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The Conduct of Hostilities in International Humanitarian Law

Volume II

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The Conduct of Hostilities in International Humanitarian Law, Volume II

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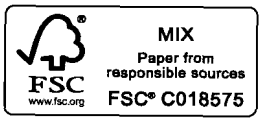

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Series Preface

Over half a century ago, Sir Hersch Lauterpacht, then Whewell Professor of International Law at the University of Cambridge, observed that 'if international law is the vanishing point of law, the law of war is at the vanishing point of international law'. He was wrong. While it is true that the law of war, or international humanitarian law as it has become known, is particularly vulnerable to the vagaries of political, social and economic influences, it has nevertheless proven itself a robust normative regime that positively shapes man's most destructive undertaking – warfare. No other body of law can be credited with saving more lives or alleviating as much suffering.

These six volumes comprise a collection of particularly significant works on humanitarian law. They are intended for use by scholars, practitioners and students who seek to better understand the topics addressed herein, together with their lineage. Just as importantly, they allow users to begin to separate the wheat from the chaff. The proliferation of publications in the field, in part a sad reflection of the fact that armed conflict remains so horribly pervasive, as well as the digitization that facilitates access to journals that would not otherwise be readily available, often results in information overload. A Ministry of Defence legal adviser looking for background material to address a situation involving belligerent occupation will, for instance, uncover scores of articles. The student writing a dissertation on the law of targeting or a scholar penning an article on detention will find him- or herself buried in material. Unfortunately, some of what they unearth will prove misguided, out of context or simply wrong. This collection will not break down these obstacles in their entirety. But it does afford a useful starting-point by offering topically arranged humanitarian law journal essays that have been thoroughly vetted by many of the top experts in the field.

In this regard, a few words on the process used to choose the essays are helpful. It began with the selection of those subjects that we believed comprised the *sine qua non* of international humanitarian law – development, principles, scope, application, conduct of hostilities, detention, occupation, and implementation and enforcement. We then contacted over 60 recognized humanitarian law experts, both academics and seasoned legal advisers. They were provided the topics and asked in a very open-ended fashion to identify pieces they considered 'classics', believed to be 'essential' in a compilation of this nature, have found to be especially influential, used regularly in their work or deserved greater attention on the basis of their quality and insights. The experts were asked to pay particular attention to those essays that may have been 'forgotten' over time, but merited 'rediscovery'. Many of them responded in depth. We also benefited from the work of a five-member team from Emory Law School's International Humanitarian Law Clinic which conducted an exhaustive literature review to locate essays relied on regularly by writers – the 'usual suspects', if you will. Finally, as editors we took the liberty of adding a few pieces to the pool *sua sponte*.

Armed with a daunting inventory of candidates for inclusion, we began the difficult task of whittling it down. Many essays proved to be consensus choices among the experts; often the Emory team had also identified them. These provided the skeleton for the project. We then fleshed out the collection based on two key factors: quality assessments by the experts and topic coverage. The latter criterion proved particularly central to the process, for our objective was to produce a collection that not only contained thoughtful and influential works, but also addressed most key humanitarian law topics.

Beyond esteem factors and topical relevance, some essays were selected on account of their temporal significance, that is, having been written at key junctures in the development of international humanitarian law. As an example, the collection includes pieces written in the immediate aftermath of the First and Second World Wars and the attacks of 11 September 2001. Others were published soon after adoption of the 1949 Geneva Conventions or the 1977 Additional Protocols. We hope they both afford insight into the perspectives at play as humanitarian law was evolving and provide a context for understanding the genesis of contemporary norms.

In the end, we were unable to include many insightful and influential works. Exclusion was frequently a mere matter of being cursed with too many good choices on a particular topic. Although no reader is likely to be entirely satisfied with the essays included, or comfortable with the omission of others, we hope the rigorous selection process has resulted in a collection that is both useful and enlightening.

This project would not have been possible without the help of many supporters. We are, of course, deeply indebted to the many international experts who took time from their busy schedules to offer recommendations and comments over the course of the three-year effort. Although we cannot possibly name them all, particular appreciation is due to Ken Anderson, Yutaka Arai, Louise Arimatsu, Laurie Blank, Gabriella Blum, Bill Boothby, Ove Bring, Claude Bruderlein, Knut Dörmann, Alison Duxbury, William Fenrick, Dieter Fleck, Steven Haines, Agnieszka Jachec-Neale, Dick Jackson, Marie Jacobsson, Claus Kress, William Lietzau, Noam Lubell, Lindsay Moir, John Murphy, Sean Murphy, Mary Ellen O'Connell, Bruce Oswald, Hays Parks, Stephen Pomper, Jean-Francois Queguiner, Noelle Quenivet, Adam Roberts, A.P.V. Rogers, Peter Rowe, Joseph Rutigliano, Robert Sloane, Dale Stephens, Ken Watkin and Sean Watts.

We are equally indebted to the brilliant group of young scholars at Emory Law School, whom we dubbed our 'IHL Detectives' – Flora Manship, Carmel Mushin, Jeannine Privat, Nandini Rao and, in particular, Benjamin Farley. Their ability to identify and locate 'lost treasures' of humanitarian law was awe-inspiring. All have since graduated, and we wish them the very best in their professional careers.

Three people deserve special mention and gratitude. Laurie Blank, Director of the Emory's International Humanitarian Law Clinic, ably and tirelessly supervised her team. Beyond supervision, she also devoted an enormous amount of her own time to the substance and administration of the project. At European University Viadrina, Kaya Kowalski took on the task of collating materials and later working with us as we made the final selections for the collection. She was unflappable in the face of our long and sometimes contentious deliberations and always exceptionally good-natured and professional. Finally, we thank our editor at Ashgate, Valerie Saunders, who showed the patience of Job throughout.

We hope this collection proves valuable in the years to come. For our part, it was a fascinating endeavour.

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Introduction

Weapons

Part I of this volume deals with the subject of weaponry, a topic which straddles international humanitarian law and arms control. The lineage of attempts to limit weaponry is long. Even before the era of modern codification, international law prohibited or restricted such weapons as poison, pikes and crossbows. But the nineteenth century marked the birth of an era of continuous codification of weapons norms. For instance, the 1868 St Petersburg Declaration renounced the use of certain explosive projectiles, while the Hague Conventions and Declarations of 1899 addressed various 'means of warfare', including weapons launched from balloons, asphyxiating gas, expanding bullets and those of a nature to cause superfluous injuries. As noted in Volume I, the 1907 Hague Peace Conference limited the use, *inter alia*, of automatic submarine contact mines. Later treaties, or attempts to craft them, dealt with such issues as submarines, gas, bacteriological toxins, weapons with non-detectable fragments, incendiaries, anti-personnel mines, blinding lasers and environmental modification.

Efforts to limit or prohibit the use of weapons have not been without controversy. For instance, the United States did not become party to the 1925 Gas Protocol until 1975, and then only with a reservation as to reprisal. And it took 19 years for the United States to become party to the Incendiary Weapons Protocol, with both a reservation and understanding. More recently, certain key states have declined to become party to the 1997 Ottawa Anti-Personnel Mines Convention and the 2008 Convention on Cluster Munitions. Perhaps the defining instance of contentiousness over weaponry was the International Court of Justice's decision to issue an advisory opinion regarding the legality of nuclear weapons in 1996. Many states, including all nuclear powers (which embraces all permanent members of the Security Council), vehemently opposed the proceedings and the Court's findings.

Much of the disagreement results from an inherent tension between those who believe that weapons are adequately dealt with by general international humanitarian law principles and rules and others who advocate specific weapons regimes. The former point to the principle of distinction and its prohibition on indiscriminate use, including use which violates the rule of proportionality, as well as the requirement to take precautions in attack by using a feasible means or method of warfare likely to minimize civilian harm without forfeiting military advantage. By these norms, it is unlawful to use a weapon if another weapon would suffice but cause less collateral damage, or when the expected harm to civilians is excessive relative to the anticipated military advantage to be achieved through its use. This faction points out that prohibitions or restrictions on specific weapons deprive commanders of options that, in certain circumstances, might reduce civilian harm.

Those taking the opposite position suggest that the general norms are too vague and malleable to effectively preclude the use of weapons that pose particular risks to civilians or civilian property. For instance, it is often difficult to determine with certainty whether this or

that weapon is better placed to limit collateral damage; such inquiries are always contextual. Directly prohibiting or restricting the use of a weapon deprives states and their military forces of any opportunity to creatively justify the use of the weapons in question.

At their core, weapons debates reflect the tension between military necessity and humanitarian considerations that undergirds all international humanitarian law. On the one hand, weapons make possible the achievement of military aims. On the other, they cause collateral damage. It is unsurprising, therefore, that attempts to prohibit or restrict particular weapons are often met with disfavour on the part of militaries and states likely to go to war, but with support from groups dedicated to humanitarian purposes and states unlikely to engage in armed conflict. Ultimately, though, the shared goal must be to achieve the right balance between the military and humanitarian imperatives. The first three essays in Volume II exemplify this tension.

In 'The Law of Weaponry' (Chapter 1), Christopher Greenwood, presently a judge on the International Court of Justice, characterizes the law of weaponry as 'one of the oldest and best established areas of the law of war' but one that is 'also widely regarded as one of the least effective' (p. 3). Greenwood asserts that because the law of weaponry has not kept pace with the development of means and methods of warfare, 'much of the law and the legal literature in this field has a distinctly anachronistic feel' (ibid.), amusingly citing a leading textbook that points out that 'cannons must not be loaded with chain shot, crossbar shot, red-hot balls, and the like' (pp. 3–4). That said, he acknowledges some success, such as the bans on use of chemical or biological weapons.

As Greenwood notes, 'the law of armed conflict is ... based upon the assumption that States engaged in an armed conflict will necessarily inflict death and injury upon persons and damage to property, and seeks to limit these effects by preventing the infliction of suffering and damage which is unnecessary because it serves no useful military purpose' (p. 7). Accordingly, '[t]he principal objective of the law of weaponry is the protection of these values' (ibid.). Of course, other objectives also underlie this body of law – disarmament, in particular.

The development of weaponry law has not always been linear or logical. For instance, Greenwood observes that:

> Deep-seated taboos found in many societies regarding certain types of injury or means of inflicting harm have meant that certain types of weapons (those employing or causing fire, for example) have been treated as particularly horrific, without any serious attempt being made to compare their effects with those produced by other weapons. (p. 9)

Moreover, those seeking limitations can be self-interested. The classic example is that discussed in Volume I – attempts to limit the use of submarines – which was partly motivated by Great Britain's desire to maintain naval supremacy.

Several key foundational principles underlie the law of weaponry. Foremost among these is the principle of unnecessary suffering, first set forth in the 1868 St Petersburg Declaration. It prohibits methods or means of warfare that cause unnecessary suffering and have no military purpose to combatants. Determining where this threshold lies 'requires a balancing of the military advantage which may result from the use of a weapon with the degree of injury and suffering which it is likely to cause' (p. 13). Unfortunately, '[t]his balancing act is

... easier to state in the abstract than it is to apply, since one is not comparing like with like and there is considerable uncertainty regarding the factors to be placed on each side of the scales' (ibid.). The principle further requires a comparison with other weapons in determining whether the injuries and suffering in question are 'necessary'. This assessment may prove difficult to accomplish, for one must also consider such factors as availability, logistics and force protection. Greenwood concludes that the principle has only 'limited effects', observing that there is not 'a single example of a weapon which has entered into service during the twentieth century and which is generally agreed to fall foul of this principle' (p. 16).

Also fundamental in the law of weaponry is the principle of discrimination which prohibits the use of indiscriminate weapons and the indiscriminate use of discriminate weapons. The prohibitions on directly attacking civilians, the rule of proportionality and the requirement to take precautions in attack also reside in the principle. The 1990–91 Gulf War demonstrated that these rules were 'workable' (p. 20).

Although international humanitarian law clearly dominates issues of weapons legality and the lawful use of weapons, Greenwood notes that it 'does not operate in isolation and the rest of international law cannot be disregarded in determining whether the use of a particular weapon is lawful' (p. 34). He cites three bodies of law as potentially relevant, all discussed in the International Court of Justice's Nuclear Weapons Advisory Opinion. The first is human rights, particularly the prohibition on arbitrary deprivation of life. Greenwood adopts the Court's position that, while the right to life applies in armed conflict, it is subject to the *lex specialis* of humanitarian law. The second is international environmental law; the Court concluded that no prohibition on the use of nuclear weapons could be derived from it. Finally, the *jus ad bellum* was deemed applicable to the use of weaponry, in particular the self-defence criteria of necessity and proportionality.

> The logic of the Charter and customary law provisions on self-defense means that the modern *jus ad bellum* cannot be regarded as literally a 'law on going to war,' the importance of which fades into the background once the fighting has started and the *jus in bello* comes into operation. (p. 36)

Ultimately, Greenwood concludes that '[w]ith the law of weaponry, as with most of the law of armed conflict, the most important humanitarian gain would come not from the adoption of new law but the effective implementation of the law we have. That should be the priority for the next century' (p. 40).

Richard Baxter, Professor of Law at Harvard University at the time, addresses the issue of weapons other than weapons of mass destruction in 'Conventional Weapons Under Legal Prohibitions' (Chapter 2). The essay was written as the international community was deciding to convene the UN conference that ultimately led to adoption of the 1980 Convention on Conventional Weapons and its accompanying protocols. It is valuable not only for its discussion of the core principles of weapons law, but also for its rich account of the ensuing negotiations. What becomes immediately apparent is that when assessing bans or restrictions on weaponry, states look closely to their own national interests, especially as to how their forces will be affected on the battlefield.

Baxter traces the modern lineage of the law governing weapons to the 1868 St Petersburg Declaration. Two principles expressed in that instrument continue to infuse international

humanitarian law, including weapons law. First, 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military force of the enemy', a provision that serves as the basis for the principle of distinction. Second, 'it is sufficient to disable the greatest possible number of men'; 'this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable'. This provision is the original source of the principle of unnecessary suffering. In 1996 the International Court of Justice recognized distinction and unnecessary suffering as 'cardinal principles' of international humanitarian law in its *Nuclear Weapons* Advisory Opinion. Together with the weapons provisions of the Hague conferences, mentioned above, and the 1925 Gas Protocol, they formed the core of the weapons-specific law throughout the Second World War. In this regard, Baxter notes that:

> What law existed was either pitched on a very high level of abstraction (as was true of the prohibition on weapons causing unnecessary suffering) or was directed to specific weapons or projectiles of marginal utility (for example 'dum-dum' bullets) in comparison with the enormous technological developments that had taken place in the art of warfare. (p. 54)

The conflict in Vietnam drew attention to the issue of weapons in the 1960s and 1970s, for by then it seemed that '[t]he law was ... an ineffective instrument for establishing some control over weapons, even if good-faith effort were made to apply it' (p. 56). Discussion on weapons at the 1974–77 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 'turned out to be in large measure one between "haves" and "have-nots"' (p. 60), with the latter seeking to limit the weaponry of the former. While efforts to address specific weapons generally failed, the Diplomatic Conference adopted a resolution recommending a further conference on conventional weapons. The conference began the following year, the Conventional Weapons Convention and its accompanying Protocols being adopted in 1980.

Writing before the conference concluded, Baxter interestingly comments on the likelihood of particular weapons being addressed in the envisioned convention. He was doubtful about the prospects for incendiary weapons provisions because a number of key states saw them as having real battlefield utility; the conference did produce a protocol on such weapons, but the United States did not become a party for nearly two decades. For the same reason, he was equally pessimistic about the likelihood of restrictions on small-calibre projectiles and fragmentation and blast weapons (including cluster bomb units). While no agreement could be reached on these systems, a separate convention on cluster munitions was adopted three decades later. Baxter was correctly optimistic that agreement could be reached on regulating, but not prohibiting, the use of anti-personnel landmines and booby traps.

Ian Brownlie, who would become the Chichele Professor of Law at Oxford, deals with the sensitive topic of nuclear weapons in 'Some Legal Aspects of the Use of Nuclear Weapons' (Chapter 3). This essay was written in 1965, at the height of the Cold War and over two decades before the International Court of Justice addressed the subject. Brownlie acknowledges that the weapons are in a special category, but nevertheless insists:

> There is no evidence that, in a crisis, governments deliberately choose instruments of policy outside the law; and to deny the existence of legal standards is to free governments from the burden of justification and to beg any question of the effectiveness of the law. (p. 72)

He concludes, as the International Court of Justice did later, that the use of nuclear weapons, particularly intercontinental ballistic missiles, would be 'in most conceivable situations illegal under the existing laws of war' (p. 74).

Brownlie asserts that their use 'on any appreciable scale would involve a refusal to distinguish combatants and non-combatants, and military objectives from other targets' (pp. 74–75). Somewhat curiously, he further claims that their use would also amount to grave breaches of the 1925 Gas Protocol, although it is unclear on what basis he makes this assumption. Presumably, he equates radiation to poisonous chemicals. For Brownlie, the employment of nuclear weapons would also constitute crimes against humanity, as well as genocide, and the fall-out from the weapons, which would probably reach neutral states, would breach their neutrality. These are highly controversial statements.

Brownlie meets the various arguments for legality head-on. With regard to the assertion that the Gas Protocol does not extend to radiological effects, he argues that such a position would be akin to suggesting that older statutes on road traffic would be limited to the horse and cart, and not extend to vehicles. As for arguments that the use of nuclear weapons would be permissible as a reprisal in response to the unlawful use of the same, he takes the position that 'it is hardly legitimate to extend a doctrine related to the minutiae of the conventional theatre of war to an exchange of power which, in the case of the strategic and deterrent uses of nuclear weapons, is equivalent to the total of war effort and is the essence of war aims' (p. 79).

He does concede, however, that:

> ... situations are conceivable in which military targets could be hit without causing suffering to neutral States or population centres, and the possibilities include attacks on vessels in mid-ocean, army brigades in deserts, and a base on the Greenland icecap, and also the destruction of a missile on the fringes of space which threatened territory below. (p. 80)

In doing so, he strengthens his general legal conclusion in a way that the International Court of Justice failed to do in the *Nuclear Weapons* Advisory Opinion. But Brownlie finds these scenarios far-fetched. He is worried that, in the absence of an absolute ban, '[g]overnments can always temporise on the facts and use the cloak of military necessity' (p. 85). For him, 'the avoidance of a firm prohibition' will 'produce the moral canker of respectability' (ibid.).

Persons

Part II speaks to the status and activities of individuals involved in armed conflicts. This is a complicated topic that has generated noteworthy controversy in the past decade over such matters as the status and treatment, including detention and prosecution of terrorists and insurgents. Of particular note in this respect is the international humanitarian law rule that civilians enjoy certain protections unless and for such time as they take a direct part in hostilities.

An ICRC-sponsored study of the topic involving a distinguished group of international experts produced the 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* which has ignited impassioned debate.

Other issues have likewise drawn attention. For instance, the downsizing of many militaries has led states to employ private contractors to perform many functions that have traditionally been the responsibility of uniformed members of the armed forces. Their activities raise a number of difficult issues, such as accountability and command responsibility. In conflicts around the world, but especially in Africa, the phenomenon of child soldiers is tragically pervasive. The law continues to struggle with how to protect such children without ignoring the fact that they are, despite their age, fighters. States have turned to armed groups other than the military to prosecute conflicts, raising questions as to the applicability and efficacy of the law governing the use of mercenaries. And women are especially vulnerable to abuse now that so many conflicts are fought among the people rather than along fixed battlefronts.

When the issue of combatant status became prominent with the 'war on terror' and the conflicts in Afghanistan, Iraq and the occupied territories, Richard Baxter's 'So-Called "Unprivileged Belligerency"' (Chapter 4), written in 1951 while he was still a major in the US Army, was rediscovered. In the essay Baxter examines the legal status of individuals fighting outside standard military units in situations not involving belligerent occupation. As he notes, '[t]he law of war has exercised its "prohibitive" effect with respect to those persons who are in the power of the enemy and would otherwise be subject to the extreme licence of war by extending special protection to certain categories of such individuals' (p. 92). Examples include the wounded and sick and 'lawful belligerents' entitled to prisoner-of-war status. Those who do not enjoy these privileges are 'guerrillas, partisans, so-called "war-traitors", *francs-tireurs*, and other persons who, in the face of the enemy or behind its lines, have committed hostile acts without meeting the qualifications prescribed for lawful belligerents' (p. 93). Baxter claims that the 1949 Geneva Conventions 'have ... instead of clarifying the status of these individuals, destroyed what little certainty existed in the law' (ibid.).

Baxter examines the extent of protection enjoyed by individuals who fail to meet the requirements of Article 4A of the Third Geneva Convention on prisoners of war and have engaged in hostile actions outside occupied territory. He begins with spies. Traditionally, engaging in espionage did not violate international law. Yet, in 1942 the US Supreme Court's decision in *Ex parte Quirin et al.* held that spies could be 'offenders against the law of war subject to trial and punishment by military tribunals' for the 'acts which render their belligerency unlawful'. Despite the opinion, Baxter concludes that, under international law, '[t] he actions of a spy are not an international crime'. The conduct of the spy 'merely establishes that he is a belligerent with no claim to any of the protected statuses which international law has created' (p. 99).

Less certain is the law regarding those who engage in individual acts of violence (*francs-tireurs*) or armed bands consisting of individuals who do not qualify as prisoners of war. There is an inherent tension in the treatment of such individuals because states are sensitive to the fact that they may be acting out of patriotic motive. Thus, the Third Geneva Convention accords them prisoner-of-war status so long as they are commanded by a responsible person, wear a fixed distinctive emblem, carry weapons openly and comply with the law of war. But there is a practical problem: 'because guerrilla warfare is in essence secret warfare, it is

improbable that the majority of guerrillas will comply with these conditions, particularly those which relate to the wearing of distinctive insignia and the open carrying of arms' (pp. 102–103). While guerrilla warfare is not in itself a violation of international law, individual acts, such as killing civilians, may be. Guerrillas who do not qualify for prisoner-of-war status may also be tried for actions that violate domestic law, since they enjoy no combatant immunity.

Finally, Baxter treats those who engage in clandestine activities, but not as spies, guerrillas or *francs-tireurs*. Of particular importance are disguised military personnel. *Ex parte Quirin* dealt with eight out-of-uniform German saboteurs captured in the United States and tried by Military Commission. They were declared to be engaged in 'unlawful combatancy', which was deemed to violate international law. Commenting on the court's decision, Baxter notes that:

> While there is no doubt that secret agents of this nature are subject to trial under the statutes of military common law of the captor, the characterization of such conduct as a violation of international law arises ... from a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection. (p. 106)

Under international law, they are entitled to the same treatment as guerrillas, no more or less.

Two decades later, G.I.A.D. Draper, former colonel in the British army and then Reader at the University of Sussex, examined the same topic in 'The Status of Combatants and the Question of Guerilla Warfare' (Chapter 5). Draper returns to a pervasive theme of international humanitarian law – the balance between military necessity and humanitarian considerations. Before the notion was codified in Additional Protocol I:

> Those who had come to receive the benefit of the legal immunity from attack, i.e. the non-participant civilian population, received that immunity solely and exclusively on the basis that they retained that capacity and conducted themselves as such. Civilians participating in combat ceased to be immune from attack. (p. 116)

Draper notes that the question of whether participation in hostilities by other than a combatant constitutes a violation of international humanitarian law remains unsettled. Some commentators claim that it is a violation. However, Draper points to Baxter's essay as exemplifying the theory of 'privileged belligerency', which, as described, holds that the mere fact of participation, *sans plus*, does not violate international law. He notes that the former view finds greater support in state practice, but substantial authority exists for the latter, including certain classical writings, such as those of Grotius.

The traditional requirements for combatant status – that is, the right to engage in hostilities – were set forth for armies, militia and volunteer corps in the 1907 Hague Regulations. They reflected the characteristics of the official armed forces: '(i) some element of control, (ii) some element of identifiability, (iii) some element of openness, and (iv) a substantial element of compliance with the law of war' (p. 128). Two further conditions were implicit: '(v) dependence in some degree upon the Government of the State belligerent, and (vi) a measure of organization' (ibid.). In light of the partisan experiences of the Second World War, Article 4A of the Third Geneva Convention extended entitlement to prisoner-of-war status to

'organized resistance movements' that meet the four Hague requirements (as well as to certain civilians affiliated with the armed forces and members of a *levée en masse*).

The question remains as to when those meeting the requirements enjoy combatant status – that is, the right to participate in hostilities, or at least immunity for acts performed during the conflict in compliance with international humanitarian law. Despite the fact that the relevant treaties on prisoners of war make no mention of such a right, Draper draws on them to set forth the six cumulative conditions for groups that, although not armies, militia or volunteer groups, consist of privileged combatants. A group must be organized, belong to a party to the conflict, be subordinated to a person responsible for his subordinates, ensure that its members have a fixed distinctive emblem, carry arms openly and conduct operations in accordance with the law of war. Draper suggests that the last three conditions are both collective and individual in nature. The group itself and individual members thereof must equally comply with them. If a majority of the group fails to meet any of these three conditions, the entire group loses its status and it becomes merely a collection of individuals engaged in 'irregular combatancy' (p. 150). According to Draper, 'fighters' in non-compliance with the requirements 'not only stand under no benefit of prisoner-of-war status upon capture, but are exposed to allegations of war criminality for their participation in combat' (p. 133). In that sense, he comes to a different conclusion than does Baxter.

At the time the essay was written, only Common Article 3 to the 1949 Geneva Conventions governed non-international armed conflict in the *lex scripta*. Draper distinguishes such conflicts from international ones because, in the former, the law of combatancy does not apply and there is no prisoner-of-war regime. In light of these facts, Draper finds the law uncertain in numerous regards.

Usefully, Draper catalogues his conclusions. Those who do not meet the requirements for combatancy are 'outside the protection of the law of war and condemned alike by that law, by the municipal law of the State concerned or the penal law of the Occupying Power, as the case may be' (p. 157). Upon capture, their sole protection is found in Article 5 of the Fourth Geneva Convention. While groups meeting the conditions may engage in hostile actions, individuals may not. Interestingly in light of contemporary debates, he highlights the fact that as of 1971 the relationship between international humanitarian law and human rights law was unclear. In conclusion, he observes that:

> The existing law has reached a crude balance between the need to limit warfare to military or quasi-military personnel, to identify the enemy in order to spare the innocent civilian and to confer a measure of humanitarian treatment on quasi-military personnel, commensurate with that afforded to members of the armed forces, if certain strict conditions are met. (p. 157)

As Draper notes, one of the conditions for combatant status is a distinctive emblem that allows combatants to be distinguished from civilians, typically through wearing a uniform. In his 2003 essay, 'Special Forces' Wear of Non-Standard Uniforms' (Chapter 6), W. Hays Parks, then the Law of War Chair in the US Department of Defense's Office of the General Counsel, examines the requirement. It was a particularly propitious time to do so, for controversy had erupted over claims that US Special Forces in Afghanistan were fighting out of uniform. The allegation proved especially sensitive, for one of the reasons the United States had denied

Taliban fighters combatant status was their lack of a uniform or other distinguishing garb. Missing in the public debate at the time was the fact that the forces were not dressed as civilians, but rather had adopted the attire of the Northern Alliance forces with whom they were fighting; Parks labels this clothing 'non-standard uniforms'.

Despite misunderstanding to the contrary, the Third Geneva Convention does not require military personnel to wear uniforms; equally, it is not a war crime to fail to wear one. Instead, Article 4A of the treaty imposes a condition on 'militias and members of other volunteer corps, including those of organized resistance movements' to have 'a fixed distinctive sign recognizable at a distance'. The legal issue is whether this requirement is implicit as regards members of the regular armed forces. Parks concludes that:

> Wearing a partial uniform, or even civilian clothing, is illegal only if it involves perfidy ... Military personnel wearing non-standard uniform or civilian clothing are entitled to prisoner of war status if captured. Those captured wearing civilian clothing may be at risk of denial of prisoner of war status and trial as spies. (pp. 178–79)

The question then becomes: what is a non-traditional uniform? Parks points to the principle of distinction as informing the answer since a uniform is one of the ways of effectuating the protection civilians enjoy under international humanitarian law. He notes that '[m]ilitary wear of uniforms during conventional combat operations in international armed conflict reflects the general customary practice of nations' (p. 181), with certain specified exceptions. His examination of historical state practice and the Third Geneva Convention's negotiation records lead him to find that uniforms, uniforms worn with some civilian clothing and civilian clothing to which a distinctive emblem has been attached are 'uniforms' as a matter of law and thus the individuals attired in them are entitled to prisoner-of-war status. Civilian clothing with arms and other accoutrements, such as body armour, meets the requirement that fighting forces be distinguishable from the civilian population, but is not a uniform proper and may subject the individual to denial of prisoner-of-war status. However, it will shield that person from charges of spying if caught away from the civilian population because he or she is engaged in clearly military duties. Wear of purely civilian clothing is lawful for intelligence-gathering and is only an international humanitarian law violation if perfidy occurs. This last position is generally supported by Additional Protocol I's (to which the United States is not party) controversial relaxation of the requirement for combatants to distinguish themselves from the civilian population.

Parks concludes that '[t]he law of war requires military units and personnel to distinguish themselves from the civilian population in international armed conflict' (p. 209). While the Third Geneva Convention delineates the standards combatants are expected to satisfy, 'military personnel may distinguish themselves from the civilian population in other ways, such as physical separation' (ibid.). The law does not prohibit the wearing of non-standard uniforms or civilian clothing 'so long as military personnel distinguish themselves from the civilian population, and provided there is legitimate military necessity for wearing something other than standard uniform' (p. 208). He cautions, however, that it is a practice that 'should be exercised only in extreme cases determined by competent authority' (ibid.).

The distinction between combatants and civilians is further examined in Yoram Dinstein's 'Unlawful Combatancy' (Chapter 7). Dinstein, former President of Tel Aviv University, draws a strict divide between non-combatants (civilians) and combatants. He distinguishes lawful from unlawful combatants, the latter consisting of civilians who take up arms without legal authority (as in the case of resistance fighters meeting the four conditions or members of a *levée en masse*). Unlawful combatants are not entitled to prisoner-of-war status since a *conditio sine qua non* of said status is that the combatancy be lawful. Moreover, since only civilians enjoy protection from attack, unlawful combatants may be lawfully targeted. This position is somewhat controversial, with others maintaining that civilians who participate in the conflict retain their status as such, but lose protection from attack for such time as they so participate.

Like Baxter and Draper, Dinstein examines the question of whether unlawful combatants may be prosecuted for the mere fact of their participation. He rejects the *Quirin* decision that 'they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful', arguing instead that they may only be prosecuted for those individual acts which constitute crimes under international or domestic criminal law. In other words, while the fact of unlawful belligerency does not render the unlawful combatant subject to prosecution as such, acts which provide the basis for characterization may. For instance, when soldier A kills enemy soldier B, he or she has committed murder under domestic law, but the *jus in bello* provides soldier A with a 'legal shield, protecting him from trial and punishment, by conferring upon him the status of a prisoner of war' (p. 230). But if the same act is committed by an unlawful combatant, no shield is available and the individual may be tried in accordance with the domestic law of a state enjoying jurisdiction over the matter.

Dinstein then turns to the matter of prisoner-of-war status, finding the Hague Regulations and Third Geneva Convention conditions regarding 'other militia' applicable to the armed forces. He cites the 1968 Privy Council case of *Mohamed Ali* as support. Beyond the express requirements in the Third Geneva Convention, three others attach: organization, belonging to a party and lack of duty of allegiance to the detaining power. Dinstein takes the position that the wearing of a fixed distinctive emblem is both a collective and a individual responsibility. The organization must adopt, for instance, a uniform. Once it does, the failure of a member of the group to wear it at the critical time will deprive that person of entitlement to prisoner-of-war status. As to carrying arms openly and observance of the *jus in bello*, he believes that 'the correct approach is that their fulfillment should be monitored primarily on an individual basis and only secondarily on a group basis' (p. 242). Thus, 'John Doe has to answer for his actual behavior. However, if no opportunity for individual verification presents itself ... it is possible to establish how the group behaves in general and extrapolate from the collectivity to the individual' (pp. 242–43). But when a group fails to meet the conditions, no member of the group may qualify as a lawful combatant, despite any individual compliance.

Finally, Dinstein comments on Additional Protocol I's controversial Article 44, which dispenses with the requirement to distinguish oneself when circumstances make doing so problematic and narrows the requirement to carry arms openly to those times when the individual is visible to the enemy during deployment to an engagement and the engagement itself. It provides that when individuals fail to comply with these relaxed requirements, they are deprived of prisoner-of-war status, but nevertheless are to 'be given protections equivalent