ASPEN COURSEBOOK SERIES

International Law and Armed Conflict

Fundamental Principles and Contemporary Challenges in the Law of War

Laurie R. Blank
Clinical Professor of Law
Director, International Humanitarian Law Clinic
Emory University School of Law

Gregory P. Noone
Director, National Security and Intelligence Program
Assistant Professor of Political Science and Law
Fairmont State University

Wolters Kluwer
Law & Business

chapter 7

Combatants

LOAC's key goals are to regulate the conduct of hostilities and protect persons and objects during conflict. In order to do so, we must know not only whether there is an armed conflict but also who is involved in the conflict. Therefore, once we have analyzed the nature of the conflict and determined that the situation in question does trigger the application of LOAC — such as an international armed conflict, non-international armed conflict, or occupation — the next step is to identify the status of the persons in the zone of combat and their rights, obligations and privileges. Individual status, whether on the battlefield or off, determines whether a person can lawfully engage in hostilities, is immune from attack, enjoys the privileges of prisoner of war (POW) status upon capture, and a host of other issues. This chapter addresses the legal category of combatants in LOAC, including defining who is a combatant and what rights and privileges they have, such as the privileges and treatment owed to prisoners of war. The following chapter discusses civilians, the protections they enjoy during armed conflict and the conditions under which they forfeit some of those protections.

A. DEFINITION AND CLASSIFICATION

The notion that some persons fall into a "warrior class" has deep historical roots. Knights, who operated according to the code of chivalry, were the only members of society lawfully entitled to fight on a king's behalf in Europe during the Middle Ages.[1]

> With the rise of the nation state this privileged notion of participation in warfare was challenged by a patriotic and populist view that every citizen had a right to resist. The initial attempts to codify international humanitarian law were impacted by the conflicting visions of dominant military powers who wanted to restrict the class of privileged belligerents to their large and organized armies

1. Theodor Meron, Henry's Wars and Shakespeare's Laws 10 (1993).

> and those, most often states that might be occupied, who wanted recognition of the right to mobilize all citizens to defend their country. The motivation of the proponents for a more exclusive class of "belligerents" or "combatants" was in part humanitarian in that professional armed forces were seen as more likely to obey international humanitarian law due to state control and the existence of an internal disciplinary process.[2]

Early codifications of the modern law of war reinforced this fundamental classification of persons on the battlefield. The Lieber Code explained that "[a]ll enemies in regular war are divided into two general classes — that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government."[3] From a practical standpoint, this classification of persons is essential to the basic spirit and purpose of LOAC: the principle of distinction mandates that persons who are fighting distinguish between those who are fighting and those who are not. Combatant status enables exactly that distinction. In addition, the law of war does not outlaw all killing in war; rather, lawful belligerents do not commit crimes when they engage in lawful killing or destruction of property in the course of hostilities. Understanding who has the right to bear arms, in essence, requires an understanding of who falls within the category of lawful belligerents — or combatants — and who does not. As the Commentary to the Third Geneva Convention explains, therefore, "[o]nce one is accorded the status of a belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer."[4]

1. Combatant Status and the Four-Part Test

The legal term "combatant" is only applicable in international armed conflict; in non-international armed conflict, LOAC does not contemplate combatant status or prisoners of war. When assessing an individual's status during armed conflict, therefore, the nature of the conflict is the first level of inquiry, as discussed in Chapters 4, 5, and 6. To that end, this discussion of combatant status will focus on the law applicable in international armed conflict and will identify key issues relative to non-international armed conflict as appropriate. The 1907 Hague Convention established the earliest delineation of the components of combatant status in Article 1 of the attached Regulations Respecting the Laws and Customs of War on Land:

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

2. K.W. Watkin, Combatants, Unprivileged Belligerents and Conflicts in the 21st Century 6 (Jan. 27-29, 2003) (background paper *available at* http://www.hpcrresearch.org/sites/default/files/publications/Session2.pdf).

3. Francis Lieber, War Department, Instructions for the Government of Armies of the United States in the Field art. 155 (1863).

4. Int'l Comm. Red Cross, Commentary on the Geneva Convention (III) Relative to the Treatment of Prisoners of War 46 (Oscar M. Uhler & Henri Coursier eds., 1958).

- To conduct their operations in accordance with the laws and customs of war.

Beyond those members of the armed forces actually engaging in hostilities, there are a number of other persons who fall within the category of combatant, such as those who accompany the armed forces.

In the aftermath of World War II, which showed that significant uncertainty remained regarding the status of certain groups, such as resistance fighters, the drafters of the 1949 Geneva Conventions sought to specify clearly the categories of persons protected under the Third Geneva Convention as prisoners of war. Combatants are all persons who qualify for POW status in international armed conflict, as set forth in Article 4 of the Third Geneva Convention.

Article 4 of the Third Geneva Convention

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

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

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

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

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

(c) that of carrying arms openly;

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

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

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

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

As Article 4 elaborates, LOAC includes several categories of persons who qualify for POW status and thus fit within the category of combatant. The first, and

most obvious, are members of the regular armed forces to a party to the conflict. Any person serving in the military of a High Contracting Party (which today is every country in the world) engaged in a Common Article 2 conflict (i.e., international armed conflict) is therefore a combatant. He or she can lawfully engage in hostilities, is a legitimate target of attack by enemy forces, and is entitled to POW status if captured in an international armed conflict. The other key categories for our analysis are those listed in Article 4(A)(2), (3) and (6) above. The last category is the *levée en masse*, or spontaneous civilian uprising, which dates back to the French Revolution. Although it is rarely applicable in modern conflicts, this provision "affords combatant status to all civilians who spontaneously take up arms to defend their national soil against invaders during the short period of time that a foreign army is advancing onto the territory of their state."[5] Because such persons do not wear a uniform or other distinctive sign, the requirement emphasized in sub-paragraph (6) that they carry arms openly is of particular importance to ensure that they are recognizable as combatants.[6] Sub-paragraph (3) refers to members of regular armed forces of a government not recognized by the detaining power and was a direct response to the situation in World War II when some states refused to grant combatant status to units professing allegiance to a government they did not recognize. The classic example was the Free French forces under General Charles de Gaulle, to whom the Germans originally denied POW status under the Franco-German armistice until the intervention of the ICRC.

Militias and other armed groups belonging to a party to the conflict pose the most complicated set of issues. Beyond the preliminary requirements that such militias fight in an international armed conflict and belong to a party to that conflict, the Third Geneva Convention, like the Hague Convention before it, sets forth four additional criteria such groups must meet before their members are entitled to POW status and thus to be called "combatants." Specifically, such militia must be 1) under responsible command; 2) have a fixed distinctive sign; 3) carry arms openly; and 4) conduct operations in accordance with the laws of war. The second requirement often engenders the most discussion and debate and, as the Commentary explains, could be an armband, "a cap (although this may frequently be taken

5. Robert Kolb & Richard Hyde, An Introduction to the International Law of Armed Conflicts 198 (2008).

6. *See* Trial of Carl Bauer, Ernst Schramek and Herbert Falten, Case No. 45, Judgment (Permanent Mil. Trib. at Dijon Oct. 18, 1945), *reprinted in* U.N. War Crimes Comm'n, 3 Law Reports of Trials of War Criminals 15, 18-19 (1949) (finding that members of the French resistance — the French Forces of the Interior (FFI) — were entitled to POW status at a minimum, *inter alia*, because they satisfied the requirements of a *levée en masse*: "Inhabitants resorting to arms ['on the approach of the enemy'] would enjoy the rights of belligerents. It is immaterial whether they wear civilian clothes or any other kind of dress. The sole conditions are that they carry arms openly and respect the laws and customs of war when fighting. In our case the German witness Spielberg testified that the three F.F.I. men had committed no violations of the laws of war, and from the fact that they were captured while fighting it follows that they carried arms openly.").

off and does not seem fully adequate), a coat, a shirt, an emblem or a coloured sign worn on the chest."[7] The key purpose of this criterion is to reinforce the principle of distinction, to ensure that members of such militia groups distinguish themselves from the civilian population.

2. Classifications in Practice

Understanding whether individuals are combatants or civilians has ramifications in both the targeting and detention frameworks. In the former, members of the regular armed forces and other combatants are legitimate targets of attack at all times by dint of their status as soldiers or other combatants. Thus, an American soldier in his barracks is a lawful target, even if he is merely brushing his teeth or engaged in other non-combat activities. This status-based targeting is at the heart of the law of armed conflict framework — the right to use lethal force as a first resort against hostile forces solely on the basis of their status, rather than on the basis of identified hostile conduct. In contrast, as discussed in Chapter 8 below, civilians are immune from attack and can only be targeted if, and for so long as, they take a direct part in hostilities. Targeting in such situations is therefore conduct-based.

Sleeping Targets?

In 1998, the United States launched Operation Desert Fox – a series of airstrikes aimed at eroding Iraq's weapons of mass destruction capabilities. The United States targeted a number of military and security targets in Iraq that contributed to Iraq's ability to produce, store, maintain and deliver weapons of mass destruction. During the operation, I was approached by a young intelligence officer concerned about the targeting of the barracks of the Special Republican Guard, an elite Iraqi security unit. The officer was troubled by the idea that the Iraqi troops might be asleep and, therefore, present no immediate threat to coalition forces.

Was the officer correct? Did the United States have to wait until the Iraqi troops were "in fighting position" before they struck at the target?

– Major General (Retired) Charles Dunlap, Jr., JAGC, US Air Force, former Deputy Judge Advocate General

Questions of combatant status also arise in the context of detention. Upon capture, an individual will naturally seek to have POW status to enjoy the rights and privileges accorded to such status. The Third Geneva Convention mandates that all persons detained in the course of armed conflict are entitled to an individual determination of their status by a competent tribunal, which can take a variety of forms.

7. Int'l Comm. Red Cross, Commentary on the Geneva Convention (III) Relative to the Treatment of Prisoners of War 60 (Oscar M. Uhler & Henri Coursier eds., 1958).

Article 5 of the Third Geneva Convention

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Members of the regular armed forces enjoy POW status upon capture, a determination that will usually be made with little complication. Notably, Article 5 provides for a presumption of POW status for all persons whose status is uncertain upon capture, until their status is determined. Such persons could be members of irregular militia, civilians claiming to be members of a *levée en masse*, or others accompanying the armed forces, for example. The term "competent tribunal" encompasses a wide range of possible decision-makers, from a military tribunal to a civilian court or more typically one or more military officers at a table set up at the forward detention center or collection point. In Operation Iraqi Freedom, for example, the United States held Article 5 tribunals for thousands of detainees. Typically the "tribunal" was composed of three military officers, one of whom was a judge advocate — although the presence of a judge advocate is not necessary. Other countries have met this requirement with just one judge advocate acting as the "tribunal." Ultimately, the purpose of the Article 5 tribunal is to pass the captured individual up the chain of command to leadership, removing any determination decisions from junior enlisted personnel who theoretically may be more likely to take inappropriate actions.

QUESTIONS FOR DISCUSSION

1. The Geneva Conventions do not use or include the term unlawful combatant. As used here in *Quirin*, the term refers solely to individuals who would qualify as combatants but engage in conduct that causes them to lose that status; hence the term "unlawful" before the word "combatant." The term "unlawful combatant" is now generally used to refer to persons who fight without the right to engage in hostilities; that is, persons who are not part of any regular army or militia and would never qualify as combatants or prisoners of war. What are the consequences of this broadening of the definition or conception of the term?

2. After the Geneva Conventions entered into force, similar questions arose regarding the status of soldiers engaged in spying, sabotage or hostilities in civilian clothing. In 1966, the courts in Singapore heard several cases involving attempted sabotage in Malaysia by Indonesia soldiers disguised in civilian clothing.[9] In *Krofan v. Public Prosecutor*,[10] the court analyzed the status of soldiers who "came to Singapore at night in a boat which carried no lights, wearing civilian clothing and carrying explosives with them for the purpose of exploding these explosives in Singapore at a time when there was a state of armed conflict between Indonesia and Malaysia." As the following two excerpts show, the court looked to both customary law and the Geneva Conventions in assessing whether "members

9. Note that at the time of the events at issue, Singapore was a part of Malaysia.

10. Krofan v. Public Prosecutor, (1966) (Sing.), *reprinted in* 1 MALAYAN L.J. 133 (1967); 52 I.L.R. 497 (1979).

of the armed forces of a party to the conflict who enter enemy territory dressed in civilian clothing as saboteurs are prisoners of war in the sense of the said Geneva Convention."

- ***Customary international law***: "Both [spies and saboteurs] seek to harm the enemy by clandestine means by carrying out their hostile operations in circumstances which render it difficult to distinguish them from civilians. In the case of the 'soldier' spy it is universally accepted that he loses his prisoner of war status and need only be treated as any other spy would be treated. There seems no valid reason therefore why a 'soldier' saboteur, who by divesting himself of his uniform cannot readily be distinguished from a civilian, should not also be treated as any other saboteur would be treated. Both, by reason of their having purposely divested themselves of the most distinctive characteristic of a soldier, namely his uniform, have forfeited their right on capture to be treated as other soldiers would be treated i.e. as prisoners of war."
- ***Geneva Conventions***: "The conditions of modern warfare are not such as to make the spy or the saboteur any less dangerous or more easily distinguishable or more easily apprehended than at the time of the Hague Regulations. As we have mentioned, the Hague Regulations gave the status of prisoners of war to "members of the armed forces" of the belligerents. The words used in article 4A(1) of the Geneva Convention and article 3 of the Hague Regulations to describe regular combatants are identical namely 'members of the armed forces.' In our opinion the principle applicable remains the same, namely, that a regular combatant who chooses to divest himself of his most distinctive characteristic, his uniform, for the purpose of spying or of sabotage thereby forfeits his right on capture to be treated as other soldiers would be treated i.e. as a prisoner of war."

3. In late September 2001, U.S. Special Forces entered Afghanistan to link up with the Northern Alliance, the forces fighting against the Taliban regime, in preparation for the launch of Operation Enduring Freedom on October 8, 2001. U.S. soldiers in combat fatigues, buzz cuts and standard-issue gear certainly would stand out among the local tribesmen and fighters in the mountains of Afghanistan. As a result, these units dressed in the traditional Northern Alliance *pakol* (brown or gray hat) and checkered scarf, grew beards, traveled on horseback and carried weapons and equipment more similar to their Northern Alliance counterparts. What would have been their status if captured?

4. On March 3, 2011, prior to NATO's involvement in the conflict in Libya, news reports surfaced of three Dutch marines captured by Libyan forces during a helicopter evacuation of European civilians trapped in the chaos in Libya. How would you analyze the status of the three marines? What law governs their treatment? Would your answer change if the same event took place after the NATO operation began?

5. On December 17, 1994, U.S. Army Chief Warrant Officer Bobby Hall was shot down over North Korean airspace and captured by North Korean forces. He

was held for thirteen days before being released. North Korea stated that it was treating him as a POW. On April 1, 2001, a collision between a U.S. Navy EP-3E ARIES II signals reconnaissance aircraft and a Chinese fighter jet off the coast of China disabled the American plane, forcing it to land without clearance on Hainan Island in China. The crew was taken into custody and detained for ten days. Were they POWs? If not, what would the difference be between them and Chief Warrant Officer Bobby Hall?

6. In 2007, the U.S. military launched the Human Terrain System (HTS), which embeds social scientists with military units on the ground in Afghanistan to help improve commanders' and soldiers' understanding of the local population and culture. According to an early HTS mission statement, this was

> the first time that social science research, analysis, and advising has been done systematically, on a large scale, and at the operational level. We advise brigades on economic development, political systems, tribal structures, etc.; provide training to brigades as requested; and conduct research on topics of interest to the brigade staff.[11]

Are anthropologists and other social scientists embedded with military units through HTS entitled to POW status if captured? Does it matter who captures them or what they are doing or who they are with when captured?

b. Militia and Irregular Fighters

The 1907 Hague Convention accords POW status to militia and other volunteer groups meeting the four requirements of: responsible command, distinctive sign, carrying arms openly and abiding by the laws of war. The treatment of resistance movements and partisans became a challenging issue during World War II, as debates arose over whether they fit within the category of militia. As states were occupied or absorbed into other states,

> national groups continued to take an effective part in hostilities although not recognized as belligerents by their enemies, and members of such groups, fighting in more or less disciplined formations in occupied territory or outside their own country, were denied the status of combatant, regard as 'francs-tireurs' and subjected to repressive measures.[12]

At Nuremberg, the U.S. Military Tribunal upheld reprisals and other harsh measures against partisans, in keeping with the state of the law pre-Geneva Conventions. In the *Hostages Trial*, high-ranking German officers were charged with reprisal killings in Greece, Yugoslavia, Albania and Norway. The defendants claimed that the persons killed were guerrillas and partisans and thus not entitled to treatment as POWs.

11. Beth Schwartzapfel, *Hearts & Minds*, Brown Alum. Mag., Sep./Oct. 2010, at 32, 34.

12. Int'l Comm. Red Cross, Commentary on the Geneva Convention (III) Relative to the Treatment of Prisoners of War 52 (Oscar M. Uhler & Henri Coursier eds., 1958).

First, Article 43 of Additional Protocol I expands the notion of combatant to include all resistance movements fighting on behalf of a party to the conflict. It is important to note that this formulation is significantly broader than past frameworks — because Additional Protocol I includes wars of national liberation within the regime of international armed conflict, guerrilla movements and insurgents operating on behalf of a party (even though it is not a state) will fall within the notion of combatants. Article 44 then introduces a revised conception of distinction.

Article 44 of Additional Protocol I

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

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

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

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol.

The goal of these provisions is to encourage greater compliance with the law of war by insurgents by offering them combatant and prisoner of war status. In effect, Article 44(3) removes the obligation to wear a fixed distinctive sign as long as individuals carry their arms openly when visible to the enemy and preparing to launch an attack. The Commentary to Additional Protocol I notes that

> [g]uerrilla fighters will not simply disappear by putting them outside the law applicable in armed conflict, on the basis that they are incapable of complying with the traditional rules of such law. Neither would this encourage them to at least comply with those rules which they are in a position to comply with, as this would not benefit them in any way. . . . The text of Article 44 is a compromise, probably the best compromise that could have been achieved at the time. It is aimed at increasing the legal protection of guerrilla fighters as far as possible, and thereby encouraging them to comply with the applicable rules of armed conflict, without at the same time reducing the protection of the civilian population in an unacceptable manner.[16]

Critics of this provision — including, in particular, the United States and other states that have declined to ratify Additional Protocol I — argue that it undoes one of the fundamental "*quid pro quos* of humanitarian law: in exchange for making yourself more easily distinguishable from the civilian population (and as a result facilitating the ability of an enemy to lawfully attack you), the law granted you the benefit of POW status with its accordant combatant immunity."[17]

d. Medical and Religious Personnel

Protection for medical personnel dates back to the very first Geneva Convention in 1864, which states that "[h]ospital and ambulance personnel, including the quartermaster's staff, the medical, administrative and transport services . . . shall have the benefit of the same neutrality [as military hospitals and ambulances] when on duty, and while there remain any wounded to be brought in or assisted." These protections appear in subsequent Geneva Conventions and include members of volunteer aid societies and civilian medical personnel. The four 1949 Geneva Conventions build on this long-standing practice and incorporate extensive protections for medical personnel and medical facilities, both in the First Geneva Convention (relating to the wounded and sick) and in the Fourth Geneva Convention (relating to the protection of civilians). These same protections extended to religious personnel, defined in the Geneva Conventions as "chaplains attached to the armed forces." Article 8(d) of Additional Protocol I fleshes out the definition of religious personnel:

21. In two cases in South Africa, petitioners raised Article 1(4) of Additional Protocol I as a framework for receiving POW status; both times it was rejected because South Africa had not ratified Additional Protocol I and because the courts did not find it to be binding as customary international law. See S. v. Petane, 1988 (3) SA 51 (CPD) at 51-67 (S. Afr.); S. v. Sagarius and Others, 1982 (1) SA 833 (SWAD) at 833-838 (S. Afr.), *translated and reprinted in* MARCO SASSOLI, ET AL., HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW (ICRC, rel., 2011).

> 'religious personnel' means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached: (i) to the armed forces of a Party to the conflict; (ii) to medical units or medical transports of a Party to the conflict; (iii) to medical units or medical transports . . . ; or (iv) to civil defence organizations of a Party to the conflict.

Beyond these protections, medical and religious personnel have a specific and unique status upon capture. Although they are members of the regular armed forces, they are not prisoners of war. Rather, both medical personnel who are exclusively engaged in the medical service of their armed forces and chaplains who fall into the hands of the enemy are "retained personnel."[22] They nonetheless benefit from all the protections granted to POWs under the Third Geneva Convention. Under the Geneva Conventions, the detaining power must allow these medical and religious personnel to continue to perform their medical or religious duties, preferably for POWs of their own country. When their services are no longer needed for these duties, the detaining power is obligated to return them to their own forces.

Who Is a Medic?

During late 2010 and early 2011, I was assigned to Joint Task Force 435 located at the Detention Facility in Parwan (DFIP), Bagram Air Field, Afghanistan. My position was to serve as legal advisor to the Detainee Review Boards held at the DFIP. These Boards consisted of a recorder (analogous to a prosecuting attorney), three field-grade military officers serving as voting Board members, and a personal representative (somewhat analogous to a defense attorney, although a non-JAG officer). All detainees were entitled to a Board every six months to review their detention status.

It was not uncommon that detainees would challenge their detention status based on the general principles of the law of armed conflict, or at least their own idiosyncratic understanding of those principles. As the legal advisor, it was my duty to the Board to provide them guidance on these LOAC concepts, and in particular, whether a detainee's alleged activities qualified him for noncombatant status under international law. For instance, there seemed to be a large number of individuals that believed that being an itinerant preacher of the Koran entitled them to protection under the laws of armed conflict, and there were a surprisingly large number of wrongly detained village principals of girls' schools. There were claims of mistaken identity, undercover activities, double-crosses, tribal disputes and run-of-the-mill local feuds.

One of the most interesting legal issues under the laws of armed conflict that arose from my time as a legal advisor in the Boards concerned the status of

22. Third Geneva Convention, art. 28 ("Personnel designated in Articles 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require. Personnel thus retained shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. Within the framework of the military laws and regulations of the Detaining Power, and under the authority of its competent service, they shall continue to carry out, in accordance with their professional ethics, their medical and spiritual duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong.").

medical personnel. In these cases, we would work closely with the International Committee of the Red Cross representative located at the detention facility. It is an inviolable principle of the laws of war that medical personnel have protected status. However, there are reciprocal requirements to abide by certain rules as codified in the Geneva Conventions. One major obvious requirement is the need for a distinctive emblem that would designate the individual as a member of a medical unit, such as a Red Cross or in this setting, a Red Crescent.

In many situations, this becomes a fairly simple, straightforward factual analysis. In the U.S. and most developed or developing countries, we have specialized medical personnel, wearing distinctive emblems, and organized into separate medical units. They work in hospitals, which have distinctive markings visible from the air, and are geographically separated from combatant units. When these medical personnel travel, it is in ambulances, which are themselves given distinctive markings.

These systems do not necessarily hold true in modern-day Afghanistan. The Taliban have no distinctive military identification for themselves, let alone their medical personnel. There are no hospitals, no ambulances, and no separate medical units. Even Taliban personnel who have some cross-training as medical personnel are not separated from combatants; it is unclear from what I have seen if they know that there is a requirement for nonparticipation in active hostilities.

On these Boards, we did our best to piece together the facts and attempt to determine if captured detainees who claimed this protected status were, in fact, legitimate medical personnel. The International Committee of the Red Cross has attempted to address this problem with the distribution of a type of identity card for Taliban medical personnel; of course, these cards could be subject to abuse or perfidy by the Taliban, but at least it is a start.

– Captain Benjamin May, JAGC, US Air Force

QUESTIONS FOR DISCUSSION

1. As stated above, in most militaries, medical personnel wear distinctive emblems and are organized into separate medical units. But what happens when a medic does not wear an emblem of any kind?

2. In the U.S. military, U.S. Navy Corpsmen are assigned to support the U.S. Marines. A Fleet Marine Force (FMF) Corpsman, also known as a "combat medic," typically serves with a Marine unit, in contrast to non-FMF Corpsmen, who work in hospitals. Corpsmen have a long tradition of serving side-by-side with the Marines and have been decorated for valor more than any other Navy rating (specialty). However, the Corpsman role has evolved over time. In the early days, Corpsmen went into combat with only a medical kit and were not armed; if they did have a weapon, it was only to protect their patients. Today's Corpsman is essentially a Marine infantryman with a medic bag — he or she does not wear any distinctive emblem, and can and will operate any weapon to put rounds down range. The medics in *Saving Private Ryan* and *Band of Brothers* have given way to the next generation of warfare, as seen in *Generation Kill* with Hospitalman Second Class (HM2) Robert "Doc" Bryan. In a Humvee with four men riding inside and a gunner standing up with the top half of his body exposed, each team member must be covering the area in front of him. If one of these team members is a medic, is that a LOAC violation?

B. COMBATANT PRIVILEGES AND PROTECTIONS

1. Combatant Immunity

> *War consists largely of acts that would be criminal if performed in time of peace—killing, wounding, kidnapping, destroying or carrying off other people's property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors.*
>
> —General Telford Taylor at Nuremberg[23]

One definition of a combatant is a person who has a right to participate in hostilities. This privilege is based on the doctrine of combatant immunity, which mandates that lawful combatants cannot be held criminally responsible for lawful belligerent acts during wartime. Thus, a soldier who kills the enemy in accordance with the law of war (i.e., the person killed was a legitimate target, the attack complied with basic LOAC principles, etc.) is not engaging in what would, under domestic law, be murder. As the Lieber Code stated, "so soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."[24] Indeed, the principle of combatant immunity dates back centuries: the medieval authority Gratian stated, "the soldier who kills a man in obedience to authority is not guilty of murder."[25] The Third Geneva Convention includes two articles that form the parameters of combatant immunity. Article 87 prohibits sentencing combatants to any penalties other than those provided for members of the armed forces of the detaining power. Article 99 then states that POWs cannot be tried or sentenced for any act that was not forbidden by international law or the law of the detaining power at the time the act was committed. In this way, the law effectively legalizes some acts that would be criminal during peacetime, reflecting the fact that soldiers act as agents of the sovereign state. Persons who do not qualify for combatant status, in contrast, can be prosecuted for acts on the battlefield under domestic law, because they do not enjoy the privilege of combatant immunity.

Combatant immunity will thus be raised as a defense to prosecution in some cases. In order to determine whether the defendant indeed merits combatant immunity, the court must determine whether he or she is a lawful combatant under the definition in Article 4 of the Third Geneva Convention, much like the analysis for POW status.

C. PRISONERS OF WAR: PURPOSES AND PROTECTIONS

Under the POW detention regime in the Third Geneva Convention and earlier customary and conventional law, preventing a return to hostilities is the underlying purpose of detention. "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released."[40] In particular, POWs are not liable to prosecution for their lawful wartime acts, which reinforces the fact that they are not held as a form of punishment for engaging in combat. Thus, the detention of a combatant has only "one purpose: to preclude the further participation of the prisoner of war in the ongoing hostilities. The detention is not due to misgivings about previous reprehensible conduct on the part of the prisoner of war, and he cannot be prosecuted and punished 'simply for having taken part in hostilities.'"[41] In effect, "it should always be remembered that prisoners of war are not convicted criminals in need of corrective training or punishment,"[42] but are simply held so as to remove them from the battlefield.

The essentially non-punitive nature of POW detention and the fundamental purpose of removing combatants from the battlefield forms the foundation for the comprehensive protective framework that the Third Geneva Convention establishes for POW treatment. Thus, the regulations set forth — and any restrictions on POWs — serve this protective purpose and seek to balance the respective interests of the POW, the detaining state, and the POW's state. As the International Military Tribunal for the Far East (Tokyo War Crimes Trial) explained, the "responsibility for the care of prisoners of war and of civilian internees . . . is not limited to the duty of mere maintenance but extends to the prevention of mistreatment."[43] This responsibility dates back to well before the 1949 Geneva Conventions or even the 1929 Geneva Convention on the Treatment of Prisoners of War. During the U.S. Civil War, both sides treated captured enemy personnel as prisoners of war. One infamous prisoner of war facility was the Andersonville prison, where the Confederate Army held tens of thousands of captured Union soldiers in a facility only suitable for holding a few thousand prisoners. The commandant of the Andersonville prison, Major Henry Wirz, was charged and prosecuted for mistreatment, torture and murder of prisoners.

40. *In re* Territo, 156 F.2d 142, 145 (9th Cir. 1946).

41. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 35 (2010) (citing A. ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 82 (1976)). *See also* Third Geneva Convention, arts. 87, 99.

42. UNITED KINGDOM MINISTRY OF DEFENCE, JSP 383: THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 8.1.1 (2004).

43. The Tokyo War Crimes Trial, Judgment (Int'l Mil. Trib. for the Far East November 1948), *reprinted in* THE LAW OF WAR: A DOCUMENTARY HISTORY 1037, 1040 (L. Friedman ed., 1972).

2. Treatment and Protection of POWs

Customary principles and values regarding the treatment of POWs find direct reflection in the Third Geneva Convention's detailed framework for the protection of prisoners of war in the modern law of war. For example, the Third Geneva Convention requires that detaining powers take proactive steps to protect POWs from the hazards of combat. Articles 19 and 23 mandate that POWs be held "far enough from the combat zone for them to be out of danger" and cannot be "detained in . . . areas where [they] may be exposed to the fire of the combat zone." Article 13 also prohibits reprisals against POWs because, among other reasons, "the feelings which lie behind such practices are absolutely contrary to the spirit of the Geneva Conventions."[49] Furthermore, detaining powers retain a measure of responsibility for the treatment of POWs even after they are transferred to another power, demonstrating the strong protective underpinnings of POW custody.[50] The Commentary thus explains that "it was never the intention of the authors of the Convention thereby to relieve the transferring Power of all responsibility with regard to the prisoners who are transferred."[51]

This notion of an extensive framework relying not just on the specific provisions of the Third Geneva Convention but also on the spirit and purpose of the Conventions as a whole can be seen in the comprehensive applicability of POW protections under customary international law as well. Customary international law does not only apply to the broad strokes of POW treatment and detention, therefore, but to most of the obligations and privileges set forth in the Third Geneva Convention, as shown in the following excerpts from the Eritrea-Ethiopia Claims Commission ("EECC"). The EECC was established pursuant to the December 2000 Agreement ending hostilities between Eritrea and Ethiopia and was tasked with deciding all claims relating to the conflict and/or arising out of international humanitarian law, including the Geneva Conventions.

49. Int'l Comm. Red Cross, Commentary on the Geneva Convention (III) Relative to the Treatment of Prisoners of War 142 (Oscar M. Uhler & Henri Coursier eds., 1958).

50. Third Geneva Convention, art. 12. ("Nevertheless if [the transferee] Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war.").

51. Int'l Comm. Red Cross, Commentary on the Geneva Convention (III) Relative to the Treatment of Prisoners of War 137 (Oscar M. Uhler & Henri Coursier eds., 1958).

4. Trial and Punishment of POWs

If POWs are to be prosecuted for war crimes, they must be tried in the same forums (e.g., a court-martial) and only for same offenses for which soldiers of the detaining state would likewise be tried.[62] Most importantly, under the principle of combatant immunity explained above, LOAC proscribes the trial of a lawful combatant for lawful acts of war committed within the context of an armed conflict—thus, for instance, a combatant may not be prosecuted for murder for the otherwise lawful act of killing an enemy combatant.[63] Combatants are, however, subject to trial for war crimes, other pre-capture criminal acts unrelated to the conflict, or crimes committed during captivity.[64] For example, in 1945, 14 German POWs were executed by hanging for murdering other POWs during captivity in U.S. POW camps. Five soldiers of the celebrated Afrika Korps were convicted at court-martial of killing another POW at a camp in Oklahoma. Seven U-boat submariners and sailors were similarly convicted for the murder of a fellow POW at the Papago Park, Arizona camp, and two more German soldiers were convicted of killing a POW in a South Carolina camp. In all three cases, the murdered POWs were suspected of disclosing military secrets to the Americans and attacked for being traitors. All 14 defendants were hanged at Ft. Leavenworth and are buried there.[65] This episode remains one of few examples of POWs tried for crimes committed during captivity; note that the accused were tried in a U.S. court-martial, just as American soldiers would be.

62. Third Geneva Convention, arts. 84, 87.

63. *Id.* at art. 99.

64. Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. Rev. 1, 9-10 (2004); Geoffrey S. Corn & Sharon G. Finegan, *America's Longest Held Prisoner of War: Lessons Learned from the Capture, Prosecution, and Extradition of General Manuel Noriega*, 71 La. L. Rev. 1111, 1121-1123 (2011).

65. *See Questions Surround Executions of WWII POWs*, Spartanburg-Herald J., Oct. 18, 1992.

5. Repatriation

A fundamental feature of the POW regime is that POWs must be repatriated as soon as possible after the end of active hostilities.[66] Once the fighting is over, the justification for holding enemy personnel—removing them from the battlefield—no longer exists. The Third Geneva Convention then sets forth detailed procedures for such repatriation, including the restoration of any articles of value to POWs and provisions for POWs to take their personal effects with them upon repatriation or have them forwarded.[67] Before the 1949 Geneva Conventions, the framework for repatriation left too much discretion in the hands of the detaining state. Article 75 of the 1929 Geneva Convention stated, "[w]hen belligerents conclude an armistice convention, they shall normally cause to be included therein provisions concerning the repatriation of prisoners of war." States were able to take advantage of the vague language in this provision and keep POWs for longer than anticipated in the spirit of the law.[68] For this reason, the Third Geneva Convention of 1949 specifically talks of repatriating POWs "without delay." In many cases, the parties to a conflict will negotiate specific agreements regarding the repatriation of prisoners at the end of the hostilities. For example, at the end of the conflict between India and Pakistan in the early 1970s, which resulted in the creation of Bangladesh as an independent state, the three countries signed an agreement (the Delhi Agreement) providing for three-way repatriation of prisoners. Over 300,000 prisoners were repatriated in 1973 and 1974 under the terms of the agreement.[69] Similarly, at the end of the conflict in the former Yugoslavia, the Dayton Agreement included an agreement between the parties on prisoner exchanges:

> 1. The Parties shall release and transfer without delay all combatants and civilians held in relation to the conflict (hereinafter "prisoners"), in conformity with international humanitarian law and the provision of this Article.
>
> (a) The Parties shall be bound by and implement such plan for release and transfer of all prisoners as may be developed by the ICRC, after consultation with the Parties.
>
> (b) The Parties shall cooperate fully with the ICRC and facilitate its work in implementing and monitoring the plan for release and transfer of prisoners.
>
> (c) No later than thirty (30) days after the Transfer of Authority, the Parties shall release and transfer all prisoners held by them.
>
> (d) In order to expedite this process, no later than twenty-one (21) days after this Annex enters into force, the Parties shall draw up comprehensive lists of prisoners and shall provide such lists to the ICRC, to the other Parties, and to the Joint Military Commission and the High Representative. These lists shall identify prisoners by nationality, name, rank (if any) and any internment or military serial number, to the extent applicable.

66. Third Geneva Convention, art. 118.

67. *Id.* at art. 119.

68. Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 Int'l Rev. Red Cross 15, 21 (2005).

69. Agreement on the Repatriation of Prisoners of War and Civilian Internees, Bangl-India-Pak., 74 ILM 501 (1974).

(e) The Parties shall ensure that the ICRC enjoys full and unimpeded access to all places where prisoners are kept and to all prisoners. The Parties shall permit the ICRC to privately interview each prisoner at least forty-eight (48) hours prior to his or her release for the purpose of implementing and monitoring the plan, including determination of the onward destination of each prisoner.

(f) The Parties shall take no reprisals against any prisoner or his/her family in the event that a prisoner refuses to be transferred.

(g) Notwithstanding the above provisions, each Party shall comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, surrender of or access to persons who would otherwise be released and transferred under this Article, but who are accused of violations within the jurisdiction of the Tribunal. Each Party must detain persons reasonably suspected of such violations for a period of time sufficient to permit appropriate consultation with Tribunal authorities.[70]

Although the POW protections and repatriation obligations apply solely in international armed conflict, these types of special agreements can play a significant protective role in non-international armed conflict by providing a framework for the safe return of detainees from both sides.

QUESTIONS FOR DISCUSSION

1. The agreement that brought an end to the fighting in the Korean War required that all POWs be repatriated regardless of the hundreds of war crimes investigations underway. Should war crimes allegations supersede the requirement to repatriate?

2. During the same conflict, tens of thousands of Chinese and North Koreans in U.N. POW camps refused repatriation. Is there a requirement that POWs return to their country of origin?

3. Iran and Iraq fought a brutal war from 1980 to 1988. Both sides delayed and obstructed efforts to repatriate POWs at the end of the conflict, and it was not until 2003 that most POWs had been either repatriated or registered as refusing to go back to their country of origin. Early in the repatriation process, efforts began with swaps of injured and sick POWs, but often faltered on accusations by one side that the other was not fulfilling its obligations under the relevant bilateral arrangements.[71] Can repatriation obligations rest on reciprocity in this way under LOAC or does the law — either the letter or the spirit of the law — require parties to repatriate POWs regardless of the other party's actions?

70. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1A: Agreement on the Military Aspects of the Peace Settlement, art. IX, Dec. 14, 1995, 35 ILM 75 (1996).

71. *Iran Suspends POW Exchange; Iraq Retaliates*, Los Angeles Times, Nov. 28, 1988.