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^ CHAPTER BIBLIOGRAPHY

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Introductory text

In international armed conflicts (IAC), combatants are members of the armed forces of a party. The main feature of their status is that they have the right to directly participate in hostilities. Consequently, if they fall into enemy hands, they become prisoners of war who may not be punished for having directly participated in hostilities. In return, they may remain in captivity until the end of active hostilities. In non-international armed conflict (NIAC) the term, and therefore the status of, 'combatant' does not exist (see chapter relating to NIAC).

If, as exemplified below, there is a common feature regarding who is a combatant, some subtle distinctions have to be made between what is provided for by treaty law - and there again there are some subtle distinctions to be made within treaty law - and what is provided for by customary international law. Under Convention III of 1949, combatants include restrictively members of regular armed forces, participants in a levée en masse, and members of irregular forces belonging to a party to an IAC, including resistance movements. However, at least irregular forces must fulfil four conditions, namely being commanded by a person responsible for his subordinates, having a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations in accordance with the laws and customs of war (Art. 4(A) of GC III). Under Additional Protocol I, all organized armed groups under a command responsible to a party to

an IAC and subject to an internal disciplinary system enforcing inter alia compliance with IHL fall under the unified concept of 'armed forces'. Members of those groups are combatants.

All combatants have to individually distinguish themselves from the civilian population during military operations. Otherwise they are not entitled to combatant status and – in case they fall into the power of the enemy without individually distinguish themselves – prisoner-of-war status. A nuance is introduced by Article 44(3) of that same Protocol by providing relaxed individual distinction requirements in some exceptional circumstances – such as in occupied territory or during wars of national liberation. As a result, in these circumstances, a member of an organized armed group party to an IAC who would not distinguish her/himself from the civilian population during an attack would still remain a combatant if he/she at least carries arms openly in certain circumstances stipulated in the provision. As per customary international law, one may safely state that all those who fulfil the conditions of Convention III are combatants under customary international law. It is equally true for those who meet the unified conditions of Protocol I and who respect the strict conditions of distinction, that is those who do not fall under the exceptions of Article 44(3) of Protocol I.

As a general rule, members of armed forces that fall under the definition of 'combatant' become prisoner-of-war as soon as they are in the power of the enemy and until their release and repatriation. Among their obligations under international humanitarian law (IHL), combatants have to distinguish themselves from the civilian population as discussed above. If they fail to do so, and if captured by the enemy, they are no more entitled to prisoner-of-war status. Here a precision has to be made between the collective obligation to distinguish themselves for combatants and the individual obligation to distinguish. First, members of armed forces that are party to an IAC must collectively respect a set of obligations, including the obligation to distinguish. Therefore, members of a group that fails to do so are not combatants and none of them are entitled to prisoner-of-war status if in the power of the enemy, even if those captured individually respect the obligation to distinguish themselves. This is explicitly stipulated for irregular armed forces, while it is controversial whether this also applies to regular armed forces. Second, additionally to this collective obligation, all combatants endorse an individual obligation to distinguish themselves. Consequently, even if they belong to a group that collectively distinguishes from the civilian population, members of that group who fail to distinguish themselves individually are not entitled to prisoner-of-war status if they fall into the power of the enemy.

Besides, in addition to excluded, special and controversial categories - such as mercenaries, spies, saboteurs, or members of private military and security companies - that are discussed below, there may be some confusion over whether all members of the regular armed forces of a State are combatants. That may be the case for cooks and other members of the armed forces whose primary activity does not involve combat. Contemporary terminology however does not make any distinction according to the primary role of the members of the armed forces, and consequently virtually all members are combatants. Only military medical and religious personnel are members of armed forces but not combatants and they do not become prisoners-of-war if they fall into the power of the enemy. Similarly, which group may be considered as

'belonging' to a party to an IAC, as laid down at Article 4(A)2 of GC III, has been subject to different interpretations. We are of the opinion that the concept is wider than the one of control under the law of State responsibility, at least when resistance movements are concerned. A tacit agreement should be sufficient. In other words, it is sufficient if the government of a State does not reject an armed group's claim that it is fighting on the State's behalf, at the condition that the group is armed and actually fighting. Secret services or staff of private military and security companies do not have combatant status because they are not accepted by a party to an IAC as fighting for it. For the same reason, it may be considered that members of an armed group, acting on behalf of a State that intervenes indirectly in another State through overall control over such a group, are not prisoners-of-war in most cases, even though IHL of IACs applies. It has to be stressed that even members of armed forces who regularly violate IHL are combatants and prisoners-of-war, but individual members may and must be punished for violations they committed. They are not entitled to combatant and prisoner-of-war status only if they do not sufficiently distinguish themselves from the civilian population.

Persons who have lost combatant status or never had it, but nevertheless directly participate in hostilities, have in some occasions be referred to as "unprivileged combatants" – because they do not have the combatant's privilege to commit acts of hostility – or as "unlawful combatants" – because their acts of hostility are not permitted by IHL (but in our view IHL does not either prohibit them to do so. It simply allows their punishment for doing so under domestic law). The status of such persons has given rise to controversy. We argue that they must perforce be civilians. This argument is based on the letter of IHL treaties. On one hand, with regard to the rules of the conduct of hostilities, Art. 50(1) of Protocol I defines civilians as all those who are not "referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol". On another hand, with regard to rules related to the protection persons in the power of a party, once they have fallen into enemy hands, Art. 4 of Convention IV defines as protected civilians all those who fulfil the nationality requirements and are not protected by Convention III. This would mean that any enemy who is not protected by Convention III falls under Convention IV. Those who oppose that view argue that a person who does not fulfil the requirements for combatant status is an "unlawful combatant" and belongs to a hypothetical third category. Like "lawful combatants", it is claimed, such "unlawful combatants" may be attacked until they surrender or are otherwise hors de combat and may be detained without judicial decision. The logic of this argument is that those who do not comply with the conditions set for a status should not be privileged compared to those who do.

Those who insist on the complementarity and exclusivity of combatant and civilian status reply that lawful combatants can be easily identified, based on objective criteria, which they will normally not deny (i.e. membership in the armed forces of a party to an IAC), while the membership and past behaviour of unprivileged combatants and the future threat they represent can only be determined individually. As "civilians", unprivileged combatants may be attacked while they unlawfully directly participate in hostilities. If they fall into the power of the enemy, Convention IV does not bar their punishment for unlawful participation in hostilities. In addition, it permits administrative detention for imperative security reasons. From a teleological perspective, it is feared that the concept of "unlawful combatants", denied the protection of

Convention IV, could constitute an easy escape category for detaining powers, as the Geneva Conventions contain no rule about the treatment of someone who is neither a combatant nor a civilian (see, however, Art. 75 P I).

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I. Who is a combatant ?

Introductory text

A combatant is either:

- a member of the armed forces *stricto sensu* of a party to an international armed conflict: [1]
- respecting the obligation to distinguish himself/herself from the civilian population

or

- a member of another armed group: [2]
- belonging to a party to the international armed conflict,
- fulfilling, as a group, the following conditions:
 - operating under responsible command
 - wearing a fixed distinctive sign
 - carrying arms openly
 - respecting IHL

and

- individually respecting the obligation to distinguish himself/herself from the civilian population

or

- a member of another armed group [3] who is:
- under a command responsible to a party to the international armed conflict and

- subject to an internal disciplinary system,
- on condition that he/she respects, individually, at the time of his/her capture [4] the obligation to distinguish himself/herself from the civilian population: [5]
- usually, while engaged in an attack or a military operation preparatory to an attack, by a clearly visible item of clothing;
- in exceptional situations (e.g. occupied territories, national liberation wars) by carrying his/her arms openly
- during each military engagement, and
- as long as he/she is visible to the enemy while engaged in a military deployment preceding the launching of an attack in which he/she is to participate.

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1. Members of armed forces lato sensu

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e) members of private military and security companies? (*See supra*)

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- Malaysia, Osman v. Prosecutor
- United States, Screening of Detainees in Vietnam
- United States, The Schlesinger Report
- ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part A., para. 207]
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- United States, Hamdan v. Rumsfeld
- United States, United States v. Marilyn Buck [Part IV.5]

2. The status of "unlawful combatants"

(See *supra* Distinction, VII.Relativity of the distinction in modern conflicts, 5.Terrorism, the “war on terror”, and in particular the status of “unlawful combatants”, b) once in enemy hands)

^ CASES AND DOCUMENTS

- ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
- Israel, The Targeted Killings Case [Paras 24-40]
- Israel, Detention of Unlawful Combatants [Part A., paras 11-14]
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- United States, Military Commissions
- United States, Public curiosity
- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Para. 56]
- United States, Jurisprudence Related to the Bombing of the U.S.S Cole
- USA, Guantánamo, End of "Active Hostilities" in Afghanistan
- USA, Jawad v. Gates

III. Treatment of prisoners of war

Introductory text

Those who have prisoner-of-war status (and the persons mentioned in GC III, Art. 4(B); GC I, Art. 28(2); P I, Art. 44(5)) enjoy prisoner-of-war treatment. Prisoners of war may be interned without any particular procedure or for no individual reason. The purpose of this internment is not to punish them, but only to hinder their direct participation in hostilities and/or to protect them. Any restriction imposed on them under the very

detailed regulations of Convention III serves only this purpose. The protection afforded by those regulations constitutes a compromise between the interests of the detaining power, the interests of the power on which the prisoner depends, and the prisoner's own interests. Under the growing influence of human rights standards, the latter consideration is gaining in importance, but IHL continues to see prisoners of war as soldiers of their country. Due to this inter-State aspect and in their own interest, they cannot renounce their rights or status.[6]

^ CASES AND DOCUMENTS

- United States Military Tribunal at Nuremberg, United States v. Wilhelm von Leeb et al.
- United States, Trial of Lieutenant General Harukei Isayama and Others
- United States, United States v. Batchelor
- United States, Former Prisoner of War on a Mission to Hanoi
- Eritrea/Ethiopia, Partial Award on POWs
- ICRC, Iran/Iraq, Memoranda
- United States, The Taguba Report
- Afghanistan/Canada, Agreements on the Transfer of Detainees
- Afghanistan, Code of Conduct of the Mujahideen [Arts 7-9 and 10]
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- United States, The Obama Administration's Internment Standards
- United States, Closure of Guantanamo Detention Facilities
- United States, Treatment and Interrogation in Detention
- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 98-101]
- USA, Jawad v. Gates
- Syria, Syrian rebels treat captured Filipino soldiers as 'guests'

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- POCAR Fausto, "Violence on Civilians and Prisoners of War in the Jurisprudence of International Criminal Tribunals", in *Anuário brasileiro de direito internacional = Brazilian Yearbook of International Law*, Vol. 2, No. 4, 2009, pp. 11-30.
- PREUX Jean de, "L'homme de confiance des prisonniers de guerre", in *IRRC*, No. 414, 1953, pp. 449-475.
- SADAT Leila Nadya, "International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces", in *ASIL Insight Newsletter*, Vol. 8, No. 10, May-July 2004.
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- YIN Tung, *Distinguishing Soldiers and Non-State Actors: Clarifying the Geneva Convention's Regulation of Interrogation of Captured Combatants through Positive Inducements*, University of Iowa Legal Studies Research Paper, No. 08-42, September 2008, 55 pp.

a) protected as prisoners of war as soon as they fall into the power of the adverse party

GC III, Art. 5

^ CASES AND DOCUMENTS

- The Tokyo War Crimes Trial
- Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 68-80]

b) including in exceptional circumstances

^ CASES AND DOCUMENTS

- Germany/United Kingdom, Shackling of Prisoners of War

c) no transfer to a power which is unwilling or unable to respect Convention III

^ CASES AND DOCUMENTS

- United States, Screening of Detainees in Vietnam
- ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part A., paras 672-674; Part B., paras 71-75]
- Afghanistan/Canada, Agreements on the Transfer of Detainees

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- GILLARD Emanuela-Chiara, "There's No Place Like Home: States' Obligations in Relation to Transfers of Persons", in *IRRC*, Vol. 90, No. 871, September 2008, pp. 703-750.

d) respect for their allegiance towards the power on which they depend

^ CASES AND DOCUMENTS

- United States, United States v. Batchelor
- Cuba, Status of Captured "Guerrillas"
- Eritrea/Ethiopia, Partial Award on POWs [Part B., paras 84-86]
- ICRC, Iran/Iraq, Memoranda

e) no punishment for participation in hostilities

^ CASES AND DOCUMENTS

- Convention on the Safety of UN Personnel
- Malaysia, Osman v. Prosecutor
- Nigeria, Pius Nwaoga v. The State
- Israel, Military Prosecutor v. Kassem and Others
- South Africa, Sagarius and Others
- United States, Military Commissions
- US, Combatant Immunity and Recognition of belligerency

^ SPECIFIC BIBLIOGRAPHY

Suggested reading:

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f) rules on treatment during internment

GC III, Arts 12-81 [CIHL, Rules 118-123 and 127]

^ CASES AND DOCUMENTS

- Switzerland Acting as Protecting Power in World War II
- Germany/United Kingdom, Shackling of Prisoners of War
- United States Military Tribunal at Nuremberg, United States v. Wilhelm von Leeb et al.
- Cuba, Status of Captured "Guerrillas"
- ICRC/South Lebanon, Closure of Insar Camp
- United States, United States v. Noriega [Parts A. III. and B. III.]
- Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 75-150 and Part B., paras 59-142]
- United States, The Taguba Report
- United States, The Schlesinger Report
- ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part A., paras 201-252]
- The Conflict in Western Sahara [Part A.]
- United States, Public curiosity
- United States, Jurisprudence Related to the Bombing of the U.S.S Cole
- USA, Al-Shimari v. CACI Premier Technology, Inc.

- USA, Jawad v. Gates
- ECCC, Detention Sites in Cambodia

^ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- RISIUS Gordon & MEYER Michael A., "The Protection of Prisoners of War against Insults and Public Curiosity", in *IRRC*, No. 295, October 1993, pp. 288-299.

g) rules on penal and disciplinary proceedings

GC III, Art. 82-108 [CIHL, Rules 100-102]

^ CASES AND DOCUMENTS

- United States, Trial of Lieutenant General Harukei Isayama and Others
- Cuba, Status of Captured "Guerrillas"
- Malaysia, Osman v. Prosecutor
- United States, United States v. Noriega [Part A. III.]
- South Africa, S. v. Petane
- ICRC, Iran/Iraq, Memoranda
- United States, President's Military Order
- United States, Hamdan v. Rumsfeld
- United States, Military Commissions
- United States, Habeas Corpus for Guantanamo Detainees
- United States, Closure of Guantanamo Detention Facilities
- United States, Jurisprudence Related to the Bombing of the U.S.S Cole
- USA, Jawad v. Gates
- ECCC, Detention Sites in Cambodia

^ SPECIFIC BIBLIOGRAPHY

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h) punishment for acts committed prior to capture

GC III, Art. 85

▸ CASES AND DOCUMENTS

- USSR, Poland, Hungary and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III
- United States, Ex Parte Quirin et al.
- United States, Johnson v. Eisentrager
- United States, Trial of Lieutenant General Harukei Isayama and Others
- United States, United States v. Noriega [Part A. III.]
- South Africa, Sagarius and Others
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- United States, Trial of John Phillip Walker Lindh
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▸ SPECIFIC BIBLIOGRAPHY

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i) limits to punishment for escape

GC III, Arts 91-94

▸ CASES AND DOCUMENTS

- United States Military Tribunal at Nuremberg, The Ministries Case

▸ SPECIFIC BIBLIOGRAPHY

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IV. Transmission of information

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- ICRC, Tracing Service [Para. 4]

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a) capture cards (to be sent to the family and the Central Tracing Agency)

GC III, Art. 70 and Annex IV B.

▸ CASES AND DOCUMENTS

- ICRC, Iran/Iraq, Memoranda

b) notification (to the power of origin through the Central Tracing Agency)

GC III, Arts 69, 94, 104, 107, 120 and 122

▸ CASES AND DOCUMENTS

- United States Military Tribunal at Nuremberg, The Ministries Case

- Iran/Iraq, 70,000 Prisoners of War Repatriated
- Eritrea/Djibouti: Repatriation of POWs

c) correspondence

GC III, Arts 71, 76 and Annex IV C. [CIHL, Rule 125]

^ CASES AND DOCUMENTS

- ICRC, Iran/Iraq, Memoranda

V. Monitoring by outside mechanisms

1. Protecting Powers

(See *infra* Implementation Mechanisms IV. Scrutiny by Protecting Powers and the ICRC) GC III, Arts 8 and 126; P I, Art. 5

^ CASES AND DOCUMENTS

- South Africa, S. v. Petane

^ SPECIFIC BIBLIOGRAPHY

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2. ICRC

(See *infra* The International Committee of the Red Cross and the Law) GC III, Arts 9 and 126(4); P I, Art. 5(3)-(4) [CIHL, Rule 124]

^ CASES AND DOCUMENTS

- ICRC, Tracing Service [Para. 4]
- Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict
- Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 55-62]

- ICRC, Iran/Iraq, Memoranda
- Afghanistan/Canada, Agreements on the Transfer of Detainees [Part A., paras 4, 7, 10; Part B., para. 10]

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VI. Repatriation of prisoners of war

Introductory text

As prisoners of war are only detained to stop them from taking part in hostilities, they have to be released and repatriated when they are unable to participate, i.e. during the conflict for health reasons and of course as soon as active hostilities have ended. Under the influence of human rights law and refugee law it is today admitted that those fearing persecution may not be forcibly repatriated. As this exception offers the Detaining Power room for abuse and risks rekindling mutual distrust, it is suggested that the prisoner's wishes are the determining factor, but it can be difficult to ascertain those wishes and what will happen to the prisoner if the Detaining Power is unwilling to grant him/her asylum. On the latter point, many argue that a prisoner of war who freely expresses his/her will not to be repatriated loses prisoner-of-war status and becomes a civilian who remains protected under Convention IV until resettlement.[[7]

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1. During hostilities

GC III, Art. 109-117

▸ CASES AND DOCUMENTS

- Cuba, Status of Captured "Guerrillas"

a) medical cases

GC III, Annexes I and II

▸ CASES AND DOCUMENTS

- ICRC, Iran/Iraq, Memoranda

b) agreements between the parties

▸ CASES AND DOCUMENTS

- Case Study, Armed Conflicts in the former Yugoslavia [Para. 18]

2. At the end of active hostilities

GC III, Arts 118-119 [CIHL, Rule 128 A.]

^ CASES AND DOCUMENTS

- Bangladesh/India/Pakistan, 1974 Agreement [Arts 3-11 and 13-15]
- Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict
- Eritrea/Ethiopia, Partial Award on POWs [Part B., paras 143-163]
- Iran/Iraq, 70,000 Prisoners of War Repatriated [Parts B., C. and D.]
- Case Study, Armed Conflicts in the former Yugoslavia [Paras 8 and 21]
- Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities
- The Conflict in Western Sahara [Parts A. and C.]
- Eritrea/Djibouti: Repatriation of POWs

a) when do active hostilities end?

^ CASES AND DOCUMENTS

- Eritrea/Ethiopia, Partial Award on POWs [Part B., paras 144-163]
- USA, Guantánamo, End of "Active Hostilities" in Afghanistan

b) no reciprocity

^ CASES AND DOCUMENTS

- Eritrea/Ethiopia, Partial Award on POWs [Part B., paras 148-163]

c) fate of POWs who refuse repatriation

^ CASES AND DOCUMENTS

- Iran/Iraq, 70,000 Prisoners of War Repatriated [Part D.]
- Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities [Part A.]
- Eritrea/Djibouti: Repatriation of POWs

3. Internment in neutral countries

GC III, Arts 110(2)-(3), 111 and Annex I

^ CASES AND DOCUMENTS

- Afghanistan, Soviet Prisoners Transferred to Switzerland

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Footnotes

- [1] See GC III, Art. 4(A)(1) a
- [2] See GC III, Art. 4(A)(2)
- [3] See P I, Art. 43
- [4] See P I, Art. 44(5)
- [5] See P I, Art. 44(3)
- [6] See GC III, Art. 7
- [7] See GC IV, Art. 6(4)