A TREATISE ON

THE JURIDICAL BASIS
OF THE DISTINCTION BETWEEN
LAWFUL COMBATANT
AND UNPRIVILEGED BELLIGERENT

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A study of the disposition made of partisans, guerillas, and other irregular combatants in the major land wars of the last two centuries; analysis of pertinent provisions of current conventional international law; a consideration of appropriate law for the future.

This publication is intended for instructional use and should not be cited as legal authority.

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INTRODUCTION

> It is manifest that he who fights should be hung if he fights with a gun in one hand and a purwana (a permit given to non combatants for their protection) in the other. — Rudyard Kipling[1]

When men engage in war, they make rules defining those who can join in the fighting. There is supposedly no more basic rule of the law of war than the rule that there is a sharp line which separates those who may fight from those who may not. Any examination of the legal problems connected with irregular combatants must start with that rule. This is so because the traditional rules governing the juridical disposition of irregular combatants are based on the fundamental assumption that there are but two classes of persons in war--combatants and noncombatants--and that attached to each class is a bundle of legally defined rights, duties, and privileges. Noncombatants are, by a legal theory based on this assumption, protected from violence on the express condition that they do no violence to the enemy. An eminent writer has stated that the branch of the rule which served to protect the noncombatant from being the subject of war has become a

[1]A Sahibs' War, in 18 The Works of Rudyard Kipling, 98 (1901).

hollow thing.[2] Seemingly, the other branch of the rule might then be no longer valid. If men may not fight because they are protected from harm, does it not logically follow that if they are not protected, they may fight? If the entire population of a nation is combatant in the sense of being a target, and in the sense of contributing in a disciplined way to the national war effort, (this being the excuse used to make them targets) is there now any validity to the second branch of the rule? The logical conclusion is not found in the present laws of land warfare. A noncombatant[3] who fights can be punished with death.[4] Why do the military still claim the right to execute the civilian who decides to become a part-time, or amateur fighter, while at the same time they claim the right to rain destruction upon him from above, starve him

[2]Lauterpacht, The Problem of the Revision of the Law of War, 1952 Brit. YB. Int'l L. 364 (1952); see Nurick, The Distinction Between Combatant and Noncombatant in the Law of War, 39 Am. J. Int'l L. 680 (1945).

[3]A noncombatant is a person whom both sides on the basis of experience can reasonably expect will not actually engage in overt acts of war. The word can only be defined to the satisfaction of both sides when nations of the same cultural heritage are at war. Then, noncombatant is defined by traditional examples which have meaning to both sides. In most western civilizations all persons not in the fighting forces and some, such as physicians are traditionally thought of as noncombatants. This is the sense in which the word is used here.

[4]FM 27-10, The Law of Land Warfare, Jul. 1956, paras. 80, 81, 82.

with a blockade, and occasionally vaporize him as a minor incident to an atomic missile strike against his national army? The answer lies partly in changes in the law of land warfare. There was a time when both branches of the distinction between combatant and noncombatant were said to be rigidly followed.[5] The rest of the answer lies in a misconception. The rule that a man is an illegal combtant when he becomes a part-time fighter is not in fact based on this traditional legal distinction between combatant and noncombatant, but is based on a multitude of other considerations. Nevertheless, the older authorities state a theory of illegality based solely on this distinction between combatants, and the rights, duties, and privileges of each.[6]

Dispositions of irregulars have not in fact been based upon the customary law of land warfare. This thesis will examine some dispositions of irregular combatants, both in the light of what was said to be the juridical basis of their disposition, and what was the real basis

[5]See, e.g., Winthrop, Military Law and Precedents, 778 (1895) (2d Ed. 1920 Reprint).

[6]See, e.g., Halleck, International Law and the Laws of War, 427, 428, 388 (1st Ed. 1861); Spaight, War Rights on Land, 37, 38 (1911); Hall's International Law, 610, 611 (8th Ed. 1924).

for the disposition.[7]

The Geneva Convention Relative to the Treatment of Prisoners of War of 1949[8] solves some of the problems connected with the disposition of irregular combatants. It does not replace all the old law. It should provide much clearer guide lines for the disposition of irregulars than did the older rules. Has it succeeded in providing a rule which will satisfactorily define those who can engage in fighting? Does this Convention provide a rule which will be accepted and applied by a majority of the nations in the future? This thesis examines these questions.

Irregular warfare is now a major strategical consideration. The United States Army has shown increased

[7]"Irregular combatant" and "irregular" are used hereafter to designate all those combatants who are not integral regularly constituted part of the conventional military establishment of a country. This is convenient and avoids the difficulties inherent in varying meanings of the multitude of terms normally used. Thus, "Partisans," in the American Revolutionary War were privately supported, regularly constituted units of the Continental Army, but the word has an entirely different meaning when used in connection with Tito's Yugoslav Partisans in World War II. Any attempt to say that "Partisans" are, or are not, legal combatants is sure to lead to confusion. See United States v. List, (Hostage Case) 11 Trials of War Criminals 1233 (GPO 1950) (Indictment charged accused illegally ordered troops be designated "Partisans").

[8]Geneva Convention Relative to the Treatment of Prisoners of War of 12 Aug. 1949, TIAS 3364 (effective 2 Feb. 1956).

interest in this type of warfare.[9] There are many factors which may lead to increased use of irregulars in future wars. The economy of the irregular fighter makes him attractive in an era when conventional armies become increasingly more expensive to equip and maintain. The principle of economy of force dictates their use whenever feasible in strikes against complex communications and weapons systems. Modern armies and their complex weapons systems are highly specialized tools, not particularly designed to combat irregulars. The advent of tactical atomic weapons has caused conventional armies to increase greatly the spatial dispersion between units; with a consequent increased vulnerability to attacks upon lengthened lines of communication. The same weapons tremendously increase the potential efficiency of irregulars. Finally, any estimate of the use of irregulars in the future must consider two key tenets of Communism; the inevitability of class warfare, and the command to turn ordinary wars into class wars. Irregular combatants are the means by which a class war is begun and carried out. A Russian publicist has advanced a theory of the legality of irregular warfare based upon a just-unjust war dichotomy, which

[9]See Ney, Guerilla Warfare and Modern Strategy in II Orbis, A Quarterly Journal of World Affairs 66 (1958), and also see FM 31-21, Guerilla Warfare and Special Forces Operations (1958).

is partly based upon Marxian theory.[10] The theory seems peculiarly suited to application in class warfare. Therefore, in the future large numbers of irregular combatants may oppose conventional armies. If so, the problem of the legal status of the irregular combatant will be posed in a more acute form than heretofore. Article 4 of the 1949 Geneva Convention[11] sets out four criteria,[12] which if met by the irregular, do no more than entitle him to prisoner of war status. The criteria are not exclusive. A nation could, if it desired, grant prisoner of war status to per-

[10] See Trainin, Questions of Guerilla Warfare in the Law of War, 40 Am. J. Int'l L. 534 (1946); see also Kulski, The Soviet Interpretation of International Law, 49 Am. J. Int'l L. 518, 523-33 (1955).

[11] Geneva Convention Relative to the Treatment of Prisoners of War of 12 Aug. 1949, TIAS 3364. (Effective 2 Feb. 1956).

[12] "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly; and
(d) that of conducting their operations in accordance with the laws and customs of war . . ."

sons who do not meet the criteria but who do meet some other and different test. The Convention does not enact positive law. The Convention does not state that those who do not meet the criteria are illegal combatants. If those who do not pass the test of Article 4 are held to be illegal combatants it is only because of the customary law of nations. Such persons are given certain safeguards by a different convention.[13]

The four criteria, being the product of a compromise of violently conflicting interests are vague and open to varying interpretations. Another problem then, which this thesis attempts to answer, is: How may it be determined with reasonable certainty that a given irregular combatant, or group of irregular combatants, meets the four criteria of the Geneva Convention?

For the combat soldier and unit commander there is no such problem. The soldier may defend himself and fire on any person firing at him. However, once the enemy surrenders, he is bound to treat the prisoner, whether he appears to be a civilian or not, as a prisoner of war until his status is determined by a tribunal.[14]

[13]Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, TIAS 3365, arts. 4, 66, 68, 70-78 (Effective 2 Feb. 1956). See also, FM 27-10, note 4 supra, paras. 72, 73, 247, 248, 432-448.

[14]Geneva Convention Relative to the Treatment of Prisoners of War, note 11 supra, art. 5.

The problem is a complex one for the attorney. It involves an obscure field of law, almost devoid of authority. It is useful to begin an analysis of the problem by first asking why there is a necessity for any criteria. The answer briefly stated is that the Convention is a humanitarian attempt to protect persons who traditionally have been harshly treated. Therefore, although the Geneva Convention purports to grant prisoner of war status only to a certain class, in practical effect it distinguishes between lawful and unlawful combatants.[15] An unlawful combatant is one whose combatant activities are illegal according to international law. He may be punished with death.

But why are there any unlawful combatants? The basic question still remains--why are they executed? Is that which was so manifest to Kipling and to the older authorities in reality so manifest?[16] The reasons why irregu-

[15]Or, perhaps between privileged and unprivileged belligerents. An unprivileged combatant, such as a spy, is one whose activities, while not considered illegal in law, are so dangerous that as a matter of policy he is treated with the utmost severity to discourage and minimize his use in war. See Baxter, So-Called Unprivileged Belligerency; Guerillas and Saboteurs, 28 Brit. YB. Int'l L. 323 (1951).

[16]See Spaight, War Rights on Land, 37, 38 (1911). Kipling, at the time he wrote the words at the head of this thesis was intimately connected with the British army in the Boer war. Spaight also was with the British army. Both were familiar with the Boer Commandos. See Acland, Introduction to Spaight, War Rights on Land at 1, (1911).

lars are ruled unlawful combatants, and punished by death for engaging in war are a complex combination of religion, national policy, principles of humanity, and perhaps some all but forgotten tribal memories of the proper way to conduct war. Therefore, inquiry into the reasons irregular combatants are traditionally thought of as unlawful combatants is necessary.

To consider all the potential violations of law by the irregular is beyond the limits of time and space authorized for this thesis. The irregular combatant by the nature of his operations cuts across the entire legal spectrum of belligerent action, from armed intervention to formal war. In civil wars the irregular operates in point of time from rebellion through insurgency to recognized belligerency. Spacewise he operates in his own land and in occupied territory. War is usually thought of as a legal state, and laws generally have a territorial basis. The irregular violates a host of municipal laws during a civil war. He may violate municipal laws of one (or several sovereigns) and the laws of war at different times during one belligerent action. Arbitrarily then, the juridical dispositions examined herein are for the most part limited to those dispositions occurring in a conflict of an international character. The member of the so-called "underground" and the saboteur

not operating in para-military organizations has likewise been arbitrarily disregarded.

Because that portion of the traditional law of war which deals with the question of who may engage in war does not approach the minimal requirements of a system of law, no attempt is made to fit the disposition of irregulars into the theories usually used in the literature dealing with the legal disposition of irregulars.[18]

[18]See Lauterpacht, note 2 supra, at 382; Kunz, The Chaotic Status of the Laws of War and the Urgent Need for Their Revision, 45 Am. J. Int'l L. 37, 49-50 (1951). For possible new approaches to the law of war see McDougal & Feliciano, International Coercion and World Public Order; The General Principles of the Law of War, 67 Yale L.J. 771 (1958); Baldwin, A New Look at the Law of War; Limited War and Field Manual 27-10, 4 Military Law Review 1, (Department of the Army Pamphlet No. 27-100-4, April 1959).

CHAPTER I

THE CUSTOMARY LAW AND THE FUNCTIONS PERFORMED BY RULES DISTINGUISHING BETWEEN LAWFUL COMBATANTS AND UNPRIVILEGED BELLIGERENTS

From what has been said, it is clear that we are here dealing with what is in essence a set of rules defining the persons who may fight in a war. Any consideration of the dispositions[19] made of irregulars in the past involves an understanding of the functions these rules must perform and the functions they can be made to perform. The functions of the rules pertinent to this inquiry fall generally into the fields of psychology, philosophy and military tactics.

The consideration of the disposition of irregulars in this thesis is oriented toward an analysis of the functions required of the rules concerning who may fight in a war. The functions performed by these rules supply an understanding of the reasons why the irregular combatant is traditionally thought of as an illegal combatant. Comparison of the rules which were in force at a given time with the functions required is the method used.

The first rule considered is also the oldest. From

[19]"Disposition" is used throughout in a broad sense, i.e., any action taken with regard to the irregular in the way of treatment upon capture.

about the middle of the 18th century until very recently, the major rule defining those who could lawfully participate in war was a rule which can be conveniently termed the "authorization" rule. In its simplest form, this rule was: Only those persons who were authorized by the sovereign to engage in war were lawful combatants,[20] and all others could be dealt with summarily as unlawful, illegal, or improper combatants by the forces against whom they committed hostile acts.[21] The authorization itself took a variety of forms, e.g., commissions of officers; calling up units; or the swearing to oaths of enlistment.

[20]In practice, sovereigns only authorized regular armies, and militias were generally, in Europe, denied belligerent rights. See generally, Brown v. United States, 12 U.S. (8 Cranch) 110, 132-33 (1814) (Story, J. dissenting); contra, Talbot v. Jansen, 3 U.S. (3 Dall) 133, 160 (1795) (dicta); Hall's International Law, 612 (8th ed., Higgins) (1924); Droop, The Relations Between an Invading Army and the Inhabitants, and The Conditions Under Which Irregular Combatants are Entitled to the Same Treatment as Regular Troops, 15 The Solicitor's Journal and Reporter 121 (1870) (hereinafter cited as Droop). The authorization rule may still be in effect, depending on the interpretation given to the words "party to the conflict" in Article 4, Geneva Convention Relative to the Treatment of Prisoners of War, note 12 supra.

[21]This was a fundamental error. Unauthorized participation in war is not a violation of international law, but of the domestic law of the participant's sovereign. See Brown v. United States, note 20 supra, at 132.

THE "JUSTIFIABLE HOMICIDE" FUNCTION

A most elusive function performed by the authorization rule is necessitated by man's instinctive recoiling from any attempt to allow the individual an unbridled right to decide for himself that he will take the life of another, even the life of the enemy. This instinctive limiting of the right to kill is embodied in all justifiable homicide legislation, and is probably based on the deeply ingrained reluctance of man to kill his own species. That it goes deeper than mere conditioning is evident when it is considered that nearly all animals have an aversion to killing intra-species.[22] The aversion to killing other men is most clearly seen in primitive peoples. Most have a dread of taking human life and a fear of the consequences — a dimly understood fear of some sort of divine or extra-human punishment upon the whole tribe for the act — even in war.[23] A conflict then results from the necessities of war and this fear.[24]

Among primitives the conflict is resolved by the erection of a concept that the Gods have ordained and blessed the war and condoned the necessary killing; pro-

[22] 1 Wright, A Study of War, 91-96 (1941).

[23] See Wright, note 22 supra, at 92-94; Turney-High, Primitive War, Its Practices and Concepts, 225 (1949).

[24] Wright, note 22 supra, at 156-57.

vided that particular rites and rules are scrupulously followed prior to and during the war. For example, the early Israelites were certain Jehovah approved their wars if the King and his weapons had been annointed with holy oil,[25] the warriors had refrained from intercourse,[26] and fitting rules were kept in the camp.[27]

In modern civilizations the state solves this conflict by authorizing the combatant to fight. That the authorization rule was intended to perform this function is apparent in trials of irregulars in the American Civil War. Many irregulars, in trials before military commissions, were charged with murder. The specifications followed the form of a common law indictment. That the accused shot a named Union soldier without being commanded to do so by any lawful military or civil authority was alleged as the gravamen of the offense.[28] Bluntschli, a continental author prominent in the development of war law, expressed a variation of the concept in this passage.

[25]Psalms 20; 2 Samuel 1:21.

[26]1 Samuel 21:5.

[27]Kent, Israel's Laws and Legal Precedents, 82 (1907); Dueterotomy 23:9; see also similar Moslem rules laid down by the Prophet; in Ashrof, Muslim Conduct of State 299 (1945).

[28]E.g., cases of Wright and Smith, GO No. 93, HQ's Dept. of the Ohio, Oct. 27, 1864; Ballan, Kissinger and Rider and Caldwell, GO No. 267, War Dept., Aug. 3, 1863. And also see Art. 57 of "Lieber's Code," (GO No. 100, War Dept., April 24, 1863, Instructions for the Government of Armies of the United States in the Field) (as soon as a man is armed by a sovereign, his killing is not a crime).

"Every unnecessary killing, even of armed enemies is a wrong. . . . Human life may only be attacked from a higher necessity, not from passion and for pleasure."[29]

THE FUNCTIONS OF ENFORCING DOMESTIC POLICY AND VITALIZING PHILOSOPHY

Other functions of the rule under discussion are easier to see. Sovereigns restricted the right of individuals to engage in war as a natural corollary of the concept, widely accepted on the Continent, that war is only engaged in between states and not between the individual subjects of states.[30] The authorization rule serves to partly implement this philosophical theory.[31] Sovereigns had an interest in limiting the persons who engaged in

[29]Bluntschli, Volkerrecht, § 579 (1868) (the quoted language is in a passage dealing with the use of stealth by irregulars). Translation in Droop, note 20 supra, at 122.

[30]See 2 Oppenheim, International Law, 168 (Lauterpacht, 6th ed.) (1940); Hall's International Law, note 20 supra, at 612-13. The United States courts have not adopted this theory. See The Rapid, 12 U.S. (8 Cranch) 155, 161 (1814); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 187-88 (1920).

[31]There have been dispositions of irregulars based on a variation of the authorization rule, i.e., when the state no longer exists through defeat, flight of the government or annexation, because there is no state to authorize them those who continue to fight are unlawful combatants. For a collection of these instances see Nurick & Barrett, Legality of Guerilla Forces Under the Laws of War, 40 Am. J. Int'l L. 563 (1946). This theory is of doubtful value in an era in which "governments-in-exile" are commonly accepted and supported, and has been outmoded by Article 4A(3) of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 Aug. 1949, note 11 supra.

war on their behalf, since if they engaged in atrocities, the conventional armies suffered from reprisals. Irregulars were always unpredictable, and could involve the sovereign in difficulties with neutrals, allies, and his own subjects. An enemy sovereign should have had no legitimate right to insure, by the device of denying belligerent rights to unauthorized combatants, that these latter functions were performed for his enemy. It was said, however, that all nations had an interest in insuring that wars were fought by states, not individuals.[32]

THE FUNCTION OF PREVENTING CRUELTY TO PRISONERS

The functions described above are the only functions the authorization rule can accomplish by itself, without relying on certain conditions precedent to the efficient operation of the rule. They are usually found only in wars fought between nations sharing a common heritage, in a stable historical environment. The conditions are: that both parties to the war subscribe to the theory that wars are between states, not individuals; that there is a meeting of the minds of the parties to the conflict as to the proper persons to authorize in any given war; that

[32]See Talbot v. Jansen, note 20 supra, at 160.

there exists no factual situation requiring the invoking of a different rule.

If any of these conditions are not present the authorization rule is not followed because it alone cannot perform the function of preventing cruelty. While European monarchs ruled the authorization rule worked. The conditions precedent were present. An analysis of the treatment afforded irregular combatants in the wars between France and England in North America in 1757-1760, the American Revolution, and later European wars, will illustrate the conclusion reached above.

There was, on the Continent, in the 18th century, a fairly elaborate and generally followed body of custom which might be called a code of the laws of land warfare. One of its salient features was the concept that there existed a firm distinction between combatant and noncombatant.

Wars were fought by small, highly disciplined professional armies for limited purposes. There was general agreement to use only these troops. It was understood that the losing nation was not to be annihilated. The wars had only limited impact on the masses of people, since they were not physically nor emotionally involved in them. The age of reason had been begun by the ascendency of Rousseau and Voltaire with its attendant de-emphasis of

emotion. The powerful influence of the French Court permeated the courts of all European monarchs and caused a sense of unity — an appreciation of a common culture — among the military and the ruling classes in particular, in all of Europe.[33] In spite of their location in North America, in both the French-English war of 1757-1760 and the American Revolution, the conditions defined above were present.

In the war of 1757-1760[34] both sides used composite forces of indians and irregulars. The British organized a group of frontiersmen, "Rogers' Rangers," which operated closely with indians. Rogers was commissioned in the British colonial forces, as were the indian chiefs. Both the indian warriors and the frontiersmen were paid, took an oath, and were subjected to the articles of war.[35] No uniforms were provided.[36] The terrain required the use of such units. Regular forces on both sides were relatively useless.

[33]See generally, Veale, Advance to Barbarism, Chaps. III, IV (1957). The code in Mohammedan countries about this time was quite different. See Ashrof, Muslim Conduct of State, 192-242 (1945).

[34]Commonly known in the United States as the "French and Indian" War.

[35]Letters from Lord Loudon to Rogers, March 1757 and 1 Jan. 1758 in Rogers, Journal of Major Robert Rogers, 45, 69 (1770).

[36]Each man furnished his own "cloathes," Ibid.

The commissions and oaths (which of course were mere formalities insofar as the Indians were concerned) satisfied the authorization rule. The war was in fact between states, since there were practically no inhabitants in the area. There were no other factors to be considered in the wilderness. The laws of war known in Europe were not much followed and prisoners were frequently butchered. For the troops on both sides, this was a normal incident of war.

While it cannot be said with absolute certainty that the French regarded Rogers' Rangers as lawful combatants, a strong inference can be drawn from the entire diary of Major Rogers that such was the case. Moreover, this would be implicit in the provisions insisted upon by the French in the capitulation of Quebec which ended the war.[37] The English granted the French "Militia" belligerent rights. The capitulation terms stated that it was the custom in the colonies for the inhabitants to take up arms for the sovereign.[38] Necessity then, added to an unspoken agreement upon the proper type of troops for a colonial war, brought about a meeting of the minds of the two nations as to the propriety of the use of these irregulars.

[37]See Hall's International Law, note 20 supra, at 616-17, for the terms of the capitulation.

[38]Ibid. Hall considers this evidence that at the time, "militia" in Europe were not, by custom, lawful belligerents.

A similar situation occurred in the American Revolution. The British army of Lord Cornwallis engaged various groups of American irregular combatants in South Carolina; i.e., the forces of Generals Marion, Pickens, and Sumter. These groups wore no uniforms,[39] were rarely paid, engaged only intermittently in fighting,[40] and frequently violated the laws of war by killing and mistreating Tory prisoners.[41] The American generals had been commissioned by the Governor of South Carolina in a "State" Militia,[42] although it seems doubtful that the men of these commands had any formal connection with the revolutionary government. The Governor was not in South Carolina, having been forced to leave by the British. He sent the commissions by courier.[43] Nevertheless, Lord Cornwallis, an officer with much military and political experience, in his voluminous correspondence with his government and with the Commanders of the Continental Army did not mention that he considered Marion's, Picken's, or Sumter's commands unlawful or illegal combatants.

[39]See Hartley, Life of Major General Henry Lee and General Thomas Sumter, 123-26 (1859); 1 Ross, Correspondence of Cornwallis, 91 (1859); Horry, The Life of General Francis Marion, 160 (1814).

[40]See Greene, FV, General Greene, 176; 265 (1859).

[41]See Letters of Cornwallis to Maj. Gen. Greene, to Gen. Smallwood, to Lord Germain, letter of Rawdon to Cornwallis in 1 Ross, note 39 supra, at 67, 505, App. VI (1859).

[42]Horry, note 39 supra, at 130; Hartley, note 39 supra, at 314, 316.

[43]Ibid.

Those he captured were comparatively well treated,[44] although considered rebels. He occasionally complained of their treatment of Tory prisoners. Cornwallis did order the execution of a few men, unattached to the American forces in any way, who were caught in individual sniping attempts at the British.[45]

In this war as in the earlier, authorization (although from an inchoate nation) was the sole requirement. The necessary conditions for the operation of the authorization were again present. The British shared a common heritage with the colonists. Cornwallis attempted to raise irregular troops from Tory sympathizers, a circumstance which led to a common agreement that irregulars were proper subjects for authorization.[46] If the bulk of Americans did not believe that wars are solely between states, their leaders accepted Rousseau's theory of war.

The treatment of irregular combatants in the Spanish Peninsular wars about twenty-five years later was far different, and demostrates the inability of the authorization rule to protect prisoners when a conventional army meets irregulars. The murder of prisoners, although it

[44]See generally 1 Ross, note 39 supra.

[45]See Horry, note 39 supra, at 209, 211, 212.

[46]Lower ranking British officers accepted the command decision, but were perplexed by the mode of warfare used by irregulars. See Simcoe, A Journal of the Operations of the Queen's Rangers, 18 (1790 ?)

often occurred in the two colonial wars discussed, was rarely murder of conventional army personnel. The ability of the authorization rule to prevent such atrocities had not been tested in the colonial wars.

In this war (1807-1814) Wellington was at times aided by as many as 50,000 Spanish irregular combatants. Many were authorized to fight by the Spanish Regency. Others were self-constituted. Some were motivated more by hope of booty than by patriotism. Those authorized were organized and equipped by secret "Guerilla Juntas" established in each province. Districts furnished a quota of men by levy and provided their food. The regular Spanish army provided payment, discipline, and some leaders.[47] Wellinton also used the Portuguese Ordenanza, an ununiformed, but authorized, paid, and officered militia against the French.[48]

The French treated all of these groups as unlawful combatants. Many were shot, until reprisals by the guerillas forced a semi-recognition of them as lawful belligerents.[49] It is probable that the reason given by the French

[47]See 3 Oman, A History of the Peninsular War, 488-92 (1908); Napier, History of the War in the Peninsula, and in the South of France, 1807-14, at 206, 284 (Redfield 1 Vol. ed. 1855).

[48]Hall's International Law, note 20 supra, at 619 and n.1.

[49]See 3 Oman, note 47 supra, at 488-92 (1908); Hall's International Law, note 20 supra, at 619 and p. 1; Napier, note 47 supra, at 411, 561.

Commander, Marshal Soult, in the case of the Ordenanza was their lack of uniforms.[50]

Solely from a legal standpoint, using the frame of reference of the law of war as it existed at the time, Rogers' Rangers, the French habitants, the American irregulars, the Portuguese Ordenanza, and a large portion of the Spanish Guerillas had the same legal status. Each had the authorization of a sovereign, officers, some discipline, no uniforms, and no proper appreciation of the laws of war. Using a different legal status as a measuring rod, all were "militia."[51] Each met the basic authorization rule, although they were exceptions to the custom followed by the European monarchs of authorizing only professional

[50]Wellington wrote Soult:

> "Do you call the 'Countrymen without Uniforms' Asassins and Highwaymen? They are the Country's Ordenanza, who as I had the honor of assuring before, are a military Corps commanded by officers, paid, and acting under military laws.
>
> I have heard said that you demand that all those who enjoy the right of war be uniformed, but you must remember that you yourself have added to the glory of the French Army by commanding those soldiers who were not in uniform."

See Letter from Wellington to Marshall Soult in Hall's International Law, note 20 supra, at 619 and n.1. (Translation by Mrs. Pauline LeHardy Hart.)

[51]Military men have frequently used the Regular Army-Militia dichotomy as a measure of legality. See Hall's International Law, note 20 supra, at 618-19; Art. 4 Geneva Convention Prisoners of War Convention, note 12 supra; Spaight, note 6 supra, at 40-41 (1911).

soldiers. But it was not this custom which Soult relied upon to declare them illegal. He complained of lack of uniforms. Soult was blocked from complaining of lack of authorization; but even the authorized Spanish guerillas were conspicuous for cruelty to captured French soldiers.[52] The authorization rule was impotent to prevent cruelty to prisoners. How did this weakness come to be exposed? A new type of combatant had been authorized, a type which the sovereigns had not mutually agreed upon as proper for authorization.[53]

The authorization rule then, when literally interpreted, was not able to perform a necessary function. It depended too much upon the sense of unity of the European aristocracy, their ability to find a common ground upon which to agree, their custom of using professional armies only. The Spanish Regency followed the letter, but not the spirit, of the rule. The Spanish peasants took the position this was a war between individuals. But the French felt otherwise.[54] In this war, the authorization rule was

[52]See Napier, note 47 supra, at 206, 284; 3 Oman, note 47 supra, at 488-92.

[53]Napoleon operated, while in other countries, on the principle that inhabitants who took part in hostilities without forming part of the regular army were treated as insurgents. Droop, note 20 supra, at 122.

[54]Droop, id. Napoleon at times followed an earlier extension of the authorization rule which required each belligerent to have express authorization. This extension was used to crush rebellions. See Hall's International Law, note 20 supra, at 612-13, n.2 (8th ed., Higgins) (1924).

called upon to perform a function it was not expressly designed for. Moreover, it was a new type of war not foreseen when the rule was developed. Napoleon vainly attempted to enforce a variation of the rule which granted belligerent rights only to the regular, full time army, excluding all militia from these rights.[55]

The weakness of the authorization rule is seen in two differing practices followed by the American army in Mexico in 1847. While the Mexican forces were still effective, and before the victory at Cerro Gordo which dispersed the organized Mexican army General Scott apparently required only an authorization. Thus, he issued a proclamation on April 11, 1847, in which he said, after pointing out the good discipline of the American army:

> ". . . on the other hand, injuries committed by individuals or parties of Mexico <u>not belonging to the public forces</u> upon individuals, small parties, trains of wagons and teams, or of pack mules, or on any other person or property belonging to the army, contrary to the laws of war — shall be punished with vigor — . . . ."[56] (Emphasis supplied.)

[55]Hall's International Law, note 20 <u>supra</u>, at 612-13, n.2.

[56]Major General Winfield Scott's Proclamation of April 11, 1847, directed to the people of Mexico. (Photostat of original document in the U.S. Army Library, Washington, D.C.)

Later, after Cerro Gordo, he followed a different rule, and threatened to treat the remaining guerillas as murderers and robbers,[57] although they were authorized by the Mexican government. The rules were changed because of changed conditions in the latter part of the war. In the latter part of the war, the Mexican irregulars frequently violated the laws of war, particularly by mistreating prisoners.[58]

THE COLLAPSE OF THE CUSTOMARY RULES

After the Peninsular War, all variations of the authorization rule proved unworkable. Wellington drove the French armies from Spain into France at the end of the Peninsular War. Soult had to call the French inhabitants to rise in arms against the invading British and Spanish troops.[59] Wellington, faced by French guerillas as Soult had earlier been by Spanish, announced a new rule. He issued a proclamation ordering the inhabitants to either take arms openly and join Soult or stay peaceably at home. If they did not, he threatened to hang them and burn their villages.[60] Wellington's rule was meant to

[57]General Order Number 372, Headquarters of the Army, Mexico, Dec. 12, 1847, in General Scott's orders, 1847-1948, Book 41 1/2, United States Archives.

[58]2 Smith, J.H., The War with Mexico, 168-69, 421, 423 (1919).

[59]Napier, note 47 supra, at 694.

[60]Id.; see full text of Proclamation in Holland, Lectures on International Law, 363 (1933).

require full time military activity and to forbid part time soldiering.[61]

After this there was little consistency in the rules concerning who could fight in war. Necessity required the continental powers to seek whatever help they could from the peasantry. Thus when Napoleon invaded Prussia in 1813, the Prussians issued a decree calling upon the population (i.e., the Landsturm, a form of militia) to take up arms against the French.[62] Their only uniform was a cap and belt, which they were instructed to hide when hard pressed.[63] The French announced they considered the Landsturm as brigands.[64] Not long after, Napoleon, when hard pressed, called up ununiformed French peasants, and the Germans under Blucher issued a similar proclamation.[65]

THE STRATEGY FUNCTION

There is an entirely different function which may be performed by the rules concerning who may fight in war. They can aid prosecution of a war. A clear example of this function is seen in the French Intervention in

[61]See Spaight, note 6 supra, at 37 and n.2.

[62]Droop, note 20 supra, at 122; Lieber, Guerilla Parties Considered with Reference to the Laws and Usages of War, 15 (1862).

[63]Holland, Studies in International Law, 76 (1898).

[64]Droop, note 20 supra, at 122; Lieber, note 62 supra, at 15.

[65]Droop, note 20 supra, at 122.

Mexico. The French invaded Mexico during the 1860's, installed the Austrian Maxmilian as emperor and later, after prolonged hostilities, withdrew, leaving Maxmilian to be executed by the Mexicans. Irregular combatants operated on the Mexican side through three phases of this armed intervention; most wore no uniforms. During the first phase, the invading French were opposed by both the regular Mexican forces and bands of irregulars, some of which were authorized by the Mexican government. During this phase the French recognized as lawful belligerents all those armed forces (regardless of type, authorization, or method of operation) which met, fought, or retreated from the main body of the French army. However, those Mexicans, no matter in whose name they operated, who conducted raids on towns or individuals were treated as outlaws.[66]

During this phase the French army was attempting to conduct an armed intervention without arousing more than the absolute minimum of hostility among the Mexicans. After the French capture of Mexico City and the defeat of the major portion of the Mexican army, the war entered a second phase. During this phase, while the French and

[66] 400th OR Research and Development Unit (TNG), U.S. Army, French Military Government in Mexico, 119 (1951). (A project submitted to the Research and Development Board, General Staff, U.S. Army, Proj. Log 8.) Hereinafter cited: French Military Government.

Maxmilian were attempting to pacify a country they felt was almost within their grasp, they declared all irregulars "brigands" and "robbers." Many irregulars were tried by French Military Courts and executed. The charges were usually "assassination," or pillage and arson of towns and haciendas.[67] Many of these trials were mere sham trials cynically arranged by Marshal Bazaine, the French commander. The verdicts, in many cases, were prearranged with the officers who composed the court.[68] Later, when the French were withdrawing from Mexico, having decided to abandon the adventure, they treated some of the Mexican guerillas as lawful combatants, i.e., those with close connections with the Republican Government of Juarez.[69]

The French disposition of irregular combatants in the Mexican intervention had little relationship to the customary rules. If, however, the disposition is analyzed from the viewpoint of political and military policy, two distinct conclusions appear.

[67]See French Military Government, 170, 124, 168, 271, 273, 111; Photographic copy of Illustrated London News of Jan. 2, 1864 at 111.

[68]See French Military Government, 272, 278.

[69]See French Military Government, 297-99. The "Black Decree" of Maxmilian of Oct. 3, 1865 is not discussed, as it was a patently illegal order condemning without discrimination all forces opposing him. See Winthrop, Military Law and Precedents, 798 (2d ed. 1920 reprint).

The first of these conclusions is that the disposition of the Mexican irregulars helped the basic aim of the intervention. This aim was to install a lasting puppet government at the least possible expense in time, money, and men.

The second of the conclusions is that the French used the rules concerning irregulars to aid their tactical situation. French application of the rules varied as their assessment of the tactical situation varied. The French waived, applied, and again waived the authorization rule as their situation vis-a-vis the Juarist forces changed.

The French practice in this Intervention was a combination of discriminating applications of rules. The combination had the following effects: It perhaps saved captured French troops from reprisals by the Mexican irregulars and protected the population from their depredations. This generally was the effect of the practice followed shortly after the invasion. It tended to separate the Mexican people from the Juarez government by establishing the French as the protectors of the populace from irregular raids. The combination helped to prevent identification of the French troops with the Maxmilian government. The French were still able to benefit somewhat from the harsh decrees of Maxmilian against the

Juarist forces. This effect was more apparent in the latter stages of the intervention.[70]

THE IDENTIFICATION FUNCTION

Rules can be made which compel the irregular to wear uniform-like marks or lose protected status upon capture. These rules perform three identification functions. The uniform marks identify non-fighters and thus may protect them from harm. They also aid the opposing army in picking out enemy irregulars from among the mass of the civilian population. Occasionally they may also serve to prevent surprise by the irregulars.[71]

This type of rule can also perform a strategy function. It is possible to formulate rules which ostensibly perform the function of protecting civilians, but which actually aid the strategy of the conventional army. These capabilities of the uniform marks rule were apparent in the Franco-Prussian War of 1870-71.

[70]This method of handling the problem of the disposition of irregulars, within the overall framework of policy, may well have been due to the experience of Marshal Bazaine, who had risen from the ranks of the French army, and had spent years as a soldier-diplomat governing, fighting, and negotiating with the Arabs in the French possessions in North Africa.

[71]These functions have always been more important in Europe than in the United States. See Lieber, note 62 supra, at 16 (1862).

In that war after the conventional French army was defeated or immobilized the French government called out a militia, the Garde Mobile. Groups of individual French citizens were also called up to resist the invaders.[72] Many of the latter were members of shooting clubs — the Francs Tireur — (Free Shooters).[73] The Francs Tireur were of several types; some wore uniforms,[74] while others wore only blue or grey blouses with red arm bands or a red shoulder strap.[75] The Prussians treated all these forces, without distinction, as unlawful belligerents,[76] although all were authorized by the French government. It should be noted that to maintain control of the country in areas away from the main bodies of troops, the Prussians used highly vulnerable small roving

[72]See Hall's International Law, note 20 supra, at 15, 16, n.1. See also Spaight, War Rights on Land, 41, 42 (1911); Bordwell, The Law of War on Land, 90 (1908).

[73]Spaight, note 72 supra, at 44. "Franc-Tireur" has since become a synonym for unlawful belligerent. See United States v. Wilhelm List, (Hostages case); 11 Trials of War Criminals 1244-1246 (G.P.O. 1950). (Balkan partisans illegal "Francs Tireurs.")

[74]Spaight, note 72 supra, at 42.

[75]Telegram from German Chancellor to French authorities through American minister, in Edmonds and Oppenheim, Land Warfare, 20, n.a (1908).

[76]Spaight, note 72 supra, at 43; German General Staff, Kriegsbrauch im Landkrieg (1902) in Morgan, The War Book of the German General Staff, 79 (1915); see also, Edmonds and Oppenheim, note 75 supra, at 20, n.a; Bordwell, note 72 supra, at 92, 95; Hall's International Law, note 20 supra, at 614-15 (8th ed., Higgins) (1924).

patrols of cavalry.

These groups were held by the Prussians to be illegal combatants because they did not meet one or both of the following criteria. First, since the blue blouse was the national costume of France and the arm band could be taken off at will, it was said to be impossible for Prussian troops to distinguish those individuals from those from whom they could expect acts of hostilities.[77] A uniform was therefore required. The second criteria was that each individual irregular combatant was required to have on his person a certificate of his character as a soldier, issued by a legal authority, and addressed to him personally, to the effect that he had been called to the colors, and was borne on the rolls of a corps organized on a military footing by the French government.[78] The leaders may have had such certificates, but not the men, and few could meet this. The latter rule is an extension of the authorization rule to its utmost extremity. The first rule may have protected innocent civilians from the effect of war. It also served

[77]Telegram from German Chancellor to French authorities in Edmonds and Oppenheim, note 75 supra, at 20. At times, the Germans insisted that the French insignia should be visible by the naked eye at rifle shot. See Bordwell, note 72 supra, at 91 (1915).

[78]German General Staff, The Usages of War on Land (1902) (Kriegsbrauch im Landkrieg), translation in Morgan, The War Book of the German General Staff, 79 (1915).

to prevent surprise of the Prussian troops by the French irregulars. Actually, since no uniforms were available, the French irregulars were unable to participate in the war except at the risk of death upon capture.

The Germans actively enforced these rules and great numbers of French irregulars were shot. The rules and their enforcement aided Prussian strategy. The French irregular combatants were denied popular support because of fear of Prussian retaliation and were soon eliminated as an active force. The war, which might have been carried on longer by the Francs-Tireur, was speedily ended.[79] This approach of the Prussian army to the rules concerning who may fight in war was considered contrary to custom and unfair by some,[80] but it was realistic. It is possible that the rules followed by the Prussians in this war merely represented a solution in favor of the interests of the Prussian Army.

This was the position of the German delegate to the Hague peace conference of 1899, who in discussing irregulars, stated that the interests of large armies imperatively demand security for their communications and for the radius of their occupation and that a conciliation of their

[79] Spaight, note 72 supra, at nn.2, 4. See also Dupuy, The Nature of Guerilla War, 1939 Pacific Affairs 138, 144-45 (1939).

[80] See generally, Morgan, note 79 supra, at Introduction, (1915).

interests and those of the invaded peoples is impossible.[81] The German approach is also seen in Count von Moltke's remark in 1880 that:

> "Never will an Article learnt by rote persuade soldiers to see a regular enemy . . . in the unorganized population which takes up arms spontaneously, (so of its own motion) and puts them in danger of their life at every moment of day and night."[82]

THE LAW ENFORCEMENT FUNCTION

This thesis has pointed out functions performed by the rules concerning belligerent qualifications in the fields of psychology, philosophy, the prevention of cruelty to captured persons, strategy, and protection of non-combatants from the effects of fighting.

There is another function which these rules are thought to be capable of performing. This function is the prevention of ordinary crimes such as murder, robbery, rape, and the like. The dislocation and confusion caused

[81]The Proceedings of the Hague peace conference of 1899, (Translation of official texts, Carnegie Endowment, 1920), statement of Col. Gross von Schwartzhoff at 553.

[82]Letter from Field-Marshal General Von Moltke to Bluntschli Dec. 11, 1880 in Holland, Letters on War and Neutrality, 24-26 (1909). (Commenting upon the Brussels Declaration). See also Morgan, note 78 supra, at 68-72, 90-93. But see Trainin, Questions of Guerilla Warfare in the Laws of War, 40 Am. J. Int'l L. 534, passim (1946) (violent attack upon German attitude).

by war create unique opportunities for the perpetration of these offenses.

If these offenses are committed by men or groups of men who have no connection with the opposing armies or governments, who are motivated solely by self interest; and who do not engage in fighting, then commanders of both sides can deal with them as they see fit under the laws of war.[83] If such offenses are committed by troops of the conventional armies, the offenders are usually punished by their own forces, although some "war crimes" falling in this category may be punished by the other side.[84] No question of the right to engage in war occurs in either case.

But irregular combatants fall somewhere between the two categories mentioned and have at times the qualities of each. As groups, bands of irregulars shade off in imperceptible degrees from those engaged mainly in fighting and motivated solely by patriotism to forces only sporadically engaged in fighting and motivated mostly by hope of personal profit from looting.

It is possible to formulate a rule of expediency which will in theory eliminate the commission of ordinary

[83]See FM 27-10, The Law of Land Warfare, Jul. 1956, para. 498a; Lieber, note 62 supra, at 10-12 (1862).
[84]See FM 27-10, note 83 supra, at paras. 498-511.

crimes by irregulars if those who commit such offenses are deemed unlawful combatants. The irregular is deemed an illegal combatant because experience shows that irregulars are more likely to commit such offenses. This sort of rule was followed by the Union army during the American Civil War.

Rather than use authorization as the sole test (perhaps because of its inadequacies), the Union approach was to use certain terms as words of art to define unlawful combatants. Thus "Brigand," "Marauder," "Guerillas," "Guerilla Marauders," "Free Booters," "Jayhawkers," "Bushwhackers" were all terms which were said to be so well understood as to of themselves state a punishable offense without elaboration.[85] In the trials of irregular combatants by military commissions, it was common to lay various specifications under the charge of "being a Guerilla"[86] or being a "Brigand."[87] The specifications themselves merely alleged that the accused acted as a "Guerilla," a "Jayhawker," or "Marauder," at times without

[85]See Lieber, note 62 supra, Int., 1-8 (1862) (defining some of these terms); Act of July 2, 1864, Ch 215, Sec. 1, 13 Stat. 356; (Guerilla Marauders, Guerillas dealt with without definition) Dig. Op. JAG, 1866, p. 115-16, (IX, 535) ("Guerilla" imports "Marauding").

[86]See e.g., Cases of Keaton, Wright, Marks, Moody, Smith in GO No. 93, HQ's, Dept. of the Ohio, Oct. 27, 1864; Case of Trammel and Barnes, GCMO No. 202, War Dept., July 22, 1864.

[87]See Case of Leach, GO No. 93, HQ's Dept. of the Ohio, Oct. 27, 1864.

alleging specific acts.[88] The specifications also alleged that the accused acted without authorization from any government at war with the United States.

Thus, when the Judge Advocate General held that proof of a single act of robbery or criminal violence committed in conjunction with "Guerillas," would sustain the charge of being a "guerilla"[89] he was in effect holding that robbery made a combatant an illegal combatant because he also held that the charge of "being a guerilla" was an offense per se. "Being a guerilla" was said in the same opinion to charge a well known course of conduct.[90] A "guerilla" was "beyond the pale of the laws of regular warfare" and punishable by death.[91]

But whatever the rule the Judge Advocate General announced it had little effect in practice. Most specifications in addition to charging the accused with being a "guerilla" also charged the accused with specific acts of criminality.[92]

[88]See e.g., Case of Caldwell and Young, GO No. 267, War Dept. Aug. 3, 1863; Case of Patrick, GO No. 382, War Dept., Nov. 28, 1863.

[89]Dig. Op. JAG, 1866, p. 116, (XV, 216).

[90]Dig. Op. JAG, 1866, p. 115-16, (III, 589).

[91]Id. See also General Orders No. 100, Dept. of Army, Instructions for the Government of United States Armies in the Field, Art. 82 (1863) (Lieber's Code).

[92]See e.g., Case of Caldwell, note 88 supra, (murder, robbery, being a guerilla all in one specification); Case of Young, GO No. 267, War Dept., Aug. 3, 1863 (being a "Jayhawker," a "Guerilla," robbery, plundering, in one specification); Case of Patrick, GO No. 382, War Dept., Nov. 28, 1863 (being Marauder, breaking and entering, arson, attempted murder, in separate specifications).

The authorization rule itself worked fairly well in the Civil War. The Confederates, it is true, authorized and used some units which have been called irregulars. Most were raised under the Partisan Ranger Law passed by the Confederate Congress.[93] The procedure was for an individual to raise his own force, whereupon he was commissioned, the men took oaths of allegiance and were under the articles of war, and the unit was a part of the regular Confederate forces. Mosby's Rangers were authorized by this method.[94] Most of the controversy regarding the legality of Mosby's Rangers revolved around the questions of whether or not Mosby was commissioned and whether or not the unit was a part of the Army of Northern Virginia.[95] Despite many threats, Mosby's men were generally treated as prisoners of war, albeit they were sometimes temporarily confined in civilian jails.[96] Mosby himself was granted

[93]Act of Confederate Congress, 21 April 1862, in Adjutant and Inspector General's Office, General Orders from Jan. 1862 to Dec. 1863, GO No. 30 (1864); also in V. Rebel Records (applied principle of prize law); see Scott, Partisan Life with Col. John S. Mosby, Foreword, (1867) (legislative history of law).

[94]Partisan Ranger Law, note 93 supra; Scott, note 92 supra, at 75; Mosby, Mosby's War Reminiscences, 81, 85, 112, 116, 117, 157 (1872); Williamson, Mosby's Rangers, 105-06 (1896); see also, Broadside, signed "JD Imboden, Col. Partisan Rangers," in Alderman Library, University of Virginia, (undated, but probably 1862).

[95]Dig. Op. JAG, 1866, p. 99 XIX, iii; Williamson, note 94 supra, at 174, 273, 275, 276; Scott, note 93 supra, at 4, 6, 8, Appendix, (1867).

[96]Williamson, note 94 supra, at 101-04.

the same rights as other Confederate officers at the end of the war. Those Rangers tried were usually tried for criminal acts.[97] The units raised under the Partisan Ranger law closely resembled regular units of the Confederate Army except for their right to share in the proceeds of the sale of captured Union Army horses and material, and to elect officers.

Most of the "guerillas" tried during the war were members of unauthorized bands, and were tried for civilian type offenses.[98] The irregular problem in this war was mostly that of keeping the battlefield free of ordinary criminals. The general success of the authorization rule was due to the similar backgrounds of commanders on both sides and the fact that the Confederate commanders soon incorporated all authorized irregular units except Mosby's

[97]See Williamson, note 94 supra, at 101, GCMO No. 71, War Dept., 10 Mar. 1860, GCMO No. 314, War Dept., Oct. 3, 1864; Barnes, Tramell, GCMO No. 202, War Dept., July 26, 1864; Scott, note 93 supra, Appendix (trial of McCue).

[98]See e.g., Case of Berry, GCMO No. 11, HQ's Dept. of Ky., 10 Feb. 1866 (robbery, murder of civilians, rape, larceny); Case of Ashcraft & Nichols, GCMO No. 4, HQ's Dept. of Ky., 23 Mar. 1865 (robbery); Case of Long & Gibson, GCMO No. 24, HQ's Dept. of Ky., May 13, 1865 (robbery); Case of Metcalf, GCMO No. 26, HQ's Dept. of Ky., 16 May, 1865 (murder); Case of Hatridge, GO No. 51, HQ's Dept. of Mo., 7 April, 1864 (horse stealing); Case of Hamilton, Fagan, GO No. 52, HQ's Dept. of Mo., 27 Feb., 1865 (robbery, plundering citizens).

into the line units.[99]

STRATEGIC FUNCTIONS FOR NATIONS USING IRREGULARS

Nations opposed by irregulars use the rules concerning who may fight in a war to perform functions helpful to them. The nations using irregulars seek to have these rules perform other and different functions. It is patent that a nation, through poverty, geographical location, size, antipathy toward standing armies, or the defeat of regular forces, may be forced to rely more upon irregular combatants than other nations differently situated. A nation which uses class wars as an extension of politics depends greatly upon irregular combatants. Thus nations have attempted to obtain rules which would perform the function of placing their particular irregular combatants on an equal legal footing with conventional forces. As a minimum, they have prevented the adoption of any rules which would affirmatively declare irregulars to be unlawful combatants.

[99]The Partisan Ranger Act was passed 21 April 1862. In June 1862, transfers from the CSA to Partisans were prohibited; in July 1862, conscriptees were forbidden to enlist in Partisans; in June 1863 all Partisan units except those behind enemy lines (i.e., Mosby's) were incorporated into the line regiments. See GO No. 43, 53, of 1862, GO No. 82 of 1863 of Confederate States Army, in Adjutant & Inspector General's Office, CSA, General Orders from Jan. 1862 to Dec. 1863 (1864).

Small European nations open to invasion have at times taken positions in favor of rules which would have the general effect of legalizing irregular combatants.[100] Soviet Russia has tried to extend the provisions of Article 4 of the Geneva Prisoners of War Convention to conflicts not of an international character.[101] Great Britain, before she had compulsory military service, but at a time when Prussia and Russia had conscription, refused to agree to any rules at all concerning belligerent qualifications.[102]

THE HUMANITARIAN FUNCTION

The most important function that belligerent qualification rules should perform is a humanitarian one. By maintaining a strict distinction between combatant and noncombatant, such rules can, in theory, protect a large class of persons from many of the effects of war. The protection

[100]See Proceedings of the Hague Peace Conference of 1899, 6, 546-57 (Carnegie Publication 1920) (conciliatory statements of President Martins, positions of delegates); 2A, Final Record of Diplomatic Conference of Geneva of 1949, 424, 425, 428, 561-62, 478-79 (1949; 2B, Final Record of Diplomatic Conference of Geneva of 1949, 58, 62, 63 (Danish amendments to art. 4); Final Record of the Diplomatic Conference of Geneva of 1949, 58 (1949) (Danish amendment); Bordwell, note 72 supra, at 104-06 (1908); Spaight, note 72 supra, at 50-51 (1911); Holland, Lectures on International Law, 366 (1933).

[101]See II B, Final Record of the Diplomatic Conference of Geneva of 1949, 325-30 (1949).

[102]See Bordwell, note 72 supra, at 108-10 (1908); see also Holland, note 100 supra, at 365 (1933).

of humanity is the sole valid reason for having any type of war law.[103] Most of the functions mentioned earlier are also humanitarian functions in part. The civilian population was partly protected from the rigors of war during the time that nations carefully selected those whom they authorized to fight, but this result was not so much due to the authorization rule itself as it was due to the stable political situation which has been mentioned.

Misuse of the authorization rule by the authorizing of improper persons, and the fact that it can be easily ignored because it depends upon an ill defined legal concept — the existence of a state to perform the authorization — have caused the deaths of thousands of irregulars and their families, and most probably the deaths of thousands of prisoners of irregulars.[104]

The authorization rule finally failed to perform any humanitarian function. This failure may have been behind demands for new rules.

The authorization rule was supplemented in turn by Article 1 of the Annex to the Hague Convention of

[103]See Lauterpacht, The Problem of the Revision of the Law of War, 1952 Brit. YB. Int'l L. 360, 363 (1952).

[104]See generally Spaight, War Rights on Land, 38-39, 41-44 (1911); Hall's International Law, 613, n.2 (1924); Maclean, The Heretic, The Life and Times of Josip Broz-Tito, 184, 112-17, 119-21, 158, 356 (1956); United States v. List, (hostage case); 11 Trials of War Criminals, 1007, 1034, 1165-66 (G.P.O. 1950).

1899,[105] Article 1 of the Annex to the Hague Convention of 1907,[106] and finally by Article 4 of the Geneva Convention.[107] These conventions were designed to be applied world-wide, as compared with the earlier rules which were designed for use in 18th century European wars.[108] In the following chapters the conventions will be critically examined with a view toward discovering whether they suffer from the same infirmities as the customary rules.

[105]Annex to the Hague Convention Respecting the Laws and Customs of War of 1899, 32 Stat. 1803, at 1811; 2 Malloy's Treaties 2042, at 2048 (effective Sept. 4, 1902).

[106]Annex to Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Art. 1, 36 Stat. 2295, TS No. 539.

[107]Geneva Convention Relative to the Treatment of Prisoners of War of 12 Aug. 1949, Art. 4, TIAS 3364 (effective 2 Feb. 1956).

[108]They were not intended for use against "savage tribes." See generally Colby, How to Fight Savage Tribes, 21 Am. J. Int'l L. 279, 280 (1927).

CHAPTER II

CODES AND INTERNATIONAL AGREEMENTS

The chaos caused by the breakdown of the authorization rule demanded a new approach to the problem of who can fight. Codes of rules for the conduct of war were one experiment. The earliest such code was "Lieber's Code,"[109] adopted by the Union army in the war between the states, and used with fair success. It was, however, peculiarly an american code, particularly designed for use in the Civil War. It, like the earlier customs, depended upon similar cultural backgrounds on the part of the belligerents, particularly in regard to its provisions concerning uniforms. It was primarily the work of Francis Lieber, an emigre German professor of history at Columbia University.[110] Lieber's code was a transition between earlier European customary law and the later international agreements. It is significant that the United States felt it necessary to use a European for the purpose.[111]

[109]United States Army, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, War Dept., April 24, 1863, conveniently found in Davis, Elements of International Law, 505 (3rd ed.) (1908).

[110]See Davis, Doctor Francis Lieber's Instructions for the Government of Armies in the Field, 1 Am. J. Int'l L. 13, 19-21 (1907).

[111]See generally, Friedel, Francis Lieber, Transmitter of European Ideas to America, 38 Bull., John Ryland's Library 342 (1953) (Manchester England) (penetrating analysis of Lieber's application of European concepts to American institutions).

The code contains an explicit statement that authorization by a government excuses killing by a soldier,[112] as well as a requirement for state authorization.[113] Full time participation in war, and the "appearance" of soldiers are prerequisites to belligerent rights.[114] Partisans — detached parts of the conventional army — are declared lawful combatants.[115] The codal provisions concerning uniforms state only that if the uniform of the enemy is used, it must be properly marked to distinguish it.[116] The then common concept of war as a game with rules for fair play is implemented by provisions prohibiting firing on individual soldiers, stealth and sabotage.[117] The approach to the problem used by Lieber's Code, although the code itself was generally admired,[118] was replaced by a different type of rule in later codes. The change was sparked by the Prussian treatment of French irregular combatants in the Franco-Prussian war.[119] The new solution was to hinge the right to engage in war upon the possession by irregulars of a certain minimum of the qualities possessed

[112]General Orders No. 100, note 108 supra, art. 37.
[113]Ibid., art. 82.
[114]Ibid., art. 82.
[115]Ibid., art. 81.
[116]Ibid., arts. 63, 64.
[117]Ibid., arts. 69, 84, see Davis, note 110 supra, at 14.
[118]See Davis, note 110 supra, at 22; Droop, 15 Solicitors Journal and Reporter 122 (1870).
[119]See Droop, note 118 supra, at 121.

by a conventional army.

Two such codes, drafted by unofficial conventions of international lawyers and military men, failed of adoption by governments.[120] The criteria used in these two codes, the "Brussel's Declaration"[121] and the "Oxford Code"[122] were substantially the same criteria used in the later Annex to the Hague Convention of 1899,[123] the succeeding Hague Convention of 1907,[124] and the 1949 Geneva Convention.[125]

Essentially, the criteria used today are the same as those proposed in a paper read before the Juridical Society of England in 1870 by a barrister, Mr. H. R. Droop.[126] Therefore we are now using rules based upon

[120]For a general summary of reasons, see Bordwell, The Law of War Between Belligerents, 100-16 (1908).

[121]Project of an International Declaration Concerning the Laws and Customs of War of the Brussels Conference of 1874, art. 9; conveniently found in Documents Relating to the Program of the First Hague Peace Conference 32, (Carnegie Endowment for International Peace) (1921).

[122]Manual Adopted by the Institute of International Law at Its Session at Oxford in 1880, arts. 2, 3; conveniently found in Documents Relating to the Program of the First Hague Peace Conference, note 120 supra, at 47.

[123]Annex to Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 1, 32 Stat. 1803 (effective April 9, 1902).

[124]Hague Convention No. IV, Respecting the Laws and Customs of War on Land, art. 1, 18 Oct. 1907, 36 Stat. 2295, TS 539 (effective 27 Nov. 1909).

[125]Geneva Convention Relative to the Treatment of Prisoners of War of 12 Aug. 1949, TIAS 3364 (effective 2 Feb. 1956).

[126]Droop, note 118 supra, at 122.

the experience in the Franco-Prussian war. The conservatism evident in the field is clear. Only these criteria were proposed as the basis of discussion at the 1949 Geneva Convention.[127]

Reluctance to change these criteria shows in the proceedings of the committees which framed them during the three conventions. Few changes have been proposed, none have been adopted.[128] The failure to adopt any changes is due to the sensitive nature of the subject.[129] In the 1949 Geneva Conference a tendency to liberalize these rules was met by a tendency to make them more restrictive. Compromise and a belief that the 1949 convention was not empowered to make any changes in the 1907 Hague Convention

[127]See Draft Convention Relative to the Prisoner of War Convention, approved by the XVIIth International Red Cross Conference, Art. 3, in 2 Final Record of the Diplomatic Conference of Geneva of 1949, 73 (1949).

[128]See 3 Proceedings of the Hague Peace Conferences of 1907, 6, 104, 240 (1921) (Carnegie text) (German amendment requiring notice of fixed emblem); 3 Final Record of Diplomatic Conference of Geneva of 1949, 58 (1949) (hereinafter referred to as "Final Record") (British amendments toward territorial restrictions, inform enemy of emblem, irregulars must be capable of being communicated with, command control) 2A, Final Record 416 (Partisans should possess cards); 2, Final Record 241-244 (explanation of British amendment); 2A, Final Record 478-479 (proposal to limit protection to minimum numbers, to require sign to be worn constantly); 2A, Final Record, 425; 3 Final Record 58 (Danish proposals based on self-defense); id. at 56, 58 (Belgian proposal, variation of UK's amendments).

[129]See e.g., The Proceedings of the Hague Peace Conference of 1899, Translation of Official Texts, 545-555. (Carnegie Endowment) (1921).

criteria kept them the same.[130] A factor in the failure of the Geneva Convention of 1949 to change the criteria was a determined by unsuccessful effort by Soviet Bloc delegates to extend all the provisions of the Prisoners of War Convention to civil wars.[131]

The major land wars of this century have occurred while the 1907 Hague Convention was in effect. The pertinent provisions were contained in an annex to the convention.[132]

Article I of the Annex did not have the effect of making those irregulars who failed to meet its requirements illegal combatants, for the preamble to the conven-

[130]See 2A, Final Record, 561, 1949 (necessary to correspond art. 4 with Hague); Id. at 420-421, (UK definition of combatant in 1907 Hague could not be revised by 1949 convention); 2, Final Record 422-424. (varying positions, UK to restrict, USSR to extend) Id. at 237-241 (Denmark desired liberal rules, Red Cross expert contra) Id. at 386, (general summary of positions); 2A, Final Record, 428 (UK position, against snipers, Netherlands desires to protect new classes); 2A, Final Record, 561, 562, (summary of efforts to reach compromise).

[131]See, e.g., 2B, Final Record, 325-330 (sharp debate between Russian and Burmese delegates on this proposal).

[132]"Article 1.

The Laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war."

Annex to Hague Convention No. IV, note 124 supra, art. 1 (the 1899 article was identical).

tion expressly stated that the contracting parties intended this article especially to act as a general rule of conduct; and that it was not possible to make regulations covering all possible circumstances. The preamble further said that unforeseen cases were not to be left to the arbitrary judgment of military commanders and that in all unforeseen cases the belligerents remained under the protection of the law of nations, the laws of humanity and the dictates of public conscience.[133]

This language, identical to that in the 1899 convention, represented a compromise between those nations which had insisted in 1899 that, under existing law, irregular combatants were generally illegal and those who vehemently took the position that existing law and custom was exactly to the contrary.[134]

Article 1 of the 1907 Hague Convention (and its present counterpart) bear the marks of several compromises. The very method used — requiring irregular forces to possess some, but not all of the characteristics of a formal army — is a compromise in itself. The irregular force

[133]Hague Convention No. IV, note 132 supra, at Preamble.

[134]The positions of the countries were so opposed, and so strongly held as to threaten the entire conference, until a conciliation by President Martins; See Proceedings of Hague Peace Conference of 1899, Translation of Official Texts, at 546-57. (Carnegie Endowment Publication) (1920). See also, Spaight, War Rights on Land, 50-54 (1911).

is required to be somewhat like an ordinary army, but not quite. Other compromises show in the vagueness of the four conditions. For example, what is the distance at which the emblem must be recognizable?

The two Hague Conventions did not expressly require state authorization, but it is implied since the conditions are applicable only to "armies," "militia," and "volunteer corps" all terms suggestive of forces of a state;[135] nor did they expressly apply to occupied territory.[136]

[135] Contra, 2 Oppenheim's International Law, 90 (1st ed. 1906).

[136] It was at the time and is now sometimes held that there is a duty, absent any international law to the contrary, on the part of inhabitants of occupied territory to absolutely refrain from hostile acts toward the invader. Violations can be severely punished. See FM 27-10, The Law of Land Warfare, Jul. 1956, para. 432. See also 2 Oppenheim, note 135 supra, at 267 (1st ed. 1906). Art. 4 of the Geneva Prisoner of War Convention of 1949 does apply in occupied territory of parties to the convention. See Art. 2.

CHAPTER III

THE HAGUE CONVENTIONS AND THE IRREGULAR COMBATANT

After the Hague Conventions the disposition of irregulars was intended to be made within a framework of international law. In our day, the feasibility of controlling war by enacting "law" in the sense of a set of binding rules seems doubtful. However, this is the underlying concept of the Hague Convention.

It should be remembered that the conventions did not enact a new positive law. They merely defined some of the existing custom and prohibited certain acts. Insofar as irregular combatants are concerned, the convention prohibits ill treatment of those who do not meet the four conditions — nothing more. With this in mind, the war in South Africa at the turn of the century can be seen in proper perspective.

THE BOER WAR

Great Britain ratified the 1899 Hague Convention on Sept. 4, 1900.[137] The Boer Republic and the Orange Free

[137] Scott, The Hague Convention and Declaration of 1899 and 1907, 129 (1915); see also, Myers, The Record of the Hague (1914) (table of ratifications and adhesions in appendix).

State were not parties to it. Great Britain was thus not technically bound by the 1899 Hague regulations[138] during the South African War,[139] October 1899 - May 1902 although she had signed the convention on 29 July 1899. Thus the disposition of the Boer Commandos might have been based upon the earlier customary rules, or, had the Boers met the Hague conditions, upon the convention. It is not necessary to decide the exact basis, because in fact, the dispositions were based upon neither existing customary law nor the 1899 convention. The explanation is in the peculiar organization of the Boer Army. Some of the facts which dictated British action in that war may be stated: There were three distinct types of Boer forces in operation during that war. At the beginning the Boers invaded British territory with an army of about 50,000 men. This army was of a type not contemplated by any of the rules in existence. The entire army wore civilian clothing. Officers wore business suits and bowler hats. The men furnished their own clothing, horses, rifles, and received no pay.[140] Officers were designated by the Boer Republic, but the men could at any time choose

[138]Convention II with Respect to the Laws and Customs of War, note 123 supra, art. 2.

[139]Sometimes called the "Boer War."

[140]See Reitz, Commando, 32, 123, 128, 130, 144 (1908); Doyle, The Great Boer War, 59, 339 (1902).

which officers they desired to serve under.[141] Unpopular officers had no subordinates and then reverted to the ranks.[142] There were, in practical effect, only two ranks of officers, roughly comparable to army commanders and small unit commanders. The latter commanded a "commando," a group of men, fifty to two hundred in number, who decided, because of friendship, or residence in the same district, or employment in the same business, to fight together. The Boer Republic furnished ammunition, highly efficient heavy artillery and some food. The army lived mostly off the land.[143] This was not entirely a volunteer army, as the men had been called up under a law which bound them to respond.[144] They were under some discipline,[145] but in practice came and went freely from commando to commando, and from the field of operations to their homes.[146]

[141]Reitz, note 140 supra, at 28-32.

[142]Reitz, note 140 supra, at 28-52.

[143]Reitz, note 140 supra, at 28-32.

[144]See Law No. 20 of 1898, sec. 3, of Boer Republic (all males above 16 constitute the military forces of the Republic, must report upon call or be fined); Resolution of Dec. 1900 of Boer Republic "Executive Government" (penalty for staying home).

[145]Laws No. 20 of 1898 and 1899, of Boer Republic, sec. 48, 49 (provided a general Court-martial, provisions for ordering same, offense of failure to obey orders); see also Van Devanter v. Hanke and Mossop (1903) Transvaal Sup. Ct. 401, 414, 415 (1903); but formalities and discipline were at times very lax, See Reitz, note 140 supra, at 39, 40, 169, 282 (1908) (looting, shooting renegades without trial).

[146]Doyle, The Great Boer War, 370 (1902); see also Reitz, note 140 supra, at 52.

With this casually organized army, and using standard tactics, the Boers inflicted many serious defeats upon the British regular army in the first year of the war. After the main body of the Boer Army was dispersed and defeated, the remainder turned to guerilla tactics.[147] Several fast moving columns of Boers, (the commandoes of Smuts, DeWet, DeLarcey) made continued deep raids into British South Africa. They even organized local governments of a sort there. At the same time innumerable local commandos, (who were not always full time fighters) engaged in local operations in their own country. Many Boers shifted back and forth from one type of commando to the other.

During this latter period, the government of the Boer Republic was an ambulatory one. It operated from a succession of temporary capitals. At times it was ensconced in railway cars and wagons. Nevertheless, the government, to a great extent, was able to enforce its laws and decrees, even in areas supposedly under British occupation.

Eventually, after a long program of devastation of farms, erection of blockhouses and fences, and concentration of the Boer families, the remaining Commando leaders

[147]Guerilla tactics as a military concept and guerilla warfare as a legal concept are often confused. See FM 31-21, Guerilla Warfare and Special Forces Operations (1958) paras. 2, 7, 8.

entered negotiations[148] which resulted in an agreement ending the war. The agreement was quite favorable to the Boers. By the terms of this "Peace of Vereeniging" the Boer Commandos were allowed to return home upon taking an oath of allegiance to the King. During the entire war Boers of all types were granted belligerent rights,[149] except for a few violators of the laws of war.[150] The British did try to require Boers to engage in full time warfare, and burned some farms in retaliation for part time fighting and sniping.[151]

The British practice is almost impossible to square with any of the previous rules or the 1899 convention. Without uniforms of any type, the Boers could hardly be said to have complied with Article 1 of the Hague regulations. As an ununiformed "militia," if they reached that stature, they might possibly have qualified for belligerent rights under the customary rules, except that many were part time fighters. Perhaps they might be considered an "army," under the Hague Regulations. The point here is

[148] See Reitz, Commando, 148 (1903).

[149] Id. at 167; See Doyle, note 146 supra, at 378, 402, 422-23 (1902); Lemkuhl v. Kock (1903) Transvaal Law Reports, 451, Sup. Ct. of Transvaal (1903); Van Devanter v. Hanke and Mossop (1903) Transvaal Law Reports, 401, 410-12, Sup. Ct. of Transvaal (1903).

[150] See Reitz, note 148 supra, at 194, 230, 239, 251, 252, 276, 308, 312 (wearing captured enemy uniforms, train wrecking); Doyle, note 146 supra, at 59, 387, 396 (1902).

[151] Spaight, War Rights on Land, 40 (1911).

not which law of war may be twisted so as to explain the result within the framework of the law of war.[152] The real point is that the Boer Commandos were the army of the Boer Republic. They existed as a fact, despite the law of war which made no provision for such an army. The Boer army did not fit European concepts of what an army should be. Such an army, efficient as it was, was raised, organized, disciplined, led, equipped, uniformed, paid and subsisted in a manner totally different from that of any European army. Because the existing rules were based on a pre-conceived notion of an "army" entirely different from the army to which they were required to be applied, they were totally inadequate.

In this situation, the British could have treated the Boers as illegal combatants.[153] But such a course was impossible; humanity forbade it. Military necessity

[152]Spaight attempts to do so by saying that this was a "Levee en masse" (a spontaneous uprising of the population of a country about to be invaded). This ignores the declaration of war by the Boers before the British declared, their subsequent invasion of British South Africa, and their status as the regular military face of the Boer Republic. See Spaight, note 151 supra, at 59. Professor Holland chose to treat the British practice as an exception to Article 1 of the Hague Convention. See Letter of Holland to London Times, Oct. 21, 1904 in Holland, Letters on War and Neutrality, 51 (1909). Cf, Edmonds and Oppenheim, Land Warfare, an Exposition of the Laws and Usages of War on Land, for the Guidance of Officers of His Majesty's Army, 21 at n.c. (1908) (holding Boer Army exception to levee en masse rule).

[153]Such a course was suggested by the uninformed public. See Spaight, note 151 supra, at 59 (1911).

would allow of no such decision in view of potential retaliation. The flexibility inherent in the British Army at the time allowed the local commanders to make rules which were relevant to the situation.[154] The British, although there was no international law specifically prohibiting such a course, refused to declare them illegal combatants.

There were no reasons for applying a harsh rule. The conduct of the Boers was remarkable for its freedom from cruelty to prisoners.[155] The fact that irregular combatants had sometimes been harshly treated by custom of nations in the past did not establish a positive rule of law that they must be so treated. British policy was to pacify the Boer Republic, integrate it and the mines of the Witwaterstrand into the British Empire with a minimum of hard feelings. They succeeded admirably, and part of their success was due to the rules of warfare

[154]Until about 1908, the British army had no published rules of land warfare which were binding on commanders. The war office "trusted to the good sense of the British officer." See Holland, note 152 supra, at 48; Edmonds and Oppenheim, Land Warfare, An Exposition of the Laws and Usages of War on Land, For the Guidance of Officers of His Majesty's Army, foreword, (circa 1904) (official British publication, only the Hague rules are binding, rest of book merely advisory).

[155]See Doyle, note 146 supra, at 47, 71 (1902).

they adopted.[156] Lack of uniforms caused, in a sparsely populated country, no confusion between combatants and noncombatants. Boers achieved tactical surprise upon occasion by their lack of uniforms[157] but not enough to cause British reaction. In this war, both sides operated outside of the provisions of the Hague Convention, a natural result when the true nature of the Convention's criteria as prohibitory law is considered. The rules applied by the British were only designed for, and were only required to perform a few of the functions enumerated earlier. The functions of prevention of cruelty, justifiable homicide, prevention of civilian crime, and identification were never required to be performed by the British rules. British policy was fulfilled by preventing part time fighting, insofar as a prohibitory function is concerned. Insofar as a positive function of the British rules is concerned, British policy was fulfilled by affirmative action granting most Boers prisoner of war status.

[156]They succeeded in conciliating the Boer Commanders. Marshal Smuts, a commando leader, later served the British army in two wars in high commands. Denys Reitz, author of Commando, cited herein, who was in Smuts' commando, became a Brigadier in the British Army. DeWet, as soon after the war as 1903 was a leading barrister of the British operated Supreme Court of the new Republic of Transvaal.

[157]See Doyle, note 155 supra, at 339, 387. See also, Kipling, A Sahibs War, 18 The Collected Works of Rudyard Kipling, 96 (1901) (fictional account, perhaps based on fact, of commando raid).

THE FIRST WORLD WAR

In the First World War, the 1907 Hague Convention was a potential basis for granting prisoner of war status to irregulars. There was at least one inconclusive exchange of diplomatic notes based upon the provisions of Article 1 of the 1907 Hague Convention. Austro-Hungary claimed that black and yellow arm badges were sufficient, when combined with regular officers, pay and authorization, to legitimate the irregular forces of the "Rumanian Legions." Russia apparently contended that these arm bands were not sufficient.[158]

In many instances the Germans ruled Belgians to be illegal combatants because of lack of compliance with the Hague regulations.[159] The confused situation caused by Belgian countercharges denying that there was in fact any fighting at all, and that the Germans were merely pursuing a regime of terror in these instances[160] destroys

[158]Circular Verbal Note of Hungarian Ministry of Foreign Affairs, Jan. 23, 1915, to neutral states in Stowell and Munro, International Cases, War and Neutrality, 123-24 (1916).

[159]See e.g., Extract from Memorial published by the German Foreign Office, May 10, 1915, in Stowell and Munro, note 158 supra, at 121-23 (1916); see also id. at 161-64.

[160]See e.g., Extract from Bryce Committee Report in Stowell and Munro, International Cases, id. at 119-20; Extract from Eleventh Report of the Belgian Commission of Inquiry, Jan. 16, 1915, in Stowell and Munro, id. at 167-68.

the value of these dispositions for the purpose of this paper.[161]

THE SECOND WORLD WAR

The Hague Convention criteria did not serve as the basis for disposition of irregulars in this war. The Convention was again bypassed as a basis for decision, despite the tens of thousands of irregulars operating in that war.

Two distinct and separate groups of irregulars operated in Yugoslavia, the "Partisans" of Tito; the Cetniks of Mihajlovic. The Germans treated the Partisans

[161]The actions of "Lawrence of Arabia," (Col. T. E. Lawrence) in Arabia are not treated here. The Bedouins he led were either considered rebels, or perhaps under the Moslem code of war, outlaws. The Bedouins operated under tribal chiefs, wore traditional clothing, were almost without discipline, plundered frequently, took prisoners but at times failed to deliver them to British bases. For a brief account of typical actions and some of Lawrence's action reports, see Blacker, Irregulars, Partisans and Guerillas, 145-53 (1954). For a brief history of the Arab Revolt see Lawrence, The Arab Revolt of 1916-18, in 10 Encyclopedia Brittanica 950-950D. See generally Lawrence, Seven Pillars of Wisdom, 224-26, 303, 440-47 (1926). A good account of the strategy of the revolt is in Lawrence, Secret Despatches from Arabia, 1939. (Reprints of Lawrence's Intelligence Reports). The use of western clothing was the test of belligerent rights in this war. See Lawrence, Secret Despatches, id. at 130. The Arabs treated all persons as combatants. For pertinent Moslem law see Ashrof, The Muslim Conduct of State, 170, 177-79, 195, 200-02, 205-06, 224 (1945).

as illegal combatants,[162] the Cetniks as quasi-legal.[163]

Tito's Partisans were under fairly tight discipline.[164] Most of the combat leaders had been key Communist party officials in the illegal underground which existed in pre-war Yugoslavia. Tito (Josip Broz) had for years been the secret head of the Yugoslav Communist party. Partisans wore, at times, various captured uniforms, or parts of uniforms, with a small Red star on the cap.[165] When in uniform, they wore complete insignia of rank on sleeves.[166] For certain operations they wore civilian clothing. At times, they operated what amounted to a functioning government, with postal systems, an armory capable of turning out 400 rifles a day, and a rough judicial system. Tito fought both the Germans and the Cetniks; the Cetniks were quasi-neutral, or at times acted as German auxilaries. The Partisans were supplies by the

[162]See Maclean, The Heretic, The Life and Times of Josip Broz-Tito, 119, 122, 184 (1957) (hereinafter referred to as Maclean). See also United States v. List (Hostages Case) 11 Trials of War Criminals 63, 196, 515, 521 (G.P.O. 1950) (hereinafter cited as Hostages trials).

[163]See Maclean, note 162 supra, at 171-72; Hostages Trial 1007 (Pros-Ex 197).

[164]See Maclean, note 162 supra, at 956-57, 1165-66.

[165]See Maclean, note 162 supra, at 111-13, 217, 212-17, 240-41; Hostages Trial, at 917, 922, 918-24, 939-56, 957-64, 967, 986-87, 993-94, 1002-14, 1015-20, 1041-43, 1054-55.

[166]See Maclean, note 162 supra, at 96, 113, photos beginning at 116; Hostages Trial, at 1007; Hostages Trial, at 984, 1014-15.

allies. Military missions from Great Britain, the United States, and Russia were assigned to them. During most of the war Tito obeyed radioed orders from the Presidium of the USSR without a question.[167]

The Partisans had many of the characteristics of a regular army, even to a staff organized upon conventional lines.[168]

In Russia, the Germans never granted Soviet partisans prisoner of war status. These partisans, numbering in the tens of thousands, and including Red army dispersed units, were led by communist officials or Red Army officers.[169] The Soviet government eventually made the partisans a separate force, with the same status as the Red Army, Navy and Air Force under the direction of a separate executive agency. The command line by-passed the Red Army completely

[167]See Maclean, note 162 supra, at 112, 114, 158.

[168]The Cetniks were conservative Serbs, led by Colonel Mihajlovich, a regular officer in the Yugoslav army. The Yugoslav General Staff organized the Cetniks before the war as a patriotic organization designed to conduct guerilla warfare if the army was defeated. When the event happened, most Cetnik leaders quickly reached a tacit understanding with the Germans--a quasi truce. After it was clear Mihajlovich would not seriously harm the Germans, allied support was withdrawn from him. The Cetniks wore Serbian peasant clothes, and were distinguished by traditional long beards and fur caps. Officers usually wore Yugoslav Army uniforms. See Maclean, note 162 supra, at 106-07, n. at 100, 119-21, 155, 211.

[169]See Howell, The Soviet Partisan Movement 1941-1944, pp. 42-43, 44-45, 47, 48-49, 77, 79, 80-83, 140, 193, 195 (DA Pamph. No. 20-244) (Aug. 1956) (hereinafter referred to as Soviet Partisan Movement).

in some instances.[170] In the later stages of the war, they had developed into an efficient organization cooperating closely with the Red Army[171] under tight control by Partisan headquarters in Moscow.[172]

Hitler's decrees were the basis for disposition of all Communist partisans opposed to the Germans in World War II. The Hague conventions were never a factor in German decisions after the first month or two of the German drive into Russia. At the beginning, an attempt by German Army legal advisors to apply the conventions was overruled by Hitler.[173] If there was any legal basis for Hitler's decision, it might have been that the Hague Convention did not apply in the Russian campaign either on the grounds that the "general participation" clause made it inapplicable; that the USSR had ceased to exist or that the Hague Convention did not apply in occupied territory.[174]

[170]See Soviet Partisan Movement, at 47, 65, 80-82.

[171]See Soviet Partisan Movement, at 155, 156.

[172]See Soviet Partisan Movement, at 138-39.

[173]See Soviet Partisan Movement, at 57-60, 116-17.

[174]Whether the 1907 Hague Convention acutally applied in World War II is a difficult question. Two war crimes tribunals chose to avoid the issue. The difficulty is in the general participation clause, Art. 2, which makes it applicable only when all belligerents are parties to the Convention. Several belligerents in World War II were not parties. See Hague Convention of 1907, note 124 supra, Art. 2; United States v. Goering, 1 Trials of War Criminals 253-54 (War Crimes Tribunal, 1946) (court finds unnecessary to decide); United States v. Von Leeb, 10 Trials of War Criminals 529-33, (War Crimes Tribunal, 1947) (court finds unnecessary to decide). See also, Soviet Partisan Movement, note 169 supra, at 58.

The real basis for treatment of Communist partisans was a policy that Hitler laid down for extermination and enslavement of the Slavs.[175] His disposition of irregulars was merely an adjunct to that policy. For example, Hitler at one time expressed the idea that partisan warfare had some advantages for Germany, as it enabled eradication of whoever opposed them.[176] Accordingly, he issued a series of orders which in effect allowed any officer to execute on the spot, without a trial, any person opposing the German Army, whom it was felt expedient to liquidate.[177] The policy was stated by Hitler in a top secret order, in these words: "In all Eastern territories the war against the partisans is therefore a struggle for the absolute annihilation of one or the other side. . . ."[178]

[175]See Soviet Partisan Movement, at 15-20, 21.

[176]See Hostages Trial, at 577.

[177]The "Dispersed Soldier Order," directing that all dispersed soldiers and civilians with arms be shot; the "Night and Fog Decree" authorizing execution without trial for acts by Non-Germans endangering the Reich; the "Commissar Order" directing that all political Commissars with troops be shot after capture; the "Barbarossa Order" directing that all attacks by civilians upon troops be handled by unit commanders without recourse to the Judiciary. For texts of these orders see 11 Trials of War Criminals 63, 196, 197, 515, 521-25. These orders were interpreted by troops as authorizing immediate on-the-spot execution of suspected partisans. See 10 Trials of War Criminals 1152, 1153, 1158, 1160, 1161, 1166, 1168 for unit reports and orders to this effect.

[178]See United States v. Von Leeb, 11 Trials of War Criminals, 578-80 (Reichenau Order) (Jews, Partisans, Bolsheviks, Vagabonds all to be exterminated to save German lives). See also Soviet Partisan Movement, at 120.

Within the framework of "Fuehrer orders," the high command of the German Army issued other orders based on military necessity to liquidate partisans.[179] Many of these liquidations were camoflaged as execution of hostages.[180]

Japanese practice in the Phillipine Islands during the Second World War paralleled the German practice. Filipino irregulars and escaped Americans maintained an active irregular warfare against the Japanese. Few made any attempt to comply with the Hague conditions. The Japanese almost invariably executed irregulars without a trial.[181]

What are the conclusions to be drawn from the dispositions of irregulars since the international agreements? It is evident from the Boer War that the approach to the problem embodied in the agreements (the use of four characteristics of a conventional army) is not capable

[179]This was not a new idea in the German Army. See United States v. Von Leeb, 10 Trials of War Criminals (High Command Case) 419 (War Crimes Tribunal, 1947) (1924 German Staff evaluation of feasibility of complying with Hague Convention).

[180]See Hostages Trial, at 975 (order of Field Marshal List to C. G. Serbia, 4 Oct. 1941, hold suspected partisans as hostages).

[181]Interviews with Lt. Col. Francisco Bautista, Phillipine Army, October 10, 1958, March 20, 1959 (Lt. Col. Bautista, then 2nd Lt., participated in irregular warfare as unit commander). See also, Nurick and Barrett, Legality of Guerilla Forces Under the Laws of War, 40 Am. J. Int'l L. 563, 581, nn.84-89. See also, Volkman, We Remained (1954); Reel, The Case of General Yamashita (1949).

of application when it is necessary to deal with a national army composed solely of irregulars.

During the First World War a highly significant event occurred. This unnoticed event probably has made the criteria in use today obsolete. Prior to World War I, the tactics of irregulars were similar to those of any light troops. If they were considered to have any usefulness it was solely in the field of harassing of enemy troops. The objects of their attacks in one word, were men. Their place in strategy was roughly the same as that of conventional forces.

The Arab revolt of 1916-18 provided a laboratory in which Lawrence worked out an entirely new strategy for irregular warfare. He put his strategy in fifty words.

> "Granted mobility, security (in the form of denying targets to the enemy), time and doctrine; (the idea to convert every subject to friendliness) victory will rest with the insurgents, for the algebraical factors are in the end decisive, and against them perfections of means and spirit struggle quite in vain."[182]

[182]Lawrence, The Arab Revolt of 1916-18, in 10 Encyclopedia Brittanica at 950D. Lawrence apparently condensed and refined his version of the strategy of irregular warfare for this article from his staff studies and thinking in World War I, and his post war book. See Seven Pillars of Wisdom, note 161 supra, at 224-26, and his instructions to liaison officers in Lawrence, Secret Despatches from Arabia, at 128 (1939).

As a part of denying targets to the enemy, his strategy proposes to strike not at the enemy, but at his communications. More germane to this examination — the theory also requires that the irregular never present a target to the enemy. The conflict between this strategy and the conventional criteria is apparent. If it is followed even in part (and there is some evidence that it was followed in part by the Communists in 1941-1945) irregulars will not attempt to comply with the criteria.[183] This conflict explains, in part, the disposition of irregulars since the convention. Other factors, of course, entered in. Hitler's decrees, the military problems faced by the Germans in attempting to conquer Russia with inadequate means all played a part.

The Axis powers did not attempt to twist the conventional conditions to fit policy. They worked around the Conventions — not through them. It is possible that international agreements are less subject to manipulation than the authorization rule. Some legal loopholes in the Hague Convention may perhaps have influenced the disposition. It was possible for the Germans to find

[183]Lawrence's strategy is apparently the foundation for guerilla strategy in the future. See FM 31-21, Guerilla Warfare and Special Forces Operations (1958), paras. 2, 4, 9, 10, 11, 12, 13C.

legal excuses to disregard the convention in its operative clause, and its non-application to occupied territories.

CHAPTER IV

ANALYSIS OF THE GENEVA CONVENTION PROVISIONS PERTINENT TO IRREGULAR COMBATANTS

The 1907 Hague Convention had internal failings which partly emasculated it as a vital force in regulating the status of belligerents. Some of these were eliminated in the 1949 Geneva Prisoner of War Convention.

The Hague Convention did not apply to a conflict unless all parties to the conflict were also parties to the Convention. The Geneva Convention binds all the powers to the conflict who are parties to it, in their mutual relations, even if some belligerents are not parties to the Convention.[184]

It was possible to make a strong case for the proposition that the Hague Convention did not apply to occupied territory. This question is rendered moot by the express provisions in article 4 of the Geneva Convention that irregulars who meet the four conditions are protected if operating in, or outside their own territory, even if the territory is occupied.[185]

[184] See Geneva Convention Relative to the Treatment of Prisoners of War of 12 Aug. 1949, TIAS 3364 (Effective 2 Feb. 1956), Art. 2. See Gutteridge, The Geneva Convention of 1949, 27 Brit. YB. Int'l L. 294, 299-300 (1949).

[185] See also Art. 2. (Convention applies to all partial or total occupations).

Some organized resistance movements in World War II were potentially vulnerable to denial of belligerent privileges under the authorization rule. Many lacked specific state authorization because the government had fled, was not in touch with a particular group, or had ceased to exist. Denial of prisoner of war status on this ground has been foreclosed by equating organized resistance movements to militia in Article 4,[186] and by a specific provision protecting regular armies of governments in exile.[187]

Summary determination by unit commanders that an irregular does not meet the Conventional criteria is no longer possible. The question must be decided by an undefined "competent tribunal."[188] The irregular who meets the condition of Article 4, and who operates in all situations short of formal declared war, apparently including armed interventions which meet no resistance are protected.[189]

Finally, even if an irregular does not meet the Article 4 criteria, he is potentially granted some safeguards in occupied territory by the Civilian Convention.

[186] See Gutteridge, note 184 supra, at 312-13. 2 Final Record of the Diplomatic Conference of Geneva of 1949, 237 (1949) (provision result of compromise).

[187] Art. 4A(3).

[188] Art. 5.

[189] Art. 2; See Gutteridge, note 184 supra, at 297-98.

He is entitled to a trial;[190] to counsel;[191] some minimum of due process;[192] appeals;[193] maximum sentence limitations and stays of death sentences.[194] His family and associates are protected from reprisals for acts he has committed.[195] His rights under the Civilians Convention may not be denied by erection of puppet governments.[196]

All these latter rights are more illusory than real, because the Civilian Convention is capable of being interpreted so that the power in whose hands a person has fallen may suspend or omit these safeguards in cases where the irregular is detained as a spy, saboteur, or person under definite suspicion of activity hostile to the security of the occupying power.[197]

The Geneva prisoner of war convention then applies in almost any conceivable conflict, in any kind of territory; forstalls arbitrary decisions upon the question of an irregular's legal status; and provides a minimum procedural framework in which to decide the question of prisoner

[190]See Geneva Convention Relative to the Protection of Civilians in Times of War, 12 Aug. 1949, Art. 4; TIAS 3365 (2 Feb. 1956).

[191]Art. 72.

[192]Arts. 64, 65, 66, 72, 74.

[193]Art. 73.

[194]Arts. 68, 74, 75.

[195]Arts. 14, 33, 34, 53. See also Arts. 45, 49 (deportation prohibited).

[196]Art. 47.

[197]Art. 5.

of war status. But this is all the Convention does. Jurisdiction and a minimum of procedural law has been provided by the Convention, but is the law defining the issues sufficient? That law is provided by the four criteria. An examination of the sufficiency of that law involves an examination of each of the four criteria, and the tools for interpretation.

Heretofore, this thesis has pointed out the harm which can flow from treating the problem of who may engage in war solely as a legal problem. However, the traditional approach of statute, legislative history, precedent, as an entity in interpretation cannot be entirely disregarded. It might be possible to develop a basis for the disposition of irregulars by this method. Let us then see what possibilities it offers. The first criteria is: "(a) That of being commanded by a person responsible for his subordinates."

Since "person" is not defined, and is a word subject to many interpretations, it, and other phrases in the criteria lacking clarity might be interpreted through precedent, and practice. Herein lies the difficulty. The precedent dates from a time when the authorization rule was in effect; a time when the main function of the officer under that rule was to make the authorization

manifest.[198] That function is now performed by article 4, which equates resistance movements to militia.[199]

There have been no groups of irregulars treated as lawful combatants who have not been commanded by an officer commissioned by a state, or its equivalent, but this is not authority for concluding that the condition can only be fulfilled by a commissioned officer. The main function of the "person responsible for his subordinates" now is to provide prior assurance that a group of irregulars will not violate the laws of war.[200] It was intended at the time the condition was first formulated that the person would be responsible to his own government for his subordinates' actions, not to the enemy.[201]

Lacking evidence of the actual practice interpreting this requirement, the only aids to interpretation are a few statements of publicists, some statements in military manuals, and occasional remarks by delegates in the Con-

[198]See notes 20, 42, 50, supra.

[199]This has not really solved the authorization problem, since the organized resistance movements fight for and are authorized by parties to the conflict, which are not defined, but possibly could be rebels. See Art. 3. If the "party to conflict" is not a sovereign state, the problem remains.

[200]This was the function in mind of the originator of this rule. See Droop, 15 Solicitors Journal and Reporter 121, 122 (1870).

[201]Ibid.

ventions. These sources state in carefully general language some theoretical examples of what would be compliance. They do not purport to state what would not fulfill the condition.[202]

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

There are two problems here. The definition of the word "fixed," and the distance at which it should be recognizable. It would appear that fixed should mean "unable to be easily removed." But it is an open question as to whether the sign must be worn at all times. If the irregular unit is to resemble a conventional army, the answer would be in the affirmative. But since there is

[202]As to publicists, see Holland, Studies in International Law, 75 (1898) (discussing Arts. 9 and 10 of Brussels Declaration: should be so organized to be under order of ascertainable individual who is, in "some sense of another," responsible); Droop, note 200 supra, at 122 (officers recognized by, and responsible to chief military authorities of state). As to convention delegates, see Proceedings of Hague Peace Conference of 1899, 546-55 (translation of official texts, Carnegie Endowment) (1920) (remark German delegate, fulfilled by Mayor, former soldier, an "official"); 2A, Final Record of Diplomatic Conference of Geneva of 1949, 428 (1949) (British delegate; must differentiate between movement and individual snipers). As to military manuals see Edmonds and Oppenheim, Land Warfare, An Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army, 19 (1908) (regular or temporary officer, person of position, "landed proprietor," or if member possess certificates, to show authority from state, or not acting on own authority); FM 27-10, The Law of Land Warfare, para. 64a (1958) (except for "landed proprietor," same as Edmonds above).

little logical connection between such an army and an irregular group, such a conclusion has opponents. Thus the Danish delegate at Geneva took the position that it need not be worn at all times, but only when engaged in military operations, and (possibly to avoid controversy) the other delegates present at the committee meeting agreed that this was implicit in the article.[203]

"Recognizable at a distance" is, of course, so vague as to be meaningless.[204] The historical examples of lack of uniforms given earlier[205] are somewhat irrelevant, since before the Franco-Prussian War, uniforms and uniform marks had the strictly utilitarian function of distinguishing friendly troops from the enemy.[206] From what has been said of the basis for the disposition of irregulars prior to the Convention, it is apparent that lack of uniform marks was not a real factor in the disposition, with the possible exception of the completely ununiformed Portugese Ordenanza in the Spanish Peninsular War.[207]

[203]See 2A, Final Record of the Diplomatic Conference of Geneva of 1949, 424 (1949). See also the general discussion by working party, id. at 478-79. (proposed changes to make condition more definite). (Cf. Spaight, War Rights on Land, 56 (1911).)

[204]See Edmonds and Oppenheim, note 202 supra, at 19.

[205]See notes 36, 39, 48, 63, 71, 77, 116, supra.

[206]American and British irregulars in the American Revolution wore civilian clothing. To distinguish themselves, the Americans wore green twigs in their hats. See Hartley, Life of Major General Henry Lee and General Thomas Sumter, 123-26 (1859). See also notes 71, 116, supra.

[207]See note 50, supra.

It may be said, however, that no irregular combatant group has ever worn a uniform mark — short of a complete uniform — which met the requirements imposed by the enemy. There was, however, one instance in which the requirement was thought to be met by an international lawyer.[208]

The official British Army Manual of 1908 gave some examples of possible compliance. A badge, or device sewn on clothing, colored stripes on trousers, one white sleeve, double colored arm bands, even a set of uniform buttons were said to be sufficient.[209] The present United States Army Manual is less specific, and merely says that the condition will be satisfied by a uniform, part of a uniform, or a helmet or head dress which will readily distinguish the silhouettes of irregulars from ordinary civilians.[210]

"(c) That of carrying arms openly."

This requirement has not been controversial enough to create precedent or to warrant comment. Until the

[208]Japanese in white helmets, and European clothing, with flowers embroidered on coat, in a Chinese population dressed in native costume, in Japanese-Chinese War. See Edmonds and Oppenheim, note 202 supra, at 20, n.A. (opinion of Japanese war executed Siberian convicts wearing small cross in cap, red bands on sleeves, red edging on coats, Ibid. But this was solely because they were convicts. See Spaight, note 153 supra, at 60 (1911).

[209]Edmonds and Oppenheim, note 202 supra, at 70, n.a.

[210]FM 27-10, Law of Land Warfare, para. 64b (1956).

second World War, arms were carried openly by all irregulars. During that war, there were some complaints by the Germans concerning concealed weapons. It is apparent that weapons carried under the clothing, or concealed, or abandoned when hard pressed do not meet the condition.[211]

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

Here the historical examples discussed have some relevance. It is apparent that those irregulars, of the examples given, who were treated as lawful belligerents were the irregulars who committed no atrocities against the conventional enemy army. The irregulars of Rogers, Marion, Sumter, Pickens, the Boers, Mosby's Rangers, are all illustrative of this point. On the other hand, the Spanish Partidas, Mexican irregulars in 1847,[212] the Yugoslav Partisans,[213] and the Soviet Partisans were all thought by the opposing armies, to have murdered or mistreated prisoners. It is not suggested that this was the sole factor in their disposition, nor that it was even the primary reason but it played a significant part in

[211]Edmonds and Oppenheim, note 202 supra, at 20; FM 27-10, Law of Land Warfare, para. 64c (1956).

[212]See notes 52, 58, supra.

[213]See United States v. List, (Hostage case), 11 Trials of War Criminals, 1014-15 (German intelligence report; Partisans shoot all captured officers). Id. 578-80 (Reichenau order).

gaining them recognition in varying degrees as lawful combatants.

The condition is self-explanatory, but it leaves open the question of the effect of non-compliance by individuals upon the remainder of the group. All persons engaged in war must follow the rules of warfare. Hence requiring the group as a whole to meet the requirement as a condition precedent to prisoner of war status is a pure matter of policy. There is no other reason why a majority of a group should be denied this status because of the acts of individuals.[214]

There is some judicial precedent for interpretation of these four conditions as a whole. In 1947 a war crimes tribunal tried a group of German Army officers who had engaged in the suppression of irregular warfare in the Balkans. They were charged, among other offenses, with the illegal drafting of orders denying quarter and prisoner of war status to enemy troops, and with illegally ordering that members of the national armies of Greece and Yugoslavia be designated "partisans," "rebels" and "bandits," thus causing the murder of thousands of soldiers.[215]

[214]See FM 27-10, Law of Land Warfare, para. 64d (1956).

[215]United States v. List, (Hostage case), 11 Trials of War Criminals, 1233 (count three of indictment).

The extent of compliance by some Yugoslav and Greek partisans with the Hague conditions then became an issue. One of the defenses urged to this charge was that the persons so treated were not entitled to prisoner of war status under the Hague Convention because of non-compliance with its conditions.

The burden then fell on the prosecution to show compliance. The court stated that the evidence failed to show beyond doubt that the incidents involved in the case concerned partisan troops having the status of lawful belligerents, and acquitted the accused of any charges concerning the illegal shooting of partisans. The court held that the evidence concerning the relevant bands of partisans (with no further identification of them) showed a para-military organization, but no common uniform; the wearing of civilian clothing, at times, and at other times parts of captured uniforms; the use of the Soviet star as insignia (which could not be seen at a distance); the carrying of arms openly only when it was to the Partisans' advantage; and finally some evidence of a centralized command in some cases. The court concluded by saying that some bands operating in the area met the requirements, but not those involved in this case.

Extreme difficulty is encountered in assessing this case as precedent, in the absence of identification of

the bands involved and the alternative grounds possibly used as a basis for the decision.[216] There were dozens of bands operating in the area, during the period of about four years covered. Moreover, the report of trial contains only a small fraction of the evidence introduced on the point. It is probable that the evidence consisted mostly of German intelligence reports, German witnesses, and a few captured partisan documents[217] and that no witnesses were called from among Tito's higher command.[218] Other evidence concerning Tito's partisans[219] shows that generally they were very similar to the bands the court described. They had in fact a much tighter command structure than that shown by the German sources used in the List trial.

It can be reasonably concluded from this case that partial or no uniforms, small red stars, intermittent carrying of arms and lack of a visible central command will not comply with the conventional conditions.

[216]The court also held guerilla warfare, in Yugoslavia and Greece was illegal, because the regular armies had capitulated, the governments had surrendered, and the territory was occupied, id.

[217]This is the sole type of evidence picked for inclusion within the bound report.

[218]In a similar case involving Soviet partisans, the court did not find it necessary to decide their legality. United States v. Von Leeb, 11 Trials of War Criminals 530 (U.S. War Crimes Tribunal) (1947).

[219]See notes 162, 173-67, supra.

It is clear then that the Conventional criteria are vague, and that there is now no body of precedent which will satisfactorily supply this deficiency. The pressures which will be put upon these criteria in any future war are such as to require a well defined body of war law and widespread agreement among nations as to how they may be fulfilled if they are to be a real basis for disposition of irregulars. Lacking this, the criteria must still go through a long process of interpretation before they will become definite enough to withstand potential deliberate misconstructions by nations which would vitiate them. It may well be that in the future, as in the past, the type of approach to the problem of who may fight in a war which they typify will be disregarded completely. From the wary attitudes shown by the delegates at the Geneva Convention; their inability to agree to more than the criteria already in effect; it is clear that any hope of clarification by another convention is remote, even if clarification would, in fact, be beneficial.

CHAPTER V

APPROPRIATE LAW FOR THE FUTURE WITHIN THE CONVENTION

The changes wrought in the field of belligerent qualifications by the Geneva Convention of 1949, while they represent important innovations, did not reach the crux of the problem. There are three main areas in which the Convention will be found to be ineffective. One has been mentioned previously, i.e., the changed strategy of irregular warfare renders it unlikely that irregulars will make more than a token attempt to comply with the criteria.[220] In some armies the irregular of the future, well trained and armed, will bear more resemblance to a new weapon of interdiction of communications, with an effect similar to strategic bombing than he will to his counterpart in a traditional army.[221] In other armies, the irregular will be the instrument whereby a system of government is imposed upon an unwilling body of men in small increments. The Communist strategy of irregular warfare is essentially the application of force by a method of diffusion — a small

[220] See generally, FM 31-21, Guerilla Warfare and Special Forces Operations (1955), paras. 2, 4, 9-12, 103e, 114c, 116b, 121, 100 (general implication of units without uniforms, using civilian clothing, civilian supply corps, using Lawrence's strategy).

[221] Id. paras. 8, 9.

amount of force applied at a great number of points — rather than the concentrated application of a great amount of force at a few points. The Communist irregular extends politics into the realm of force, but never abandons his political function while he is using force. Neither type of irregular is likely to make much attempt to comply with the Conventional criteria.

Secondly, the advent of mass irregular armies, perhaps numbering into the millions of men and women, pose logistic problems which may render it impossible to grant all the privileges of a prisoner of war to these huge numbers.[222] The main body of the Prisoner of War Convention is a detailed, complex set of rules designed for maximum protection of a comparatively small number of prisoners.

The third problem which the Convention does not solve is within the Convention itself. The vagueness of the criteria render it certain that they will be interpreted so as to eliminate most irregulars from their

[222]Chinese Communist militia for example, who in some areas constitute the entire adult population of an area. See Bowles, A Long Look at China, April 4, 1959 Saturday Evening Post, 23, 108 (1959). For a detailed account of the tactics likely to be used see Snow, The Battle for Asia, 342 (1941). For an assessment of the strategy likely to be used in China by the Chinese Communist guerillas against the Japanese, in the nature of a prediction which was fulfilled see Dupuy, The Nature of Guerilla Warfare, 1939 Pacific Affairs, 138, 142, 146 (1939).

protection, both for the reasons given above, and for strategical and tactical reasons.

It is probable then that the strict and literal interpretation of the criteria used by the court in the List case will be the method chosen to separate those whom the nations desire to give prisoner of war status and those whom they do not. There may be some units of irregulars which make an attempt to comply. It will then be necessary to decide whether to use the approach followed by the List tribunal, an approach which can be called the traditional international law method of interpretation, or another method.

The traditional method is the one which most readily comes to the legally trained mind, the stare decisis system of jurisprudence that uses judicial precedent and the custom and practice of nations as aids to interpretation. The issues to be determined will be those caused by a group of irregulars which at least comes as close to meeting the criteria as did Tito's Partisans.

Before this traditional method is chosen as the means of interpreting the criteria, certain fundamental difficulties should be recognized.

The original criteria were no more than an attempt to mitigate the horrors of war by the use of a two-pronged attack. The first prong was that the irregular would be

given a protected status upon capture if he met the four conditions. The other prong was that it would also be agreed by all nations that they would not use irregulars which did not meet the conditions, and would, on the contrary, use every effort to suppress them.[223] To apply precedents based on mere expediency would defeat the purpose of the criteria as a humanitarian device.

It is extremely unlikely that the nations are going to make the interpretations of these criteria contained in their military manuals, such as FM 27-10, more definite. The subject matter is not of a type to encourage a nation to establish precedent which might later restrict its freedom of choice. Therefore, there will be little chance of developing a body of custom based on the statements of nations.

The only other written precedent, with the exception of the war crimes tribunal cases is either negative, irrelevant, or statements of publicists made at the turn of the century.

The danger in using the custom and practice of nations as a valid source will be ever present. The practice is,

[223]The original project of the Brussels Convention contained such a provision, proposed by the Czar of Russia, but it was eliminated from the final draft because nations lacking large armies and conscription thought that it was a device to gain strategic advantage. See Holland, Studies in Interantional Law 74 (1898).

and probably will remain merely a collection of varying and conflicting policy decisions made on an ad hoc basis.

Some other difficulties, although merely mechanical, are formidable. There are no systems of reports for reporting the trials which have been held, or may in the future be held upon the issue of compliance vel non with the criteria. There is, and will be no uniformity of systems of jurisprudence, issues of law, grounds of decision, personnel of courts, language, legal concepts, and modes of proof in such cases. One nation may use a quasi-judicial system such as the United States military commissions. Others may use a mere board of officers, or a command decision to decide the question of the granting of protected status.[224] It is optimistic to think that there will be many "trials" in the sense of a judicial hearing. The decisions may well continue to be made upon policy grounds. Who then can tell whether a particular decision is good precedent, or merely a policy exception to customary law?

It is therefore unlikely that any stare decisis system will ever solve the problems posed by masses of irregular combatants if it relies upon prior events, either

[224]For a discussion of the difficulties of this type encountered in obtaining precedent for use in World War II war crimes trials see Brand, Development of International Law of War, 25 Tulane Law Review 186 (1951).

judicial or in the nature of practice. Despite the difficulties and inconsistencies inherent in such a system, it is probable that a combination of strict interpretation and the use of past practices (which may be summed up by saying that irregular combatants have never met the tests laid down for them except as exceptions to custom) will be used to deny prisoner of war status to most irregulars.

This result will be in consonance with the history of the law of war as a step by step process of mitigating the rigors of war in small increments. The 1949 Convention will continue to grant strong protection to organized armies, without weakening what has been gained heretofore by slow and painful steps. It may, under some conditions, grant a lesser degree of assurance of protection to some selected irregular groups.

If however, it is found that the stare decisis method is insufficient to supply the mentioned deficiencies in the criteria, it is suggested that a functional test might be applied as developed in this thesis. If a leader, or some other entity functions to prevent cruelties and the commission of ordinary crimes, then the first condition might be considered fulfilled. If some type of uniform mark is found necessary to protect civilians from harm, or to identify an irregular otherwise able to melt into the population, then any mark which will fulfill the particular

need required at that time and place should be sufficient. If the carrying of arms openly is required to identify the irregular, (in the same manner as the uniform mark) then it should be required, but if there is no function to be performed by such carrying then it might well be dispensed with. Some such system, flexible enough to be applied as the situation demands, would be more likely to withstand the pressures put upon it by military necessity than a system based upon precedent, a system which will inevitably lead to misinterpretation.

CHAPTER VI

THE COMING RULES: THE FORCES WHICH WILL SHAPE THEM

To use the traditional international law method of stare decisis, one must assume that the law of war is a rational system of rules based upon recognized principles of law, or at the very least; upon some logical basis. This fundamental assumption is open to grave doubt,[225] particularly in the field of belligerent qualifications. There is no real reason to treat war as a legal status, productive of rules of law, and defined and controlled by them except that war is generally thought of by lawyers in that way. War if it can be defined at all, is a sociological phenomenon,[226] it exists, it is only slightly and indirectly a creation of man and controlled by him. The rules man makes for war are much less the product of man's conscious will than they are of forces beyond his control. There is ample evidence of this in every disposition made of irregulars. Napoleon and his contemporaries could not have made the regular army-militia rule work, no matter how they tried. The decision that this rule was inappropriate was made by the advent of mass armies.

[225] See I Annuaire de l'Institut de Droit International 556 (1954).

[226] See Kotzsch, The Concept of War in Contemporary History and International Law, 19-24 (1956).

Mass armies were made possible by the industrial revolution and technological advances which made it feasible to equip, move and maintain them. Mass armies necessarily require mass hatred to be effective, and mass hatred breeds mass cruelty as a result.

Discipline, strong leadership and the military tradition will not prevent mass cruelty, as the Second World War so lamentably demonstrates. Discipline, leadership, complete uniforms and adherence to all the customs of war will not lift an army above the class of murderers in the subconscious minds of most of the world's population unless some undefinable entity outside that army has put a stamp of approval upon their killing, and stands available to share the guilt. This may not be logical, but the thread of this tabu runs through the history of irregular combatants.

The rule which gives protected status to a group which outwardly resembles what was thought of as an army in 1870 is only slightly more logical than the rule which allowed savages the same privileges provided that they had been read the Articles of War and had taken an oath to defend the King. Rules which give protected status to conventional armies only because they are conventional armies and completely ignore their conduct, can be justified on grounds of expediency and humanity, but cannot be

defended as logical.

There are forces only partly controlled by men which will shape the rules concerning irregulars in future wars. The rules followed will have their genesis in the basic physical sciences, economics, and mass psychology, rather than in any logical attempt by men to control the kinds of participants in war. The irregular will not be granted prisoner of war status perhaps, but he will not be executed in large numbers either.

Fear of reprisals will temper harsh decisions. It is significant that the two great powers of the world will in the future both use irregulars — although of a different type. It is possible that weapons systems of such sophistication or such destructiveness will be developed as to require conventional armies to adopt the strategy of irregular warfare. If such armies must, to survive, absolutely deny themselves as targets to the enemy, as the irregular is now required to do, it will be quickly agreed that uniforms and the open carrying of arms are irrelevant to granting prisoner of war status.

If, on the other hand, the techniques of psychological warfare develop to the point where the civilian populace can be so controlled as to deny the irregular his vital support, it is likely that the irregular will no longer be important. Such considerations as terrain,

relative population density, opportunity to subvert enemy personnel, logistic capabilities, the availability of first rate troops to combat the irregular, new weapons, will all have their effect upon the rules to be followed in the future outside the 1949 Convention. Military necessity may take some new and different forms. Necessity may require a lenient policy and the granting of belligerent rights rather than the harsher policies traditionally followed.

It is certain that the principal of humanity, which is perhaps the basis for all war law[227] will be the foundation upon which all such rules will be built. Depending on a host of variables, of which the examples given above are only a few, the rules adopted will depart more or less from the ideal of humanity.

It is likely however, that whatever rules are adopted all will require that the irregular be something other than a self constituted group which decides by itself to engage in homicide, and all will require that the irregular refrain from mistreating prisoners from the opposing army. Other rules may in addition, require, depending upon the variables, freedom from crimes against the civilian populace, uniform marks, the open carrying of arms,

[227]See FM 27-10, The Law of Land Warfare, para. 3 (1956).

full time fighting, and authorization from a strictly defined state. The important point is that there will be fewer attempts to use pure terror as a weapon to combat irregulars because it has proven to be more of an aid to the irregular than it has to the conventional army.

The trend will be toward varying rules, tailored to fit the conditions of the war, rather than to one rule of universal application. Wars for absolute survival will have different rules than those used in limited wars. The influence of man, as contrasted to the complex forces unleashed in war, will be most strongly felt in inclining the rules toward the principle of humanity. The trend of history seems to indicate that despite occasional setbacks, the forces leading to the mitigation of war are always in operation, and by almost imperceptible degrees gain the ascendancy.

CONCLUSION

"When the enemy advances we retreat
When he escapes, we harass
When he retreats, we pursue
When he is tired, we attack."
(Mao Tse-Tung)[228]

Many of the reasons why irregulars are called unlawful have been discussed. It should be remembered that these are the reasons formulated by western minds. They are the product of minds which possess a mental image of war as a traditional clash between groups of champions, within the framework of a concept which presupposes a necessary and inevitable mutual test of the strength and resolution and skill of the champions. Western armies are, in short, expected to fight to a quick decision.

The Chinese guerilla slogan above, which is a restatement of an ancient Chinese mental picture of the proper type of war, shows that the gulf between the occidental and oriental concept of war is vast. The magnitude of the difference may be shown by this: it was twenty two years before Mao judged that the Kuomintang was sufficiently tired to justify the final attack. Retreat can

[228]Payne, Mao-Tse-Tung, 104 (1954). This slogan in poetic form is said to have been considered of prime importance by Mao during the Chinese Communist's guerilla warfare against Chiang Kai Shek in the 1930's. It is an adaptation by Mao of principles first enunciated by a strategist renowned in Chinese history, Sun Wu, sometime between 722 and 481 B.C.

mean a retrograde movement across terrain. Can it not also mean a retreat into an appearance of non-belligerency?

The western mentality supplies many reasons why an irregular should be called unlawful: it produces a picture of a murderer, both of the soldier he kills in combat and of the prisoners he cannot keep; it projects the image of a common criminal or of a man who takes an unnecessary and unlawful part in a war which is really no concern of his. At times the consideration which makes the irregular unlawful in the western mind is the harm and misery he brings to the mass of civilians in which he lives as a fish lives in water. The western mind at times can justify penalizing the irregular because he is hard to identify and harder to combat. There is some indication that the penalty is imposed to discourage the unauthorized practice of the warrior's profession. How many of these images of the irregular does the oriental mind conjure up? How does the oriental mind rank considerations of humanity in its hierarchy of values? Does the oriental mind rate open combat by identifiable groups as highly as we do?

A group of irregulars and an army are, by the convention, only separated by the lack of an oath (perhaps) a leader, a uniform and the open carrying of arms. Presumably if these deficiencies are supplied, and if the

majority of the irregular group refrains from violating the laws of war the irregular group is no longer a band of murderers and criminals, it no longer causes appreciable harm to the civilian population; presumably the irregulars are no longer outsiders, but qualified members of the profession of arms. It may be that these results would not inevitably follow compliance with the four criteria.

One result would inevitably follow however. The irregular army would be easy to defeat. Compliance with the criteria would insure destruction of the poorly led, badly equipped, lightly armed and undisciplined irregular force. The difference between the irregular unit and the ordinary army which at first glance seems so slight is in reality profound. The Convention's criteria then, require by four seemingly innocuous phrases that the irregular use the strategy and tactics of the conventional army as the price for protected status upon capture. This requirement may appear only fair and just to many, and it may at times be justified by the highest considerations of humanity.

But it would be indeed remarkable if the rules of belligerent qualification could be successfully used to perform the function of forcing a powerful and determined nation to use what the leaders of that nation rightly or wrongly universally conceive of as a suicidal variety of

tactics and strategy. Such a result would entail changing the entire basic concept of war held by the leaders (at all levels) of that nation. It is highly probable that those in power in China at the present time, whose basic concept of strategy was formed in the long war with the Kuomintang and the Japanese, would consider regular tactics as suicidal in many situations. The leaders of Russia perhaps do not place the same degree of emphasis upon irregular warfare, but it is certain that they conceive of irregular warfare in a far different manner than do their western counterparts.

It is certain then that in any major war between the great powers that Article 4 of the Geneva Prisoners of War Convention will assume great significance. One potential western interpretation freezes the irregular into the mold of the conventional army, and in effect (but not expressly) makes an entire strategical concept illegal. The article will be interpreted by <u>both</u> belligerents so as to forbid the use of irregulars just so long as irregular warfare is thought by <u>both</u> to have only marginal utility. If it should happen that one belligerent believes that irregulars possess military utility which outweighs their military disadvantages then either ways will be found to legitimate them through the medium of new interpretations or Article 4 will be useless as part of the law of war.

It will be useless because war law that is only unilaterally accepted and enforced, although it may still be considered as law by some, fails to perform its primary function — mitigation of the effect of war.

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TREATISES

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