Denver Journal of International Law & Policy

Volume 12
Number 2 *Spring*

Article 4

January 1983

Terrorism and the Laws of War

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Keywords

Terrorism, War, Crimes, War Crimes, Civil War, International Law: History, Legal History, Military, War and Peace, Regulation

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I. INTRODUCTION

In days when the world seemed simpler, international law was neatly divided into the law of peace and the law of war.[1] Even Grotius' great work is so divided. Modern perceptions seem to have been solidified by the common practice of scholars to follow Grotius's example.[2] But the neat classifications of lawyers have never meshed with reality, and reality has always been victorious in the end.

The Roman religious practice of declaring war to mark the shift from the law of peace to the law of war has always appealed to lawyers more

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1. *Inter bellum et pacem nihil est medium* ("between war and peace there is no other category.") GROTIUS, DE JURE BELLI AC PACIS III, xxi, 1 (1625). This dictum was taken from Cicero's 8th Philippic Against Anthony. It was not intended to mean that the law of war applied only when war had been legally declared against a recognized enemy. *Cf. id.* at iii, 6, where it is made clear that war can begin without declaration since an attack is equivalent in the law of nature to a declaration under international law. In fact, Cicero's assertion relates to Roman religious practice and moral imperatives, not to the legal regime of the law of war at all. *Cf.* CICERO, DE OFFICIIS, I, xi, 36-37 (44 B.C.). The details of the religious practice are set out in I LIVY, THE EARLY HISTORY OF ROME 32, 69-71 (ca. 27 B.C., de Selincourt trans. 1960). The religious practice was more or less abandoned by the end of the first century A.D. DIO CHRYSOSTOM, DISCOURSES 67 (Discourse 38, *To the Nicomedians*, c. 97 A.D.) (Loeb Classical Library 1956): "while peace is proclaimed by heralds, wars for the most part take place unheralded." There can be little doubt that the law of war was conceived to apply in both Roman and Grotian days by operation of the law of nature whenever there was an armed contention between pretenders to public authority deriving from some such authority a license to kill people and destroy property. Publicists' attempts to restrict the application of the law of war to armed contentions between recognized "states" or some other narrow class of acceptable opponents uniformly failed to have practical effect; and failed also to have legal effect outside the legal system of the law-asserting authority. For a more recent example of such a failed attempt, see the American Civil War cases cited in note 25 *infra*.

2. The two volumes of Lauterpacht's last versions of L. OPPENHEIM, INTERNATIONAL LAW, are titled, respectively, PEACE (8th ed. 1955) and DISPUTES, WAR AND NEUTRALITY (7th ed. 1952); John Westlake's precursor text to Oppenheim is also in two volumes, PEACE (1904) and WAR (1907).

than to military men or statesmen.[3] It has been repeatedly suggested in modern times that the supposed sharp theoretical distinction between the law of peace and the law of war, with all its complex exceptions, is more deceptive than helpful in analyzing international law, which grows from state practice and diplomatic correspondence.[4] The importance of re-analyzing the relationship between the law of war and the law of peace has provoked the most resistance from those who perceive virtues in rigid classification of the law when discussing "terrorism."[5]

Attaching the label "terrorist" or "soldier" to an individual engaged in violence for what he considers to be a public purpose is in the first instance a political as well as a legal act. As has been the case with regard to recognition of statehood or governments, recognition of "belligerency" is frequently denied for political reasons, but recognized by implication when the legal results of recognition are sought by states who simultaneously deny the overt label.[6] Thus, "terrorists" may be labeled "criminals" while in fact treated as "prisoners of war" when captured by a state denying that the law of war applies even to that particular outbreak of political violence.

It is the purpose of this paper to examine the evolution of the current law relating to "irregular" combatants, particularly their entitlement or lack of entitlement to treatment as "prisoners of war" under the law of war. The discussion to follow is an attempt to clarify the underlying perceptions of law as they appear to have been growing, in disregard of the dicta of Cicero, by analyzing the refusals to label some irregulars as lawful combatants and the treatment actually accorded to them in several cases.

II. FORMAL POW STATUS; RULES

There has been a peculiar twist in the formal designation of persons who should be treated as prisoners of war since the earliest days of the movement towards codification of the laws of war. In the Lieber Code,[7]

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3. America's first formal war was fought against France from 1798-1800 without any declarations but with the belligerent law of "prize" being applied by American courts at Congress's direction in order to make "legal" the capture of French ships by American privateers. *See* Statute of 9 July, 1798, ch. 68, 1 Stat. 578, §§ 1, 2 & 5.

4. F. GROB, THE RELATIVITY OF WAR AND PEACE (1949); Jessup, *Should Inter-national Law Recognize an Intermediate Status between War and Peace?* 48 AM. J. INT'L L. 98 (1954); Lauterpacht, *The Legal Irrelevance of the "State of War"*, 62 PROC. AM. SOC'Y INT'L L. 58 (1968); Rubin, *Sunken Soviet Submarines and Central Intelligence; Laws of Property and the Agency*, 69 AM. J. INT'L L. 855 (1975); Norton, *Between the Ideology and The Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L L.J. 249 (1976).

5. *See, e.g.*, remarks of Professor William O'Brien in 74 PROC. AM. SOC'Y INT'L L. 206 (1980) *and* Reply by Professor Rubin, *id.* at 209; Dissent by L.C. Green and J.J. Lador-Lederer, 4th Interim Report, INT'L LAW A. COMM. ON INT'L TERRORISM 8-11 (1982).

6. This was done by the United States with regard to the undoubted government of the People's Republic of China in Beijing from 1949 until President Nixon made a formal state visit in 1972. The legal and political threads are definitively disentangled in Kelsen, *Recognition in International Law*, 35 AM. J. INT'L L. 604 (1941).

7. Promulgated as General Orders No. 100 issued by President Lincoln to the Union

articles 49-51[8] define those persons who should be given prisoner of war status. Generally, the status should apply to soldiers, civilians accompanying the forces, such as newsmen and contractor personnel, and civilians who are part of a *levée en masse*[9] in a section of the country not subject to military occupation. All others are mere brigands. Under article 82, squads of men who "commit hostilities . . . without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war" are to be given motivation.[10] The fundamental distinction is between full-time soldiers and those integrally involved in their operations on the one side, and full-time civilians on the other. Those seeking to occupy an intermediate position blur the distinction and need not be accorded soldiers' privileges under the Lieber Code.

The Brussels Declaration of 1874[11] maintained the same distinction and added two more qualifications which further restrict the definition of those captives to be treated as honorable prisoners of war. Article 9 extends soldiers' privileges to "militia and volunteer corps," and although it does not expressly require that members of such corps be full-time soldiers, it does require that those considered for soldiers' privileges "carry arms openly" and that "they conduct their operations in accordance with the laws and customs of war." Article 10 extends the same privileges to members of *levées en masse* "if they respect the laws and customs of war."![12] Since "respect" for the laws and customs of war seems

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Army of the United States, Apr. 24, 1863 [hereinafter cited as the Lieber Code], *reprinted in* D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICTS, 3-23 (2d rev. & comp. ed. 1981). Formally issued as Instructions for the Government of Armies of the United States in the Field, the code of 157 articles was drafted by Professor Francis Lieber of Columbia University and revised by an Army board chaired by General Halleck, a respected international legal scholar as well as Army Chief of Staff. *See* Root, *Francis Lieber*, 7 AM. J. INT'L L. 453 (1913).

8. Lieber Code, *supra* note 7, acts 49-51.

9. *Levées en masse* are groups of civilians authorized by their government to assume the duties of soldiers and who act as such without the formal status of army membership. The protected status of *levées en masse* has been recognized in European practice of the eighteenth century and later. A particularly famous instance involved the citizen army of France repelling the general European onslaught of 1793. *See* W.E. HALL, A TREATISE ON INTERNATIONAL LAW 535-42 (4th ed. 1895). On the French call to arms of August 23, 1793, see II T. CARLYLE, THE FRENCH REVOLUTION, Ch. VI, 296-97 (1837) (American ed. by Belford, Clarke & Co., n.d.). The legal position of the Massachusetts Minutemen of 1775 might properly be classified as a response to a similar call from the "shadow government" headed by John Hancock, Samuel Adams, and their friends.

10. Lieber Code, art. 82; *reprinted in* D. SCHINDLER & J. TOMAN, *supra* note 7, at 14.

11. The Brussels Declaration of 1874 was contained in a Russian draft submitted by Czar Alexander to a European conference of fifteen states, which adopted the draft with minor alterations. It was never adopted formally, but was an important intellectual link between the Lieber Code, which had been adopted as municipal law in the United States only, and the Hague Regulations of 1899 and 1907. *See also* D. SCHINDLER & J. TOMAN, *supra* note 7, at 25, for a description and text; W.E. HALL, *supra* note 9, at 544-46 describes some of the negotiations at Brussels pertinent to this subject.

12. Brussels Declaration of 1874, arts. 9-10, *reprinted in* D. SCHINDLER & J. TOMAN, *supra* note 8, at 27-29.

to require less than conducting "operations in accordance with" the laws and customs of war, and the requirement of carrying arms openly appears in article 9 but not in article 10, it appears that a door was opened in 1874 to the possibility that some partisans might be considered entitled to soldiers' privileges and that the rigid 1863 distinction between soldiers and civilians was being eroded.

Hall summarizes the results of the Brussels discussions on this point as follows:

> The possession of belligerent privilege . . . hinges upon subordination to a responsible person, who by his local prominence, coupled with the fact that he is obeyed by a large force, shows that he can cause the laws of war to be observed, and that he can punish isolated infractions of them if necessary.[13]

The Brussels formulations were incorporated more or less verbatim in articles 1 and 2 of the Hague Regulations of 1899 and 1907.[14] The one significant change is that the 1907 text of article 2, relating to *levées en masse*, reintroduces the requirement that arms be carried openly, thus closing to some degree the door that the Brussels Declaration of 1874 had opened in favor of some partisans.[15] Article 1 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War[16] incorporates the 1907 Hague provisions by simple reference.

Article 4 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (1949 Geneva POW Convention) reorganizes the Hague formulation and expands it considerably. It grants soldiers' privileges, including prisoner of war status, to members of regular armed forces even when they "profess allegiance to a government or an authority not recognized by the Detaining Power,"[17] regardless of whether those forces carry out their operations in accordance with the laws and customs of war. The provisions regarding "carrying arms openly" and "conducting

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13. W.E. HALL, *supra* note 9, at 546.

14. Regulations Annexed to the Conventions With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; and Oct. 18, 1907, 36 Stat. 227, T.S. No. 539 [hereinafter cited respectively as 1899 and 1907 Hague Regulations], *reprinted in* D. SCHINDLER & J. TOMAN, *supra* note 7, at 69.

15. Article 2 reads in pertinent part:

> The population of a territory which has not been occupied, who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with article 1, shall be regarded as belligerents[,] *if they carry arms openly and* if they respect the laws and customs of war.

1907 Hague Regulations, *supra* note 8, art. 2. The italicized portions were added in 1907, and the comma in brackets was deleted.

16. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 1, 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343 (*entered into force* June 19, 1931).

17. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(3), 6 U.S.T. 316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, [hereinafter cited as 1949 Geneva POW Convention].

operations in accordance with the laws and customs of war" are retained for members of militias and other volunteer corps. *Levées en masse* remain within the conception of soldiers for purposes of prisoner of war status, subject only to the 1907 Hague Regulations restrictions regarding carrying arms openly and "respect" for the laws and customs of war.[18] Since article 4 of the Convention applies only to international armed conflicts (and not to "armed conflicts not of an international character"),[19] the extension of prisoner of war status to rebels is not normally considered to be encompassed by the extension of that status to members of the regular armed forces of unrecognized authorities.

It is ironic that a captured member of a regular armed force is accorded prisoner of war status regardless of crimes committed by the captive, either as an individual or as a matter of policy by his commanders (such as engaging in prohibited chemical warfare), while captured partisans, "freedom fighters" or "terrorists" engaged in a domestic conflict, or armed conflict not of an international character, are denied prisoner of war status no matter how scrupulously they as individuals and as an organized force adhere to the humanitarian laws and customs of war.

To fit the most legally troublesome, current sort of political violence into the pattern of the 1949 Geneva Conventions it would seem that the key step would be the Detaining Power's (typically, the defending government's) acceptance of the conflict as an armed conflict of international character. If that were done, individual liability for war crimes and "grave breaches" of the 1949 Geneva Conventions [20] would be applied to prison-

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18. *Id.*

19. *Id.* Article 2 states that the Convention "shall apply in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . ." which, under article 139, may include "any Power" acceding to it. Under general international law, a party to a multilateral convention may refuse to recognize the legal efficacy of a purported accession by a "Power" it does not recognize. The closest to an incisive discussion of this conclusion, which rests primarily on a perception of the function of recognition and consent in the international legal order, is found in the advisory opinion of the International Court of Justice on Reservations to the Convention on Genocide, 1951 I.C.J. 15 (Advisory Opinion of May 28, 1951) (Dissenting Opinion of Vice-President Guerrero and Judges McNair, Read, Hsu Mo at 20).

Article 3 provides some minimal humanitarian obligations, not including prisoner of war treatment, for Parties to the Convention detaining surrendered combatants in the case of "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The basis for distinguishing in 1949 between international and noninternational armed conflicts for the purpose of determining humanitarian rules of law appropriate to any armed conflict is not self-evident and has been increasingly criticized. *See* INT'L L. ASS'N (American Branch), Proceedings and Committee Reports 1979-1980, Report of the Committee on Armed Conflict 38 (1980).

20. Each of the four 1949 Geneva Conventions contains provisions defining some egregious acts as so far beyond the scope of soldiers' privileges that they can be called "grave breaches" of the Conventions themselves. These acts trigger obligations in the Parties to search for persons alleged to have committed such grave breaches, then to try or extradite them for trial to another concerned party. Articles 129 and 130 of the 1949 Geneva POW Convention list some "grave breaches" against prisoners of war:

ers, while honorable partisans, "freedom fighters" and "terrorists", who observe the laws and customs of war would be given the treatment provided for prisoners of war under the 1949 Geneva POW Convention. That was surely the intention of those drafting the Convention in providing for that status regardless of the Detaining Power's refusal to "recognize" the government or authority to which the prisoners profess allegiance.

The pattern for applying the law of war to internal armed conflicts while withholding recognition of the governmental authority of the rebel leadership traces back in modern times to the earliest codification and to the American Civil War.[21] The dividing line, however, is frequently unclear between rebel leadership so highly organized that it borders on bad faith not to accept its legal capacity to engage in belligerency, and rebel leadership that is merely a cabal of malcontents attempting to redistribute wealth by robbing banks and keeping the spoils.[22] In these circumstances, the defending government cannot be faulted for using the tools the law makes available to it by withholding that recognition.[23]

There are some inhibitions on abuse of this discretion. For example, if the defending government wants to exercise belligerent rights against

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willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war the rights of fair and regular trial prescribed in this Convention.

"Grave breaches" do not exhaust the list of war crimes. Any soldier exceeding his privileges may be guilty of a war crime and subject to arrest, trial or extradition and punishment under general international law and other treaties even if his acts do not amount to a grave breach of any of the 1949 Geneva Conventions.

The four 1949 Geneva Conventions are: I. Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; II. Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; III. 1949 Geneva POW Convention, note 17 *supra*; IV. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

21. The Lieber Code, *supra* note 7, art. 152, refers to the time "when humanity induces the adoption of the rules of regular war toward rebels" and denies that such adoption implies a recognition of any governmental status in the rebel leadership. Article 154 of the Lieber Code envisages trying the rebel leaders for treason. In practice, the U.S. military asserted the belligerent right of blockade in 1861 before Congress had legislated the equivalent of a declaration of war, and the Supreme Court narrowly upheld the legal power of the Executive Branch to do so, primarily on the ground that facts determined true legal relationships, not the forms of law. *See* The Prize Cases, 67 U.S. (2 Black) 632 (1862). This is not the place to repeat the Court's analysis nor to subject it to criticism.

22. This is not to suggest that the legal status of the armed conflict should be determined by the military prowess and degree of central organization in the belligerent parties. Many other factors might be legally significant, such as the depth of political feeling involved and the degree to which it makes political sense to apply any other regime of law to the situation.

23. A more elaborate legal argument leading to this conclusion may be found in Rubin, *The Status of Rebels Under the Geneva Convention of 1949*, 21 INT'L & COMP. L.Q. 472 (1972).

neutrals, such as the right to interdict contraband in a neutral vessel on the high seas, it must concede a status of belligerency to its enemy in order to claim belligerent rights for itself. This was one of the reasons why the federal government of the United States conceded belligerent status to the Confederate States' armies and navies in the earliest days of the American Civil War. The neutral involved was Great Britain and diplomatic correspondence between the U.S. federal authorities and the leaders of the British Government held great political as well as legal significance to the United States.[24] Another example is the diplomatic isolation and the practical difficulties of negotiating an end to the hostilities with an "unrecognized" enemy when it is perceived that absolute victory is unattainable.

III. FORMAL POW STATUS; MODERN PRACTICE

But those situations are rare today. Once a state has denied belligerent status to armed "terrorists" who obey the laws and customs of war, it becomes difficult, from a political perspective, to later reverse that classification. To do so implies that the "terrorists" have achieved a degree of success warranting a change in legal classification. Whatever may be the truth of that perception to a neutral observer, it is likely to be a truth that must be denied by the defending government for internal political and morale reasons. The result in practice is the adamant insistence by governments upon a system of labeling which makes it impossible to cross the threshold between noninternational and international armed conflicts. This is so regardless of the degree to which the rebels might have achieved control over territory once part of the state ruled by the defending government, and regardless of the rebels' adherence to the laws and customs of war in their operations. This political labeling process results in the defending government being permitted to deny soldiers' privileges to the "terrorists," while asserting special "police" privileges (but not soldiers' privileges under "martial law") to its own military forces. By denying the applicability of international law, and asserting the exclusive applicability of its own internal law, adjusted with 'emergency' provisions and special tribunals and prisons, an assymetry of legal status is achieved.[25] The resulting situation may be analogized to a military force composed entirely of a posse of ad hoc deputy sheriffs chasing criminals. "Terrorists" are tried for "murder" instead of the war crime of killing civilians outside the reach of the soldier's privilege, and are imprisoned for an arbitrary number of years as members of an "illegal organization," instead of being detained for the duration of the conflict because of their

24. J. MOORE, A DIGEST OF INTERNATIONAL LAW 626-30, 768-69 (1906).

25. "Symmetry," in this context, refers to the two or more parties to the conflict being equal before the law. "Assymetry" is the situation in which one side or another asserts that its legal system dominates the situation; for example, one's forces are entitled to the privileges of belligerents while the forces on the other side are criminals under municipal law, subject to extradition if they reach third countries.

participation.[26] The legal status of defending government forces and "terrorists" is thus asymmetrical. The status of "international armed conflict", which is the threshold at which a symmetry of legal status is achieved and all combatants are treated alike under the law, is reached, if it is reached at all, too late to affect the tactics of the struggle.

That, in turn, must encourage the irregulars to ignore the laws and customs of war, and to go to any extreme to escape capture. Further, in reprisal, captured regulars of the defending forces may be symmetrically treated as mere brigands regardless of how well-motivated and respectful of the laws and customs of war their actions may have been.

These results are clearly inconsistent with the underlying even-handed, humanitarian philosophy of the law of armed conflict and, in practice, have been avoided by defending governments through various expedients. During the Vietnam conflict, captured Viet Cong were given prisoner of war treatment without regard to technical questions of status. Arguably, prisoner of war status could have been denied these prisoners on the basis of a strict application, with some modification, of the terms of the 1949 Geneva POW Convention. Captured Viet Cong soldiers, otherwise personally conforming to the laws and customs of war in the operation in which they were captured, were not considered responsible for the violations of the laws and customs of war which appeared to the United States to be part of the general mode of operation of the Viet Cong.[27]

The same pattern appears in the British grant of "political prisoner" treatment to captured Irish Republican Army (I.R.A.) "terrorists" in Northern Ireland despite the adamant British refusal to accord that status.[28] This pattern also supports the I.R.A. contention that some special

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26. In The Prize Cases, note 1 *supra*, Justice Grier for a 5-4 majority denied the validity of the analogous labeling system that had been adopted by the federal authorities of the United States during the Civil War, saying that soldiers of the United States on the battlefield are not "executioners" killing criminals convicted of "treason." *Id.* at 673. Instead, he argued that belligerent rights are being exercised on both sides. *Id.* at 669, 673-74. It was only thirteen years after the Civil War had ended that the Supreme Court managed to reconcile the labeling system adopted by the federal government with the facts, concluding that "belligerent rights" were "conceded" to the Confederate forces by the Union "in the interest of humanity, and to prevent the cruelties of reprisals and retaliation". Ford v. Surget, 97 U.S. 594, 605 (1878).

27. Bond, *Protection of Non-Combatants in Guerrilla Wars*, 12 WM. & MARY L. REV. 787 (1971); the official American directive, Military Assistance Command, Vietnam Directive 381-446: Criteria For Classification And Disposition of Detainees (Dec. 27, 1967), is located at *id.* at 798 n.23.

28. Ireland v. United Kingdom, 1976 Y.B. EUR. CONV. ON HUMAN RIGHTS 512 (Eur. Ct.). The arrest and detention arrangements are outlined at 590, but the whole report of the European Commission of Human Rights is worth reading for the strained attempt by the United Kingdom to picture its emergency regulations as simply a special part of the normal criminal law. The Judgment of the European Court of Human Rights (Jan. 18, 1978) outlines the interrogation and detention practices of the United Kingdom as if they were merely emergency additions to the normal criminal law, and holds them to be in violation of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221 [hereinafter cited as European Convention],

political prisoner treatment is legally required, and that such treatment is not a mere matter of grace by the British defenders of the status quo, but rather a matter of the general application of humanitarian international law. The utilization of special tribunals and detention facilities, and the special treatment accorded to captured Palestinian "terrorists" by Israel,[29] and to Italy's "Red Brigade,"[30] is further evidence of an underlying humanitarian law. It would appear that many defending governments confronted with "terrorism" feel the humanitarian tugs of the law of armed conflict and the practical policy reasons that support that law more strongly than they are willing, for political reasons, to admit.[31]

Arguably, the behavior of states and defending governments reflects, as part of the lawmaking process, a series of political evaluations developing parallel to the 1949 Geneva Conventions. These evaluations may be better suited to the realities of modern armed conflict than the legal categories established by the Conventions. The treatment accorded to captured "terrorists" in practice more closely conforms to the underlying principles of humanitarian law than the Geneva formulation would require, and may spring from the same humanitarian roots as the formulation. The formulation, however, remains unmodified, possibly reflecting the statesmen's desire to reserve to themselves the legal discretion asymetrically advantageous to defending governments under the present treaty formulation.

Under the present formulation, the treatment accorded captured "terrorists" is entirely a matter of the municipal law of the capturing state as interpreted by the defending government, and if that government decides to treat its captives below the minimum standards which the Conventions would fix, that government merely denies the applicability of the Conventions and the legal interest (standing) of any other state to

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which states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 602 (Eur. Ct.).

It is hard to see how the humanitarian treatment required by article 3 of the 1949 Geneva POW Convention would in any way be a higher standard than that already provided to common criminals under the European Convention, and except for details regarding correspondence and protecting power or Red Cross visitations, it is hard to find significant differences between the European Court of Human Rights' interpretation of article 3 of the European Convention and the elaborate protections for prisoners of war in international armed conflicts under the 1949 Geneva POW Convention.

29. In the recent case involving Ziyad Abu Eain, the Government of Israel classified Abu Eain as a common criminal and undertook to treat him as such in Israel if the United States would extradite him to stand trial for a politically motivated bombing in Israel. This departs from the normal Israeli practice with regard to accused "terrorists." *See* Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981); Department of State, Memorandum of Decision in the Case of the Request by the State of Israel for the Extradition of Ziyad Abu Eain (Dec. 12, 1981) (furnished to the author by the Office of Sen. Dan Quayle); Rubin, *Extradition of Terrorists*, 15 INT'L PRACTITIONER'S NOTEBOOK 15 (1981).

30. S. Conti, Treatment of Terrorists in Italy (unpublished M.A.L.D. thesis, the Fletcher School of Law & Diplomacy) (in the files of the author, Florence, Italy).

31. *Cf.* R. TRINQUIER, MODERN WARFARE 20-25 (1964) (discussing the practical policy arguments of the law).

express a view. It can also deny that international law is in any way relevant, thus rejecting the disinterested interposition of humanitarian organizations, such as the International Committee of the Red Cross. Such organizations may have purview over the application of the Conventions, but none over the application of municipal criminal law to matters essentially within the reservation of legal discretion. This discretion to treat political "freedom fighters" or "terrorists" as if they were common criminals is itself inconsistent with the fundamental object of the law itself: to minimize the impact of armed conflict on the helpless, whether or not the conflict is of an international character.

IV. THE LATEST ATTEMPT AT CODIFICATION

From this standpoint, it is interesting to look at the 1977 Geneva Protocols[32] as the latest expression of the international community which formally addresses entitlement to prisoner of war status. Protocol I, which addresses international armed conflicts, preserves the protection of general international law outside of the conventional framework as it might apply to captured irregulars. Article 1(2) states: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

To those who have followed the application of this language from its inception as the so-called "de Martens clause" of the 1899 Hague Convention[33] to the present, it is apparent that its direct effects are small.

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32. Protocol Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/44 (1977) (*entered into force* Dec. 7, 1978) [hereinafter cited as Protocol I], *reprinted in* 16 I.L.M. 1391 (1977), *and* D. SCHINDLER & J. TOMAN, *supra* note 7, at 535; Protocol Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc.A/32/144 (1977) [hereinafter cited as Protocol II], *reprinted in* 16 I.L.M. 1442 (1977), *and* D. SCHINDLER & J. TOMAN, *supra* note 7, at 619. Protocol I relates to the provisions of the 1949 Geneva Conventions applicable to international armed conflicts (so-called "Article 2 Conflicts"). Protocol II relates only to armed conflicts not of an international character (so-called "Article 3 Conflicts"). The articles relate to the 1949 Geneva Conventions, all four of which make the same distinctions. *See* note 19 *supra*. Article 1(2) of Protocol II specifically excludes from its material field of application "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts," thus leaving the asymmetrical regime of armed conflict not of an international character essentially only to the nonisolated, nonsporadic violence in civil wars that before 1949 was considered properly regulated by the symmetrical law of war. *See* INT'L L. ASS'N (American Branch), note 19 *supra*.

33. 1899 and 1907 Hague Conventions, *supra* note 14, preambular para. 9 (1899) & para. 8 (1907). De Martens was the Russian official usually considered responsible for the language first appearing in the 1899 Hague Convention making it clear that the rules codified in its appended Regulations did not exhaust the field. The precise words of the "de Martens clause" are:

> . 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 Regu-

But it does leave open the possibility that the treatment of Viet Cong guerrillas, I.R.A. "soldiers," P.L.O. "terrorists," "Red Brigade" members and some other "freedom fighters" is part of the overall legal regulation of armed conflict, and not mere political concessions by the defending governments in anticipation of equivalent, merely political, concessions by the guerrilla units capturing their own soldiers.

More directly, Protocol I addresses the legal asymmetry between defending government forces and "terrorists" in its article 1(4), under which the symmetrical rules of "armed conflict" should be applied in principle to the following:

> [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, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations.[34]

This language, if unmodified, would appear to rectify to some extent the asymmetry of the formal Geneva approach favoring the defending forces by making it more difficult for the defending forces to avoid a legal responsibility to give captive enemies, whose personal conduct conforms to the humanitarian laws of war, prisoner of war treatment on the basis of violations of the rules and customs of war by others. A very persuasive argument can be made that this provision of Protocol I, coupled with the Protocol's expanded specification of "grave breaches" in articles 11 and 85, would create a legal framework for the treatment of "freedom-fighting" guerrillas. The framework would provide the needed symmetry of legal rights and obligations and would satisfy the practical object of assuring maximum legal protection for the innocent victims of a conflict (both as prisoners and as the object of attack—such attacks now being defined themselves as "grave breaches" under article 85(3) of the Protocol).

But the problem of auto-interpretation, of each party to the conflict using the legal classification system to its own political advantage by simply asserting or denying the "colonial" or "racist" nature of the struggle, would remain. The framers of Protocol I sought a further step to solve that possibly unsolvable problem in an ingenious but equivalently asymmetrical way. Article 96(2) provides that parties to the Protocol are bound to its terms in an armed conflict "in relation to each of the Parties

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> lations 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.

See Münch, *Die Marten'sche Klausel und die Grundlagen des Völker-rechts*, 36 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 345 (1976).

34. Protocol I, *supra* note 32, art. 1(4).

[to the conflict] which are not bound by it [the Protocol], if the latter [i.e., a Party to the conflict which is not bound by the Protocol] accepts *and applies* the provisions thereof."[35] (emphasis added). The emphasized phrase, "*and applies*," seems to be the reflection of the older formulations restricting the entitlement to prisoner of war treatment to "members of" those organizations (however defined) which "conduct their operations in accordance with the laws and customs of war."[36] But it is here that it is possible to see most clearly the inequities of the attempt at symmetry. The symmetry is sought to be applied to organizations rather than to individuals of honorable temper engaged in political violence. Moreover, it is uncertain whether guerrillas, once their movement has achieved the degree of success that brings into play the very notion of applying the law of armed conflict to their struggle, will necessarily have the control of territory and the infrastructure necessary to assure prisoner of war treatment to captured defenders. To refuse to apply the laws of armed conflict to participants in their movement until they do so is, in the context of the Geneva framework, to withhold humanitarian protection from some more or less innocent victims of armed conflicts.

To argue that soldiers in a movement that is not yet sufficiently successful to warrant the application of the law of armed conflict deserve no treatment other than the humanitarian treatment which international law prescribes for criminals, is to argue that well-motivated and honorable individuals acting in conformity with the laws and customs of war may be treated as ordinary criminals. The treatment prescribed for criminals is essentially all that flows from classifying the conflict as one "not of an international character" under article 3 common to the four 1949 Geneva Conventions and Protocol II. It does not seem significantly different from the legal protection owing to foreign soldiers in an armed conflict not reaching the level of an article 2 conflict,[37] or ordinary criminals under various human rights rules of international law. It is difficult to understand how such a system of classification supports respect for the laws and customs of war, responds to social needs, or protects the individual victims of armed conflict.

Article 96(3) of Protocol I states: "The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article I, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary."[38]

This language would seem to replace the existing auto-interpretation pattern of international law that gives each actor in the international

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35. Protocol I, *supra* note 32, art. 96(2).

36. 1874 Brussels Declaration, *supra* note 11, art. 9. *See also* 1899 and 1907 Hague Regulations, *supra* note 11, art.1; 1949 Geneva POW Convention, *supra* note 20, art. 4(A)(2)(d).

37. *See* note 19 *supra*.

38. Protocol I, *supra* note 32, art. 96(3).

scene the power to determine in the first instance what legal labels ought to be attached to any situation, with a special power in the leaders of "self-determination" struggles to determine what legal regime should apply to them. Since that legal power is not given to the equally successful leaders of identical struggles that lack the self-determination motive and, indeed, is not given to defending governments even in a self-determination struggle, the normal identity of rights among all parties to an armed conflict, referred to in this discussion as "symmetry," is replaced with special rights for the pure of heart. Of course, the leaders of anti-colonial or anti-racist guerrilla organizations can be expected to exercise whatever discretion the law allows them in ways designed to improve their political or military position regardless of the facts as perceived by others. Thus it would appear that the asymmetry of the 1949 Geneva approach favoring existing governments is replaced in Protocol I by a double asymmetry favoring some (but not all) guerrilla organizations. It is hard to see how symmetry can be restored to the law when an asymmetry is replaced by a more complicated reverse asymmetry.

If it were possible to suppress all guerrilla movements with minimal disruption to the higher interests of the affected communities, or if all guerrilla movements whose purported aim was to eliminate colonialism or racism were fundamentally humane or capable of replacing an unjust regime with one more just, then this legal manipulation giving one side an advantage over the other might be desirable. Unfortunately, experience has shown the contrary to be true. Some guerrilla movements express a sense of national grievance that cannot be squelched. Some are ephemeral. To stack the rules of armed conflict in such a way that the defending forces appear justified in treating all captive guerrillas as mere criminals brings the law into contempt and fails to protect some victims of the conflict who, by all our rhetoric, deserve protection. Indeed, treating even the deluded members of the ephemeral, so-called "national liberation" or "justice" movements that are politically isolated, hopeless and merely anarchistic, as criminals in the same sense as the leaders and members who order or commit war crimes or "grave breaches," cannot be justified.

Furthermore, this confusion between politically motivated violence and normal criminality is not only illogical, but also unnecessary to defend the political order. Even accepting the law of war as applicable to the lowest levels of political violence, the leaders and soldiers who commit "grave breaches," (including the "grave breach" of targeting civilian populations as such), can legally be subjected to condign punishment regardless of their status or lack of status as prisoners of war. In fact, their apprehension and punishment is easier if it is conceded that they are acting in a general armed conflict subject to the Geneva system, rather than if they are conceived as mere politically motivated criminals. The Geneva system includes obligations on the High Contracting Parties to search for and either bring before their own courts, or hand over to another concerned party for trial, persons alleged to have committed such "grave

breaches."[39] Thus, where a "normal" criminal may escape from extradition under the terms of an extradition treaty that exempts "political offenders," a soldier who commits a "grave breach" of the laws and customs of war pursuant to the 1949 Geneva Conventions and Protocol I, enjoys no such exemption.

The technical approach of the 1949 Conventions and the 1977 Protocols to the codification of the laws and customs of war as applied to guerrillas leads to these anomalous results, and thus seems ripe for reconsideration. If a more realistic solution cannot be had through a multilateral conference than through the slower but more sure route of state practices, the assertion of law through international correspondence, public statements, learned discussion and before national tribunals as envisaged in article 45(2) of Protocol I should be used to develop the law of international armed conflict.

V. SUMMARY

It may be seen from this brief survey of the Geneva system as applied in theory and practice to guerrilla-type "freedom-fighter" or "terrorist" situations, that the current codifications and hopes for future codifications of the law, in the short term, lead to a pattern of prescription that is unsatisfactory from any point of view. If the codifications are read technically as covering the entire field, treatment as a common criminal is proper for even well-motivated and honorable guerrilla fighters, and pleas for better treatment of defending soldiers are unlikely to be persuasive. This situation seems inconsistent with the basic idea of humanitarian law: protecting the victims of armed conflict. As exemplified by the American, British, Israeli and Italian treatment of captured "terrorists," the Geneva system also seems too narrow to describe the real apprehensions of law. It is, at least, too narrow to describe the policies that enlightened and humane states in general are likely to conclude would be wise in the interests of humanity, eventual reconciliation and peace, and reciprocity. The growth of this practice is part of the law-making process of the international legal order and should be encouraged by highlighting its legal underpinnings and law-making implications.

This plea for a broader conception of the laws of armed conflict as applied to "national liberation freedom fighter" situations rather than the technical interpretations provided for in the Geneva system is already implicit in part of Protocol I. Article 44(3) of that Protocol recognizes that there are situations in armed conflicts where, "owing to the nature of the hostilities an armed combatant cannot so distinguish himself [from the civilian population], he shall retain his status as a combatant provided that . . . he carries his arms openly . . . during each military engagement, and . . . during such time as he is visible to the adversary while he is

39. 1949 Geneva POW Convention, *supra* note 20, art. 129.

engaged in a military deployment . . . ."[40] Indeed, even combatants who fail to meet these requirements, although deprived of prisoner of war status by article 44(4), are by the same article, "given protections equivalent in all respects to those accorded to prisoners of war . . . ."[41] Surely these provisions are evidence of the irreconcilable conflict between those who would lower the threshold of prisoner of war entitlement to admit all politically motivated "soldiers" and those who would treat all irregulars as bandits until the armed conflict took on more nearly the form of European wars of the nineteenth century.

In drafting Protocol I, the twentieth-century humanitarians obviously won, as treatment as prisoners of war is the essence of the prescription, subject to an expanded "grave breaches" conception and the removal of soldiers' privileges from guerrillas who masquerade as civilians during deployment. The result is to authorize the capturing power to condemn as common criminals, rather than as war criminals, those guerrillas who target civilians or masquerade during deployment. Nevertheless, the Protocol treats as legitimate soldiers those combatants who, by disguising themselves as civilians at other times, lead the defending forces to target people who appear to be civilians. But even this strange victory for humanitarians is eviscerated by the provisions discussed above, by which the best contemporary classifying minds have made these prescriptions inoperative in their entirety until the "freedom-fighting" or "terrorist" organization decides it is in its own interest to have them apply. Rather than attempt further to disentangle the skein, it is best at this point to indicate simply that article 44(3), and possibly article 44(4), appear to be steps towards codifying a more humane and logical approach. They also constitute further evidence that the Geneva system for bringing into play the conception of prisoner of war treatment for "freedom fighters" is incomplete and does not fully take account of the realities or perceptions of wise legal policy, or even what is arguably already existing international law.

It was noted above that U. S. tribunals in practice already apply something like the terms of article 45(2) of Protocol I in permitting an accused criminal to allege his entitlement to prisoner of war status and to hear argument on the merits of the allegation. An attempt to use that practice was made by William Guillermo Morales, whose argument was rejected by Eugene H. Nickerson, District Judge for the Southern District of New York, in *U.S. v. Morales*.[42] Morales claimed that as an associate of the Armed Forces of the Puerto Rican National Liberation (FALN) he was entitled, when captured after nearly killing himself making explosives, to be treated as a prisoner of war. It appears he believed that such a plea, if accepted by the court, would result in his being turned over to U.S. military authorities for detention until he could be removed to a

40. Protocol I, *supra* note 32, art. 44(3).
41. *Id.* art. 44(4).
42. U.S. v. Morales, 464 F. Supp. 325 (E.D.N.Y. 1979).

neutral country for the duration of the conflict. Judge Nickerson did not address that patently erroneous legal conclusion, but held that the defendant had not clearly alleged his own membership in the FALN, thus denying the claim on the preliminary question of pleading.

The case is interesting for two reasons. First, it reveals the patent misconception that some lawyers and self-styled "freedom-fighters" seem to have as to the privileges of soldiers (the FALN as an organization seems to have ordered "grave breaches" to be committed), and the legal results of acquiring prisoner of war status. Second, it raises the question of eventual release.

In the language of the 1949 Geneva POW Convention, "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities."[43] It is ancient practice to allow a prisoner of war his liberty on "parole" if he undertakes to avoid further involvement in the conflict.[44] But ordinary criminals presumably serve a fixed time reduced by parole or other considerations independent of national or international politics. Thus, the internment of a prisoner of war may be longer or shorter than that of the same person labeled a mere criminal. The factors that determine the length of the incarceration are wholly different. In the *Morales* case, would the interests of society in having Morales removed from a political struggle in which he has been taking an active and violent role be better served by classifying his status as a "prisoner of war" or as a "criminal"? Would his release after three years as an unauthorized possessor of dangerous weapons meet the needs of society to remove him from our midst while he is fanatically convinced of the virtues of his political position? Would twenty years be appropriate, when the armed struggle could collapse within two years by the acceptance of FALN participation in a Puerto Rican Government and the redirection of FALN energies, assuming that Morales is in fact no danger to society outside of the FALN political context?

VI. CONCLUSIONS

It would seem that a basic conception of the modern codification of the laws of war was the sharp distinction between organized soldiery and civilians, with an exception made for *levées en masse*, to be entitled to soldiers' privileges. With the legitimation of underground and partisan guerrilla warfare during the Second World War, the 1949 Geneva Conventions replaced that sharp distinction with a much more elaborate set of rules. The application of these rules, however, is withheld until the parties concerned classify the conflict as "international." In retrospect it appears to have been the intention of the statesmen involved to give soldiers' privileges to partisan remnants of defeated national armies, but withhold those privileges from guerrillas engaged in struggles against co-

43. 1949 Geneva POW Convention, *supra* note 17, art. 118.
44. *See* Lieber Code, *supra* note 7, arts. 119-30.

lonial regimes. The asymmetries that resulted have been ameliorated to a considerable extent by the practice of states extending to guerrillas in noninternational armed conflicts something quite close to the special treatment that they would be entitled to if the conflict were international. There is a question as to whether that special treatment is given as *of grace* through the normal criminal law system of the defending government, as all defending governments claim for their own position, or as a manifestation of an underlying *opinio juris* that well-motivated and honorable guerrillas individually observing the laws and customs of war are entitled to soldiers' privileges.

Attempts to bring the Conventions' regime closer to current reality in 1977 ended by increasing the elaboration and asymmetries inherent in the 1949 regime. It may be suggested that the elaboration of humanitarian legal protection for common criminals and for participants in armed conflicts not of an international character is slowly making irrelevant the legal categories negotiated by statesmen in disregard of principle and reality.[45]

45. Some of these ideas are explored further in Rubin, *Terrorism, "Grave Breaches" and the 1977 Geneva Protocols*, 74 PROC. AM. SOC'Y INT'L L. 192-96, 209-10 (1980-1981). During the discussion that followed the reading of the papers, the question was posed as to just how low a threshold should be taken as the point at which the law of armed conflict might usefully be applied to political violence. This author responded that there was no clear ultimate limit. More recently, while expounding the same idea at Washington and Lee School of Law, the author was asked if the law of armed conflict should be applied to Ku Klux Klan members killing Communist Worker's Party demonstrators. In light of the jury verdict of not guilty in an extreme case in Greensboro, North Carolina, on November 17, 1980 (N.Y. Times, Nov. 18, 1980, at 1, col. 2), this author had no difficulty in answering in the affirmative. Under the law of armed conflict, the "soldiers" of the Klan would have been imprisoned as "prisoners of war" until they conceded the end of the hostilities, presumably for life, and might well have been tried by court martial for the war crimes involved in their shooting an "enemy" that was not obstructing their achieving any rational military goal. Even releasing them on parole would have been more sensible and realistic than trying them for murder and acquitting them.