PROTECTION OF UNLAWFUL COMBATANTS WITH SPECIFIC
STUDY ON GUERRILLA WARFARE

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ABSTRACT

The terms “combatant”, “prisoner of war” and “civilian” are generally used and defined in the treaties of international humanitarian law, the terms “unlawful combatant”, “unprivileged combatant/belligerent” do not appear in them. They have, however, been frequently used at least since the beginning of the last century in legal literature, military manuals and case law. The connotations given to these terms and their consequences for the applicable protection regime are not always very clear. Unlawful/unprivileged combatant/belligerent is understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy.

If unlawful combatants do not meet the conditions to qualify as prisoners of war and thus are not protected by GC III, this study will first examine whether unlawful combatants fall within the personal scope of application of GC IV. It will then consider to what particular protections they are entitled once they are in enemy hands.

Guerrillas are also considered as unlawful combatants in warfare. Guerrilla warfare is a form of irregular warfare in which a small group of combatants such as armed civilians or irregulars use military tactics including ambushes, sabotage, raids, petty warfare, hit-and-run tactics, and mobility to fight a larger and less-mobile traditional military. This study includes how the international humanitarian law provides protection for these types of unconventional warfare in which the combatants are often considered as unlawful.

Keywords:
- Guerrilla.
- Guerrilla warfare.
- Protection of unlawful combatants.
- Unlawful combatants.

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INTRODUCTION

Guerrilla warfare is irregular military actions such as harassment and sabotage carried out by small usually independent forces.² Guerrilla is a member of a usually small group of soldiers who do not belong to a regular army and who fight in a war as an independent unit. He is a person who engages in irregular warfare especially as a member of an independent unit carrying out harassment and sabotage.³

Guerrillas are lawful combatants if they belong to an organized resistance movement to a party to the conflict, are commanded by persons responsible for their subordinates, wearing fixed distinctive signs, carry their arms openly, and obey the laws and customs of war.⁴ Under International Humanitarian Law (IHL), guerrillas are included in the category of irregular forces defined more specifically as fighters who use unconventional methods of warfare, such as sabotage, ambushes, and sniping.⁵

Guerrilla warfare is a seemingly natural response of a relatively small, undermanned and outgunned force to the overwhelming firepower and strength of another. In other words, for the militarily weak, it is a strategy of survival.⁶

The term guerrilla is used both independently and as a component part in various expressions, such as guerrilla warfare, guerrilla tactics, guerrilla fighters. As a rule, the meaning of these expressions is more or less clear in the given context; but this is far from suggesting that they have an agreed, unequivocal meaning. Thus, it seems necessary first of all to give some indication of their scope and to examine whether a common denominator can be found. The word guerrilla itself seems to be used in two different ways, as a synonym for guerrilla warfare, or for a guerrilla fighter for which the correct term would be guerrillero. Guerrilla warfare is usually understood to mean the type of armed conflict on land in which guerrilla fighters are involved in the hostilities at the side at least of one of the parties to the conflict. This conflict may moreover be characterized by the application of guerrilla tactics, although the degree to which this is the case may vary with the various stages of the conflict. The term

guerrilla fighters is used in more than one way, but according to a fairly widely accepted view it embraces all irregular combatants. It should be noted that this excludes members of the regular armed forces applying guerrilla tactics.\(^7\)

Guerrillas may be described as bands not belonging to a regular army and not under strict military discipline, but nevertheless operating actively in the field and devoting themselves entirely and continuously to warlike avocations without intervals of the peaceful pursuits of ordinary life. They often perform valuable services to their own side by attacking convoys of arms and provisions on the way to the enemy, cutting off communications, blowing up bridges and destroying railways in rear, intercepting despatches, and harassing the enemy in numberless ways that patriotic ingenuity can suggest and superior mobility carry out.\(^8\)

**HISTORY OF GUERRILLA WARFARE**

**Russian Guerrilla Warfare**

In September 1812, Napoleon, in the course of swallowing all of Europe, invaded Russia at the head of a great army totaling several hundred thousand infantry, cavalry, and artillery. At that time, Russia was weak and her ill-prepared army was not concentrated. The most important phase of her strategy was the use made of Cossack cavalry and detachments of peasants to carry on guerrilla operations. After giving up Moscow, the Russians formed nine guerrilla divisions of about five hundred men each. These, and vast groups of organized peasants, carried on partisan warfare and continually harassed the French Army. When the French Army was withdrawing, cold and starving, Russian guerrillas blocked the way and, in combination with regular troops, carried out counterattacks on the French rear, pursuing and defeating them. The army of the heroic Napoleon was almost entirely annihilated, and the guerrillas captured many officers, men, cannon, and rifles. Though the victory was the result of various factors and depended largely on the activities of the regular army the function of the partisan groups was extremely important. The corrupt and poorly organized country that was Russia defeated and destroyed an army led by the most famous soldier of Europe and won the war in spite of the fact that her ability to organize guerrilla regimes was not fully developed. At times, guerrilla groups were hindered in their operations and the supply of

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\(^8\) T. J. Lawrence, The Principles of International Law 490 (1923).
equipment and arms was insufficient. If we use the Russian saying, it was a case of a battle between “the fist and the axe”\textsuperscript{9}

From 1918 to 1920, the Russian Soviets, because of the opposition and intervention of foreign imperialists and the internal disturbances of White Russian groups, were forced to organize themselves in occupied territories and fight a real war. In Siberia and Alashan, in the rear of the army of the traitor Denikin and in the rear of the Poles, there were many Red Russian guerrillas. These not only disrupted and destroyed the communications in the enemy’s rear but also frequently prevented his advance. On one occasion, the guerrillas completely destroyed a retreating White Army that had previously been defeated by regular Red forces. Kolchak, Denikin, the Japanese, and the Poles, owing to the necessity of staving off the attacks of guerrillas, were forced to withdraw regular troops from the front. Thus not only was the enemy’s manpower impoverished but he found himself unable to cope with the ever-moving guerrilla.\textsuperscript{10}

**Chinese Red Army**

From 1927 to 1936, the Chinese Red Army fought almost continually and employed guerrilla tactics contently. At the very beginning, a positive policy was adopted. Many bases were established, and from guerrilla bands, the Reds were able to develop into regular armies. As these armies fought, new guerrilla regimes were developed over a wide area. These regimes co-ordinated their efforts with those of the regular forces. This policy accounted for the many victories gained by the guerrilla troops relatively few in number, who were armed with weapons inferior to those of their opponents. The leaders of that period properly combined guerrilla operations with a war of movement both strategically and tactically. They depended primarily upon alertness. They stressed the correct basis for both political affairs and military operations. They developed their guerrilla bands into trained units. They then determined upon a ten year period of resistance during which time they overcame innumerable difficulties and have only lately reached their goal of direct participation in the anti-Japanese war. There is no doubt that the internal unification of China is now a permanent and definite fact, and that the experience gained during our internal struggles has proved to be both necessary and advantageous to us in the struggle against Japanese imperialism. There are many valuable lessons we can learn from the experience of those years. Principle among

\textsuperscript{9} Subrata Mukherjee, Sushila Ramaswamy, Mao Zedong: His thoughts and Works, p.no: 59 (1998).

\textsuperscript{10} Ibid.
them is the fact that guerrilla success largely depend upon powerful political leaders who work unceasingly to bring about internal unification. Such leaders must work with the people; they must have a correct conception of the policy to be adopted as regards both the people and the enemy.\(^\text{11}\)

After 18 September 1931, strong anti-Japanese guerrilla campaigns were opened in each of the three north-east provinces. Guerrilla activity persists there in spite of the cruelties and deceits practiced by the Japanese at the expense of the people, and in spite of the fact that her armies have occupied the land and oppressed the people for the last seven years. The struggle can be divided into two periods. During the first, which extended from 18 September 1931 to January 1933, anti-Japanese guerrilla activity exploded constantly in all three provinces. Ma Chan Shan and Su Ping Wei established an anti-Japanese regime in Heilungkiang. In Chi Lin, the National Salvation Army and the Self-Defence Army were led by Wang Te Lin and Li Tu respectively. In Feng Tien, Chu Lu and others commanded guerrilla units. The influence of these forces was great. They harassed the Japanese unceasingly, but because there was an indefinite political goal, improper leadership, failure to co ordinate military command and operations and to work with the people, and, finally, failure to delegate proper political functions to the army, the whole organization was feeble, and its strength was not unified. As a direct result of these conditions, the campaigns failed and the troops were finally defeated by the enemy.

During the second period, which has extended from January 1933 to the present time, the situation has greatly improved. This has come about because great numbers of people who have been oppressed by the enemy have decided to resist him, because of the participation of the Chinese Communists in the anti-Japanese war and because of the fine work of the volunteer units. The guerrillas have finally educated the people to the meaning of guerrilla warfare, and in the north-east, it has again become an important and powerful influence. Already seven or eight guerrilla regiments and a number of independent platoons have been formed, and their activities make it necessary for the Japanese to send troops after them month after month. These units hamper the Japanese and undermine their control in the north-east, while, at the same time they inspire a Nationalist revolution in Korea. “Such

\(^{11}\) Id. at 61.
activities are not merely of transient and local importance but directly contribute to our ultimate victory” said Mao Zedong.\textsuperscript{12}

**Vietnam War**

The Guerrilla tactic was widely used by the Vietcong. During some ambushes the Vietcong guerrilla fighters would sneak up on unaware U.S. troops, attack them, and leave before risking capture. The Vietcong would also pose as citizens or farmers then, when least expected, they would surprise attack U.S. troops using arms provided by Ho Chi Minh. Ho Chi Minh was a Vietnamese Marxist revolutionary leader and also the president of the Democratic Republic of Vietnam. He ordered an elaborate 200 mile long tunnel system to be dug to aid the guerrilla fighters in their ability to move from place to place undetected by U.S. infantry. Vietcong soldiers had access to Chinese versions of the AK-47; they also had heavy, medium, and light machine guns. The heavy machine guns were mainly used as anti-aircraft weapons, most effective against U.S. helicopters. Other weapons such as land mines, and booby traps were hand crafted in North Vietnamese villages. The Vietcong also got aid from an unexpected source: they would scavenge the country side for unexploded American bombs and land mines and use the explosives in bombs of their own. In one year approximately 20,000 tons of explosives could be found in unexploded or dud American bombs.\textsuperscript{13}

In December 1965, Ho Chi Minh and the North Vietnamese leadership ordered a change in a way the war in the South was to be fought. From now on, the Vietcong would avoid pitched battles with the Americans unless the odds were clearly in their favor. There would be more hit and run attacks and ambushes. To counter the American build-up, Vietcong recruitment would be stepped up and more North Vietnamese Army troops would be infiltrated into South Vietnam. The Vietcong, following the example of Chinese guerillas before them, had always given the highest priority to creating safe base areas. They were training grounds, logistics centers and headquarters. They also offered secure sanctuaries for times when the war might go badly. Hiding the base areas had always been a high priority for the Vietcong. Now, with American spotter planes everywhere, it was more vital than ever to protect them. In remote swamps or forests, there were few problems, but nearer the capital, it was much more difficult. The answer was to build enormous systems of underground tunnels. The

\textsuperscript{12} Id. at 62.

\textsuperscript{13} http://vietnamawbb.weebly.com/guerrilla-warfare-and-war-of-attrition.html (Last Visited on November 1, 2016).
orders coming from NLF headquarters were absolutely clear. Tunnels were not to be treated as mere shelters. They were fighting bases capable of providing continuous support for troops. Even if a village was in enemy hands, the NLF beneath were still able to conduct offensive operations. There were complexes big and small scattered across the country. Each villager in a NLF area had to dig three feet of tunnel a day. There was even a standard handbook specifying how tunnels were to be built. The biggest tunnel systems were in the Iron Triangle and the Cu Chi District, only 20 miles from Saigon.14

**American Civil War**

Throughout the American Civil War, as vast armies in blue and gray clashed on conventional battlefields, a drastically different kind of conflict was raging as well a bloody guerrilla war that erupted in the South in response to Federal invasion. Characterized by ambushes, surprise raids, and irregular styles of combat, this guerrilla war became savage, chaotic, and often disorganized. The guerrilla war, as waged by both Confederate guerrillas and Unionists in the South, gathered in intensity between 1861 and 1865 and had a profound impact on the outcome of the war. Several different kinds of guerrillas emerged during the Civil War. The majority of Civil War guerrillas were called bushwhackers, so named because of their tendency to hide behind foliage and forest lines, what Union soldiers referred to as “the bush,” and attack their foes. Bushwhackers were un-uniformed civilian resisters, who had no affiliation with the Confederate army, and were a source of constant confusion for the Union army who had no way of distinguishing a peaceful Southern civilian from one who would attack them later. Guerrillas, who had the advantage of surprise and knowledge of the territory, were nearly impossible to catch and efforts to capture them only distracted soldiers from fighting the Confederate army. Their inability to stop the guerrillas who continued to destroy Union supplies and kill Union men encouraged a growing dislike among Northern soldiers for the Southern population from which the guerrillas came. By late 1862, the Union Army, overwhelmed by fighting a conventional army in their front and a guerrilla threat from all sides, began to meet guerrilla action with “hard war” policies. Union commanders began to hold civilians responsible for the actions of guerrillas, often by burning homes and communities, arresting civilian non-combatants, and in some cases evacuating entire counties. By 1865, the guerrilla war throughout the South had become confused, bloody, and disorganized. The Union Army had ceased to tolerate guerrillas, and met their attacks

unhesitatingly with retaliation. Civilians, exhausted by the violence in their communities and hopeful of preventing Federal retaliation against their homes, lost their support for the guerrilla movement and it soon began to die out.\(^{15}\)

**Chatrapati Shivaji**

Chatrapati Shivaji Bhosale (1630-1680) the popular king from medieval India is always been idol for the whole world. King Shivaji gave world new optimum war technique known as Guerrilla Warfare. He modified and rearranged the way of fighting to the enemies, which is most favourable work in weak condition of a kingdom/state. Guerrilla warfare performed very important role in many independence movements at end of 20th century. His technique inspired many nations and warriors to fight for their motherland. Chatrapati Shivaji is taught in every army while training. Shivaji believed in the tenets of guerrilla warfare. He was a voracious reader and an ardent follower of Kautilya’s “Kut Niti”. He learnt the importance of terrain in guerrilla war in his early years and never confronted the enemy in open combat.\(^{16}\)

**Maharana Rana Pratap**

Guerrilla Warfare had been in existence since times unknown, but Maharana Rana Pratap was probably the first to use “Organized Guerrilla Warfare” against a mighty enemy and very successfully administered a disastrous blow to the Mughal army. Akbar launched an offensive against Rana Pratap in A.D. 1576 after all the efforts, to bring Rana Pratap to his servitude failed. Akbar established his headquarters at Ajmer and this became one of the 22 subahs of Akbar’s empire. As a Guerilla Warfare tactic Rana Pratap restricted his region in the mountains of Aravali i.e., from north to south, Kumbhalgarh to Rishabdev and from west to south Mirpur to Satola. The faithful aborigines “The Bhils” took to field, with Rana Pratap with their ordinary weapon the Bow and Arrow and huge stones ready to roll upon the combatant enemy, above and below the Rajputs were posted and on the cliffs and pinnacles the “Bhils”. To save the honor of their land against the mighty Mughal army with the strength of Two Lakh soldiers. There stood the Twenty Two thousand, for the defense of Haldighati and only eight thousand quitted the field alive.\(^{17}\)

\(^{15}\)http://www.civilwar.org/education/history/warfare-and-logistics/warfare/guerrilla-warfare-during-the.html (Last Visited on November 1, 2016).

\(^{16}\)https://vimsharvam.wordpress.com/2014/07/17/chatrapati-shivaji-maharaj-some-uncommonly-known-unbiased-honest-observations/ (Last Visited on November 1, 2016).

\(^{17}\)http://udaipurtimes.com/maharana-pratap-the-great-patriot/ (Last Visited on November 2, 2016).
Anglo-Irish War

The Irish War of Independence or Anglo-Irish War was a guerrilla war fought from 1919 to 1921 between the Irish Republican Army (the army of the Irish Republic) and the British security forces in Ireland. It was an escalation of the Irish revolutionary period into armed conflict. The Anglo-Irish war was a typically guerrilla war. It followed what we now perceive as a predictable pattern. Attacks on RIC patrols in order to acquire arms and ammunition, attacks on RIC barracks obliging the paramilitary police to withdraw from the area, the establishment of flying columns originally brought together for individual operations against the enemy, the original company based columns were afterwards stood down. With men forced to go on the run, they formed permanent company flying columns. The preferred size of the column was around twenty to thirty men. When fighting on its terms, this permanent small mobile army which consisted of experienced fighters was able to take on equal and superior numerical forces and defeat them. These flying columns drove the British from the country side back into the towns and cities. At night these garrisoned towns were isolated from other British garrisons. The IRA then made probing assaults, often taking over these towns for several hours, opening fire on police and army barracks before withdrawing.

The problem that beset the British was where a flying column came from before the action and where it went afterwards. The guerrilla tactics carried out by the IRA kept the British forces under a perpetual nervous strain. This type of warfare was beyond anything they had previously experienced. For the most part they were men who had fought in the trenches. Their thinking was trench-warfare thinking. The British forces, army and paramilitaries were permanently on the back foot.

Ugandan Civil War

The Ugandan Bush War (also known as the Luwero War, the Ugandan civil war or the Resistance War) refers to the guerrilla war waged between 1981 and 1986 in Uganda by the National Resistance Army (NRA) against the government of Milton Obote, and later that of Tito Okello. Yoweri Musevini, a politician who like Obote had spent many years in Tanzania in the 1970s, and who had been active in the war against Idi Amin, rejected the election

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19 Id. at 117.
20 Id. at 118.
21 Id. at 121.
results and started a guerrilla war. His group became known as the National Resistance Movement and its army, the National Resistance Army. Basing itself to the north-west of Kampala in the district of Luwero, the NRA quickly became adept at guerrilla warfare. It hit Obote’s army with ambushes and surprise attacks, organized a network of information and support at village level through what were called ‘resistance committees’, and provoked Obote’s army into vicious counter insurgency operations, further alienating the population from the government, and simultaneously building its own support. The young, poorly disciplined, and ill-trained troops of Obote’s army were increasingly no match for the highly organizes, mobile guerrilla fighters. In January 1986, the NRA captured Kampala, and Yoweri Museveni became Uganda’s new President.22

WHO IS A COMBATANT

Combatants are persons who are authorized to use force in situations of armed conflict by international humanitarian law. Conversely, they constitute legitimate military targets in times of armed conflict. But, contrary to civilians, they may not be subject to criminal prosecutions for their participation in hostilities as long as their use of force is in conformity with the provisions of the law of armed conflict, also named humanitarian law. The use of force may not occur as a result of individual but must take place under a clear chain of responsible command, within the framework of respect for the rules of the law of armed conflict. According to the definitions provided by the Geneva Conventions and their first 1977 Additional Protocols, combatants are members of national armed forces or organized groups placed under the effective control of those forces. It is this authorization to use force that distinguishes combatants from civilians. Combatants can be prosecuted under national or international criminal law if they commit war crimes, crimes against humanity, or acts of genocide, even if they act under the orders of their superiors but not for their plain participation in the hostilities. The status of combatant gives rise to a special regime of protection, established by the Third Geneva Convention, which regulates the treatment of prisoners of war. The definition of a combatant is closely linked to the notion of a prisoner of war. The combatant under the definition of Third Geneva Convention is entitled to prisoner of war status and cannot be prosecuted for participation in hostilities. Nevertheless, this status corresponds to privileges granted by States to their national armies. This status has not been implemented in non international armed conflicts, where, by definition, governmental armed

forces fight non state armed groups, rebels, or dissidents. These non-state armed groups have
the status of a party to the conflict, which compels them to comply with the provisions of
international humanitarian law applicable to non-international armed conflict, but they are not
entitled to combatant status. Regarding international armed conflicts, Additional Protocol II
provides special safeguards for civilians who take part in hostilities, but they do not
Correspond to the reality and activities of non-state armed groups, who are also present in
international armed conflict.23

MEANING AND DEFINITION OF UNLAWFUL COMBATANT
An unlawful combatant, illegal combatant or unprivileged combatant/belligerent is a person
who directly engages in armed conflict in violation of the laws of war. An unlawful
combatant may be detained or prosecuted under the domestic law of the detaining state for
such action, subject of course to international treaties on justice and human rights.24

The term “unlawful/unprivileged combatant/belligerent” is understood as describing all
persons taking a direct part in hostilities without being entitled to do so and who therefore
cannot be classified as prisoners of war on falling into the power of the enemy. This seems to
be the most commonly shared understanding, example civilians taking a direct part in
hostilities, as well as members of militias and of other volunteer corps including those of
organized resistance movements not being integrated in the regular armed forces but
belonging to a party to conflict, provided that they do not comply with the conditions of
Article 4A (2) of GC III. The notion “unlawful combatant” has a place only within the
context of the law applicable to international armed conflicts as defined in the 1949 Geneva
Conventions and Additional Protocol I. The law applicable in non-international armed
conflicts does not foresee a combatant’s privilege (i.e. the right to participate in hostilities and
impunity for lawful acts of hostility).25

DIFFERENCE BETWEEN LAWFUL AND UNLAWFUL COMBATANTS
An unlawful combatant is a person taking part in belligerent acts against a State, while not
being part of a regular military force or subsidiary militias. Even an individual combatant

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24 https://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm (Last Visited on November 2,
2016).
who is part of a regular military force, and has forfeited his POW status through committing certain illegal acts, is regarded an unlawful combatant. The distinction between lawful and unlawful combatants is intended to uphold and emphasize the basic distinction between combatants and civilians. This distinction is, therefore, complementary to the basic distinction between ‘combatant’ and ‘civilian’. The term unlawful combatant originates in World War II. In 1942, a group of German soldiers arrived by submarine at the American West-Coast, disguised in civilian clothes. They were captured by the Americans and brought to justice. The U.S. Supreme Court ruled unanimously that the Laws of War distinguished between combatants and civilians, and between lawful combatants and unlawful ones. Lawful combatants are subject to capture and detention as POWs by the opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.\(^\text{26}\)

The term unlawful combatant as applied in international law has been inferred from the definition of a lawful combatant. Unlawful combatants are either members of the regular forces or members of resistance guerrilla movements that do not fulfill the conditions of lawful combatants. The main legal impact of being a lawful combatant under the Geneva standards is the right to POW status. Unlawful combatants, although still targets of capture, are presumably not entitled to POW status.\(^\text{27}\)

The Military Commissions Act of 2006 passed by Congress on Jan. 3, 2006 and signed into law by the then President Bush on Oct. 17, 2006, stated\(^\text{28}\):

The term ‘lawful enemy combatant’ means a person who is:

1. A member of the regular forces of a State party engaged in hostilities against the United States;
2. A member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

\(^\text{26}\) Ex Parte Quirin, 317 U.S. 1 (1942).


\(^\text{28}\) Section 948a(2) of The Military Commissions Act, 2006.
3. A member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

The term ‘unlawful enemy combatant’ means\textsuperscript{29}:

1. A person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

2. A person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Article IV of the Aug. 12, 1949 Geneva Convention defined "prisoner of war" with the following criteria:

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

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

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
   a. That of being commanded by a person responsible for his subordinates;
   b. That of having a fixed distinctive sign recognizable at a distance;
   c. That of carrying arms openly;
   d. That of conducting their operations in accordance with the laws and customs of war.

\textsuperscript{29} Section 948a(1) of The Military Commissions Act, 2006.
Combatants falling under the above criteria are considered as lawful combatants and others are considered as unlawful combatants.

**LEGAL PROTECTION OF UNLAWFUL COMBATANTS UNDER GC IV**

According to Article 4 (4), GC IV does not protect persons protected by GC I-III. A textual interpretation of the Conventions can only lead to the conclusion that all persons who are not protected by GC I-III, thus also persons who do not respect the conditions which would entitle them to POW status/treatment, are covered by GC IV provided that they are not nationals of a State which is not party to the Convention; nationals of the Party/Power in which hands they are; or nationals of a neutral State.  

The fact that a person has unlawfully participated in hostilities is not a criterion for excluding the application of GC IV. On the contrary, Article 5 of GC IV, which allows for some derogations under strict conditions from the protections of GC IV, uses the term “protected persons” with regard to persons detained as spies or saboteurs as well as persons definitely suspected of or engaged in activities hostile to the security of the State/Occupying Power. Both the concepts of “activity hostile to the security of the State/Occupying Power” and of “sabotage” certainly encompass direct participation (without entitlement) in hostilities. Thus, this article would apply in particular to persons who do not fulfill the criteria of GC I-III and take a direct part in hostilities, i.e. persons labeled “unlawful combatants”.  

Moreover, for the application of GC IV to “unlawful combatants” can be drawn from Article 45 (3) of Additional Protocol I. The provision reads as follows:

“All person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.”

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30 Supra note 28 at p.no: 49.
31 Supra note 28 at p.no: 50.
This provision of Additional Protocol I contains an implicit confirmation of the interpretation of GC IV that “unlawful combatants” are protected persons under GC IV if they fulfill the above-mentioned nationality criteria.

SUBSTANTIVE PROTECTION OF UNLAWFUL COMBATANTS UNDER GC IV

Part III thereof defines the material scope of protection for protected persons within the meaning of GC IV’s Article 4. Its first section contains provisions common to the territories of the parties to conflict and to occupied territories. These include rules on humane treatment; special protection for women; non-discrimination; prohibition of the use of protected persons as human; prohibition of coercion and of corporal punishment, torture, etc.; individual responsibility; and prohibition of collective punishment, pillage, reprisals and hostage taking.

This section is followed by specific provisions on the treatment of aliens in the territory of a party to conflict (Section II), which deal inter alia with the right to leave the territory; the treatment of persons in confinement; the right to individual/collective relief, to medical attention and to practise their religion; employment; measures of control, i.e. assigned residence and internment, and the procedure to be followed; and transfer to another Power.

Section III, on protected persons in occupied territory, includes rules on deportation and transfers; children; labour; food and medical supplies for the population; hygiene and public health; relief operations; penal legislation; penal procedure; treatment of detainees; and security measures.

Section IV contains regulations for the treatment of internees, inter alia on: places of internment; food and clothing; hygiene and medical attention; religious, intellectual and physical activities; personal property and financial resources; administration and discipline; relations with the outside; penal and disciplinary sanctions; transfers of internees; deaths; and release, repatriation and accommodation in neutral countries. Article 79 of that section stipulates that protected persons may not be interned, except in accordance with the provisions of Articles 41-43 (aliens in the territory of a party to conflict) and Articles 68 and 78 (protected persons in occupied territory). Since unlawful combatants are protected by GC IV if they fulfill the nationality criteria set out in Article 4 thereof, the above forms of protection also apply to them.32

32 Supra note 28 at p.no: 60.
PENAL PROSECUTION OF UNLAWFUL COMBATANTS

It is generally accepted that unlawful combatants may be prosecuted for their mere participation in hostilities, even if they respect all the rules of international humanitarian law. National legislation must, however, first provide for such a possibility. If unlawful combatants furthermore commit serious violations of international humanitarian law, they may be prosecuted for war crimes. In any such proceedings they are entitled to fair trial guarantees as contained in GC IV if applicable (i.e. if they comply with the nationality requirements of its Article 4), or at least to those contained in Article 75 of PI, which reflects customary international law. There seems to be general agreement that once in the hands of the enemy they may not be executed/punished without proper trial. Moreover there is limit on the competence of a capturing State to punish unlawful combatants for mere participation in hostilities when he claims an unlawful combatant may be put on trial only for an act committed in the course of the same mission that ended up in his capture by the adversary. Hence, should the enemy capture at a later stage, it may not prosecute him for the misdeeds of the past. This restriction has also been included in Article 44 (5) of Additional Protocol I (which stipulates that “any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities”) for members of the armed forces who have not distinguished themselves from the civilian population as required by that article’s paragraph 3. 33

STATUS OF COMBATANTS IN INTERNAL ARMED CONFLICTS

International humanitarian law does not recognize combatant status for members of non-state armed groups involved in non-international armed conflicts, but it can be applied by way of special agreement by parties to the conflict, as encouraged by Common Article 3. If such status is not applied, they are considered as civilians taking part in the hostilities under Article 13(3) of Additional Protocol II. However, they must at a minimum benefit from the fundamental guarantees established for persons who no longer participate in the hostilities. Additional Protocol II also provides specific provisions to fill the vacuum created by the absence of POW status. Article 5 regulates the treatment of persons deprived of their liberty for reasons related to the armed conflict, while Article 6 spells out guarantees concerning the prosecution and punishment of criminal offences related to the armed conflict. Those judicial

33 Supra note 28 at p.no: 71.
guarantees are very important because in non-international armed conflicts, the sole fact of taking up arms against national authorities is considered a crime under domestic law. The guarantees contained in these articles are minimum guarantees, which can be completed by more favorable provisions provided by the rest of humanitarian law with the agreement of parties to the conflict.  

**CONCLUSION**

Guerrilla warfare is a form of irregular warfare in which a small group of combatants such as paramilitary personnel, armed civilians or irregulars use military tactics including ambushes, sabotage, raids, petty warfare, hit-and-run tactics, and mobility to fight a larger and less-mobile traditional military. Guerrillas are considered as unlawful combatants and there is always a confusion regarding the legal recognition of Guerrillas. So a specific arrangement shall be done to rectify this as the guerrilla tactics are still being used in the modern warfare. International aspects shall be taken into consideration for the recognition of guerrillas. Even though in modern warfare, they are not adopting guerrilla tactics directly as it was before, now they are being a part of warfare. So there is a necessity to protect the guerrillas on par with belligerents and other lawful combatants.

The terms “combatant”, “prisoner of war” and “civilian” are generally used and defined in the treaties of international humanitarian law, the terms “unlawful combatant”, “unprivileged combatant/belligerent” do not appear in them. They have, however, been frequently used at least since the beginning of the last century in legal literature, military manuals and case law. The connotations given to these terms and their consequences for the applicable protection regime are not always very clear. At present the unlawful combatants are accorded protection under GC IV. There is a need to frame a specific arrangement regarding the protection or status of unlawful combatants.

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