatants, non-combatants, civilians, criminals -- or an entirely new category of person? This question lies at the heart of the prosecution's decision and reflects a decades-long, if not centuries-long, debate regarding properly handling persons who are not members of a sovereign's military, or do not conduct themselves in accordance with recognized standards of military operations. United States Supreme Court Justice Clarence Thomas, writing in dissent in a case involving a GTMO detainee, contends that the current war on terror is a different type of conflict, with different types of protagonists:

We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American Soldiers.¹¹

On battlefields around the world, and throughout history, however, these persons have fought, and been labeled in various ways: unprivileged belligerents, unlawful enemy

combatants, terrorists, spies, brigands, and a host of other less-flattering and more colorful descriptions.¹²

While the international community has recognized individuals who are not lawful combatants, the debate has not gone further to define exactly who they are. Nor has the conversation extended to the treatment these persons should receive when captured.

Does a person captured on an active battlefield in Iraq or Afghanistan, who is not a member of a recognized sovereign's military organization, receive different treatment than a person who makes an improvised explosive device (IED); who conducts denial-of-service attacks against a military's computers; or who moves money between banks to finance combatant activities? Is there a distinction between different sectors of the battlefield in the war on terror, as Attorney General Holder noted when announcing the decision to try different persons in different forums? Are all persons entitled to receive a minimum standard of treatment under the Geneva Conventions? What judicial actions may a sovereign government take against these persons for their behavior? Should a sovereign treat them as lawful combatants and subject them only to Geneva-Convention-recognized, interrogation techniques, which are not used to question criminals in a domestic law enforcement investigation?

These questions arose again on Christmas Day, 2009 when Umar Farouk Abdulmutallab, a Nigerian national, attempted to ignite a bomb on a Delta airlines flight bound for Detroit.¹³ The US Attorney General chose to indict him and he will be tried in federal district court, like the "Shoe Bomber" Richard Reid; Zacharias Moussoui, the so-called "20th Hijacker"; and the mastermind of the 1993 bombing of the World Trade

Center, Ramzi Yousef.¹⁴ Is the domestic, law-enforcement avenue the proper forum to deal with these individuals, or are they combatants subject to detention for the duration of the war on terror?¹⁵ Is there some middle ground, as the United States has attempted to establish with the recent detention and interrogation at GTMO, and will now lead to prosecutions in different forums?

This paper will explore the proper treatment of unprivileged belligerents (UB),

The term “unprivileged belligerent is taken from R.R. Baxter, *So-called ‘Unprivileged Belligerency’: Spies, Guerilla, and Saboteurs* (sic) 28 B.Y.I.L.323, 328 (1951) wherein he states: A category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949. . .¹⁶

To understand who a UB is, this paper will first discuss IHL-recognized persons. The first IHL-recognized person is the lawful combatant. In 1863, the first international convention, the Geneva Convention, defined humanitarian treatment for these combatants when they were no longer able to fight. The next code promulgated during the American Civil War, the Lieber Code, provided the first, written definition of combatants and the treatment they should receive.¹⁷ Finally, the Hague Convention of 1907, and Geneva Conventions of 1949 and Additional Protocol I of the Geneva Conventions in 1977 clarified humanitarian treatment and expanded the definition of combatant.

After defining the lawful combatant and his characteristics, this paper will discuss his IHL treatment should he become sick, wounded, or captured as a result of combatant activities. This paper will then discuss the historical reasons for this treatment.

Having defined the lawful combatant and his IHL treatment, the paper will next discuss the civilian on the battlefield who comes under the control of a military force. Again, it will review civilian treatment historically through the current IHL standard found in the Fourth Geneva Convention.

This paper will then discuss the UB. These individuals are neither combatants nor non-combatants. They have taken up arms against a force, yet there is currently no universally-recognized definition of the UB nor a recognized international convention to deal with the UB as for combatants and civilians. This dearth of international law in part explains both the Bush administration's detention and prosecution decisions and the Obama administration's decision to pursue parallel prosecution venues for the GTMO detainees discussed above, and has led to the *ad-hoc* decision making so prevalent in the current war on terror.

The Bush administration detained individuals at Guantanamo Bay and prepared to try them by military commission procedures after applying new standards from the metaphorically powerful but legally boundless "global war on terror." Because some of the detainees were not seized on a traditional and legally recognized battlefield, their detention in military confinement was itself legally questionable. Matters have been made worse by their being labeled "unlawful combatants" by the administration. With the exception of captured Taliban fighters, those detained at Guantanamo do not fall within the definition of combatant of any type – enemy, lawful, or unlawful. They are simply unprivileged belligerents and are thus amenable to prosecution in US domestic or military courts for war crimes. . . . Beyond this minimal coverage, IHL is of little or no guidance in asymmetric war involving non-state actors.¹⁸

During the 1899 Hague Convention, the Russian delegate to the convention, Theodor Martens took the position:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they

result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.¹⁹

Thus, a person can never be outside the IHL protections of the Geneva Conventions.

No matter his status, he can expect a minimum standard of humane treatment.

Although this argument may set the floor for the minimum humanitarian treatment a person may expect, it is wholly inadequate to determine what actions a detaining power may take against a person captured on an active battlefield such as in Iraq or Afghanistan, but who is not a member of a recognized military organization that complies with the Law of Armed Conflict.²⁰ Nor does this minimum standard reflect the recognized procedures to handle lawful combatants as reflected in Hague and Geneva Conventions from detention to interrogation to judicial action to release upon the cessation of hostilities.

Therefore, the final section of this paper will attempt to define this person who currently has no status under international law, and argue for a new international convention to deal with such a person. This paper will examine the collective body of law known as IHL. This body of law has two components. The first concerns the treatment of the individual:

The Geneva Conventions are based on the idea of respect for the individual and his dignity. Persons not taking part in the hostilities and those put out of action through sickness, wounds, captivity or any other cause must be respected and protected against the effects of armed conflicts; those who suffer must be aided and cared for without discrimination.²¹

The second limits the means and methods of conducting warfare:

This body of law, often referred to as the “law of the Hague”, is of particular importance in alleviating the effects of armed conflict in that it regulated and limits the methods and means of warfare used by the parties to the conflict. . . All treaties regulating the conduct of hostilities, as well as international customary law which binds all States, are based on

two connected fundamental principles, namely, those of military necessity and humanity, which together mean that only those actions necessary for the defeat of the opposing side are allowed, whereas those which uselessly cause suffering or losses are forbidden.²²

This paper will argue that both sources are critical in defining the UB and coming to a written understanding of his treatment under IHL. Such IHL codification is necessary to remove ambiguity and to develop a common understanding for proper UB treatment.

Despite the fundamental nature of the distinction between combatant and non-combatant status, there is little in the way of a detailed definition of combatant status and no explicit reference to the notion of unprivileged belligerency or the status of 'unlawful combatant' which is contained in the relevant provisions of the international humanitarian law treaties, although there is considerable treatment of these issues in the literature.²³

The United States provided the basis for much of the international law concerning the treatment of combatants and non-combatants and should provide the leadership on this issue as the topic is closely tied to national security interests and American standing in the world regarding IHL.²⁴

The Lawful Combatant

In an age when we hear so much of progress and civilization, is it not a matter of urgency, since unhappily we cannot always avoid wars, to press forward in a human and truly civilized spirit the attempt to prevent, or at least to alleviate, the horrors of war?²⁵

So wrote Henry Dunant, the founder of the International Committee of the Red Cross, in the concluding thoughts of his book, "A Memory of Solferino," after witnessing that bloody battle during the Franco-Austrian War. The enormous casualties and the lack of medical attention for the wounded caused Dunant later to spearhead an international effort to establish a body of rules to care for the sick and wounded. This effort would ultimately lead to the first Geneva Convention in 1863, and the founding of the International Committee of the Red Cross.²⁶ When discussing IHL and combatant

treatment under IHL, this origin cannot be understated.²⁷ Dunant witnessed a great and bloody conflict between nation-states, waging a battle for political ends, using regimented formations controlled by monarchs as the embodiment of that monarch's will.²⁸

The ten articles of this first Geneva Convention did not define combatant, however, simply stating in Article 6: "Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for."²⁹ As Dunant later established the International Community of the Red Cross, this emphasis is not surprising. The battle's protagonists were clear: a care and treatment standard for sick or injured combatants was lacking and needed formal embodiment.³⁰ The Convention defined and protected medical personnel and equipment and citizens who aided the wounded and sick. Hospitals, ambulances, and evacuation parties were given a distinctive symbol: the red cross on a white background. As a result of this first modest effort,

[a] consensus was growing that, although war might still be a necessary element in international politics--indeed all the more so as new nations such as Germany and Italy were fighting for their freedom--it should be waged, so far as possible, with humanity. . .³¹

The humanitarian sentiment associated with protecting combatants, however, would expand the definition of who received protection in subsequent codes. Dr. Francis Lieber's Code, written during the American Civil War, defined in the broadest possible terms the lawful combatant:

A prisoner of war is a public enemy, armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation. All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency, and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers of the field or elsewhere, if captured; all enemies who have thrown away

their arms and ask for quarter, are prisoners of war, and as such, exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.³²

Note the Lieber Code's fundamental premise which continues today; a prisoner-of-war is a *public enemy*, and the detaining power has an obligation to protect the prisoner once he comes into that power's control.

A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.³³

Implicit in this relationship, however, is that a combatant's actions must comply with the law of war to receive those protections. He must be a lawful combatant:

Military necessity does not admit of cruelty--that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.³⁴

Lieber's code was the "one synthesized, comprehensive law of land warfare that laid down in clear, explicit, formal terms the rights and obligations of one's own army and those of an enemy's army and the civilian population," including the *levee en masse*, guerillas, militias and irregular forces.³⁵

The Hague Convention of 1907 attempted to qualify this broad, combatant definition and bring irregular fighters into the rubric of more traditional combatants by adding requirements to irregular forces in Article 1:

The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1) To be commanded by a person responsible for his subordinates; 2) To have a fixed distinctive emblem recognizable at a distance; 3) To carry arms openly; and

4) To conduct their operations in accordance with the law and customs of war.³⁶

The 1949 Geneva Convention's Article 4, provided protection to the broadest range of protagonists. For purposes of this discussion, only Article 4's portions dealing with combatants will be discussed:

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

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

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

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

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

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.³⁷

Additional Protocol I to the 1977 Geneva Convention represents the international community's final attempt at defining combatant protection and brings in still another

class of individuals: the revolutionary. This intent is clearly stated in Article 1 of the Additional Protocol which provides combatant protections to persons in

[a]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.³⁸

Again, this paper's discussion of the Additional Protocol 1 will focus on combatants:

Article 43—Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct 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.³⁹

Their treatment as prisoners of war is also clearly spelled out:

Article 44—Combatants and prisoners of war

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:

(a) during each military engagement, and

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

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

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.⁴⁰

As this survey through IHL makes clear, as IHL has evolved, the international community's clear intent is to provide the greatest protections for the largest population, no matter that population's willingness to comply with recognized standards for the conduct of hostilities. This trend began with Dunant, and indeed the ICRC's initial interest was to provide a common level of acceptable treatment for combatants, as seen by the earliest Geneva Convention's focus on the provision of care to those sick or wounded, i.e. *hors de combat*. This philosophy is still evident in the 1949 Conventions as sick and wounded persons are discussed in separate conventions from combatants:

The first and second Geneva Conventions . . . principal purpose was to reaffirm the principles which had been at the heart of Geneva law since its pioneering codification in the early 1860s: the protection and care of soldiers and sailors rendered *hors de combat* by wounds, sickness and or shipwreck; similarly, the protection and support of the men and women who undertake that care and the distinctive sign they carry.⁴¹

However, note too the underlying philosophy to protect those found on the battlefield who are no longer able to fight is also pervasive throughout the attempts to define broadly combatants, as seen above. The first Geneva Convention granted

combatants protection because they engaged in conduct on behalf of a sovereign government that society otherwise would not sanction: murder.⁴² In exchange for this protection, they were expected to comply with certain, expected behaviors.

As the categories of recognized combatants expands, the delicate balance between the lawful combatant and treating those not participating in combat may be tilting too far in one direction:

The balancing of military necessity and humanity is often the most challenging aspect of finding agreement on the norms of international humanitarian law. In balancing these two concepts the requirement to **distinguish** between those who can participate in armed conflict and those who are to be protected from its dangers is perhaps its most fundamental tenet.⁴³

The justification for providing broad protections no longer appears appropriate as any person with an ideology may choose to take up arms in an attempt to alter his position in society--indeed--in the World Order. This person should clearly not receive traditional, combatant status nor fall into the population which this paper next discusses: civilians.

The Civilian

The Geneva Conventions which were adopted before 1949 were concerned with combatants only, not with civilians. . . The events of World War II showed the disastrous consequences of the absence of a convention for the protection of civilians in wartime. The Convention adopted in 1949 takes account of the experiences of World War II.⁴⁴

Although attempts were made to account for the presence of civilians on the battlefield in earlier conventions, it was not until after World War II that the international community was able to summon the will to protect them as a class of persons.⁴⁵ To contend with the changing nature of wartime, to include the widespread use of airpower

in strategic bombing, and to counteract World-War-II atrocities, this Fourth Convention is detailed and expansive in its protections:

Art. 13. The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.⁴⁶

This Fourth Geneva Convention, also, for the first time dealt wholly with those conflicts not of an international character, that is, not involving two distinct nations. Many of the atrocities of World War II involved peoples within a country and systematic attempts to terrorize them, simply due to race or national origin.

Therefore, the Fourth Geneva Convention is unique because, while previous conventions dealt exclusively with sovereignties in international conflicts, this Convention provides a floor of protections for those people caught in these conflicts in its Common Article 3. Common Article 3 is labeled such because in each of the Conventions, should the conflict not be between two distinct nations, there will still be a minimum level of protection provided to the distinct classes of persons covered in the general Convention. This level of protection is often called a “mini-convention” and ensures that no matter what type of conflict, those who are not active participants in the fight whether through sickness, injury or simply because they are not combatants, will receive protection.⁴⁷

The 1949 Convention also provides for the first time a mechanism to decide who receives full, combatant-status protections. The revised Article 5 of the Prisoners of War Convention (GC III), states:

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.⁴⁸

This Article 5 tribunal, however, is not found in the Civilian Convention, GC IV, but rather in the Prisoner of War Convention, and implicitly recognizes that civilians may be inadvertently caught up in the battles between sovereign's militaries and UB. Although this Article 5 tribunal provides a procedural right to a civilian, because the "combatant" can now be found amongst and may look like the civilian population, civilians may be forced to partake in this process as the price for their protection. Therefore, Geneva Convention protection has expanded at a cost to the most vulnerable person on the battlefield, the innocent civilian. This paper turns now to the person responsible for this impact, the UB.

The Unprivileged Belligerent

When we were many, the Boer-log came out with coffee to greet us, and to show us *purwanas* (permits) from foolish English Generals who had gone that way before, certifying they were peaceful and well-disposed. When we were few, they hid behind stones and shot us. Now the order was that they were Sahibs, and this was a Sahibs's war. Good! But as I understand it, when a Sahib goes to war, he puts on the cloth of war, and only those who wear that cloth may take part in the war. . . . It is manifest that he who fights should be hung if he fights with a gun in one hand and a purwana in the other.⁴⁹

Historically, detaining powers have treated the UB in one of two ways, under domestic law as a criminal, or under international law as a traditional combatant. Both of these avenues have proven unsatisfactory. A detaining power that treats the UB as a criminal provides the UB with many rights and protections that a combatant does not have.⁵⁰ For example, the US Attorney General has charged Umar Farouk Abdulmutallah, the alleged, Christmas-Day plane bomber in US Federal District Court.

Because the Attorney General has charged him with a criminal offense, authorities cannot question him without an attorney present. Thus, US intelligence agencies have limited ability to develop further intelligence into other Al-Qaeda terrorist plots. Should the United States treat him as a combatant under the Geneva Conventions, he is only required to give certain information to his interrogators in accordance with Article 17, and therefore can use this status to shield himself from more-extensive questioning.⁵¹

The UB, found on active battlefields in Iraq and Afghanistan, exploits this gap in international law, compelling signatories to various conventions to comply with the most-favorable treatment accorded protected persons--to the detriment of these same signatories and the soldiers fighting in their service. While just two examples of this dilemma, the Boer War above, and US soldiers over 100 years later fighting in Afghanistan, highlight this quandary:

Across southern Afghanistan, including the Marjah district where coalition forces are massing for a large offensive, the line between peaceful villager and enemy fighter is often blurred.⁵²

Because the UB does not possess any of the traditional combatant characteristics, this paper does not attempt to define him by the clothes he wears, his organization, or whether he carries weapons openly or employs these weapons in a manner intended not to cause unnecessary suffering. As this paper has shown by examining the Geneva Conventions relative to civilians and combatants, this effort has proven fruitless, precisely because the UB is neither. Rather, the appropriate method to define him is through several characteristics which he does possess.

The first is by the means and methods he uses to wage his fight. Unlike the traditional combatant who utilizes the principle of **distinction**, that is, that there are lawful and appropriate targets of violence, the UB does not choose his targets or his

methods in such a way as to limit their effects. So, to the UB, the use of a civilian airliner as a weapon to target a civilian target is no different than targeting a soldier on a battlefield. This method of warfare, however, is specifically prohibited in international law, and would be considered a grave breach of IHL.⁵³

Second, the UB makes no accommodation for the **proportional** use of force to counter the threat which he faces. Therefore, the UB may use a roadside bomb which may kill not only soldiers, but also civilians. In battles between legitimate combatants, the proportional use of force is always a consideration, and lawful combatants seek to limit the adverse consequences to non-military targets and populations. Again, this theory of proportionality and failure to use force that is proportional to the threat is found in international law.⁵⁴

Third, the UB although a citizen of a country, does not fight on that country's behalf, rather fighting on behalf of a cause or an ideology. Unlike the patriot who may rise up against the armed invaders in his country as part of a *levee en masse*, or the revolutionary who fights against a repressive regime, and therefore may deserve favorable Geneva Conventions treatment, the UB fights on behalf of a cause or ideology. Fighting on behalf of a cause or ideology does not require membership in an organization such as Al Qaeda or Hezbollah, but rather simply a belief that his cause is just. Because he fights on behalf of an ideology, he may not represent the people of the country where he fights, and as such loses Geneva Convention protection, in essence carrying on a private war in the name of his ideology.⁵⁵ As a private combatant, the UB therefore does not even warrant the most favorable treatment of a revolutionary as articulated above in Additional Protocol I of the Geneva Convention.

Each of these characteristics is currently recognized as a violation of the Law of Armed Conflict under current international law, if they were committed by an otherwise-lawful combatant, and would subject him to trial by military commission.⁵⁶ These characteristics should serve as the starting point for an international convention to define the UB. This paper will turn next to what such a convention should look like.

The Fifth Geneva Convention?

Of course, in practice it would not be possible to implement the basic IHL principles of distinction and proportionality if commanders and soldiers could not readily distinguish civilians from soldiers. Although these threshold principles are not necessarily morally required, they are central to implementation of the Conventions and their terms. Today asymmetric warfare is a central feature of twenty-first century global affairs, and yet the prototype asymmetric war involving a non-state actor falls outside IHL. Thus, the absence of a set of rules to govern asymmetric warfare presents a serious problem, for states who require guidance in conducting military operations and for those otherwise victimized by such conflicts.⁵⁷

The historical survey of the four Geneva Conventions has shown them to be models of compromise and the political realities of their times. A country's interests in limiting the types of weapons used in battle, for example, may reflect the state of its industrial base. An interest in protecting a type of combatant may reflect a method of warfare that a country has an advantage to conduct. The current lack of an UB international convention may reflect the international community's inability to agree on proper UB treatment. Yet a substantial body of international law already exists regarding the treatment of persons found on the battlefield. What is needed is the synthesis of that body of law to deal with the UB who has been a player on these battlefields for as long as warfare has existed.

Thus, the existing body of law is a starting point. In 1949, the Geneva Conventions added a "Common Article 3." This change established a minimum

standard of protection for all persons found on the battlefield, whether civilians or combatants, who are sick, wounded, or surrendering. Common Article 3 makes no mention of the UB, however, and therefore a fifth convention needs explicitly to include the UB in its all-encompassing language, not provide recognition of legitimacy concerning the UB's means or methods used to conduct war, or grant all the protections that civilians and combatants receive. It would remove the ambiguity regarding the UB and the treatment he can expect. This change would also serve to remove the UB from the shadow of protections found through the Geneva Conventions and place him on an equal footing with respect to protection from violence and maltreatment as the lawful combatant and the civilian.

Geneva Convention III's Article 4 works hand-in-hand with Article 3 so a convention dealing with the UB should also include an Article 4. Just as Article 4 defines those who are lawful combatants, thus bestowing prisoner-of-war status, a fifth Geneva Convention Article 4 would define the UB.

This paper has defined the UB in three distinct areas, generally by the UB's failure to comply with established, international law when conducting attacks. However, an Article 4 should also consider whether the UB is a member of an organization that advocates the use of violence against civilians, lawful noncombatants as a method of warfare, such as Al Qaeda. Although membership alone is not determinative of a person acting as a UB, it would be a factor.

A fifth convention should add an Article 5 competent tribunal. Persons with questionable status receive an Article 5 tribunal. However, there is no process to conduct an Article 5 tribunal currently in international law. Geneva Convention III has a

number of articles that define judicial procedures for prisoners-of-war tried by a Detaining Power; however there is no similar protocol for an Article 5 tribunal. Although not intended to be a judicial proceeding, but rather an administrative one, defining the process due a UB in this tribunal will ensure consistency of treatment by countries who must make these determinations.

A fifth Geneva Convention should also spell out judicial procedures to deal with UB. In both the prisoner-of-war convention and the civilian convention, judicial procedures are currently in place for offenses committed during the conduct of hostilities or during occupation. These articles provide certain, substantive rights including the right to counsel, the right to appeal, and possible penalties. Defining procedural rights for UB is the area where the greatest certainty is required, and would eliminate the *ad-hoc* decision-making currently used to adjudicate responsibility for UB misconduct. These articles should include the right to counsel and appeal and possible penalties for guilt. Existing Geneva Convention articles defining violations should serve as a basis to charge UB. Finally, a fifth convention should spell out a power's right to detain a UB at the cessation of hostilities or during the conflict, as is the case in the Fourth Geneva Convention.

Conclusion

The international community has traditionally found agreement in the conduct of warfare when a fundamental characteristic of warfare has changed, either through technology or a method of warfare. The September 11, 2001 attacks on mass, civilian targets in the United States, conducted by members of a non-state entity, represent such a shift. Although there had been previous and subsequent attacks against both civilian and military targets, the fundamental premise remains. Individuals who do not

conduct themselves in accordance with generally-accepted principles for the conduct of warfare planned and executed these attacks. The international community must respond to this shift. Existing IHL already provides the foundation for this change. What is lacking is the leadership to recognize this shift, without recognizing the legitimacy of this method of warfare, and thereby appropriately deal with the UB. Without this movement forward, the UB will continue to hide in the shadows, both practically throughout the world and metaphorically in the world of International Humanitarian Law.

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