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# **The position of guerrilla fighters under the law of war**

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## **PRELIMINARY REMARKS**

*The present report, written in December 1969, was intended to serve — and has served — as a basis for discussion at the Congress of the Society held at Dublin in May 1970. That discussion, as well as comments received from other sides, have led to certain adjustments in the text as it is here finally presented.*

*No attempt has been made to adapt the text to the many important publications on the law of armed conflicts, and especially on guerrilla warfare and non-international armed conflicts, that have appeared in the meantime. This would have changed the character of the report completely, and besides the time for such an enterprise was lacking. Therefore, the report has remained what it was intended to be from the outset : a report for the Dublin Congress.*

*The writer thanks those who in one way or another contributed to the composition of the present report, and in particular General Prugh and Mr. Shamgar who sent me, respectively, documentation concerning the treatment of prisoners in Vietnam, and a judgement rendered on 13 April 1969 by an Israeli military tribunal denying prisoner of war status to certain captured Arab guerrillas. The references in the text to « Reaffirmation » are to the report « Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts », submitted by the International Committee of the Red Cross to the XX1st International Conference of the Red Cross held at Istanbul in September 1969.*



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## I. — THE CONCEPT OF « GUERRILLA » : ITS DEFINITION.

### 1. The notion of guerrilla.

The term guerrilla (literally : petty war) 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 (*Reaffirmation*, p. 114). It should be noted that this excludes members of the regular armed forces applying guerrilla tactics.

The term guerrilla tactics, finally, is perhaps the least unequivocal of the various expressions mentioned. As a technical, military notion it indicates the tactics which are applied by guerrilla fighters in particular when they resort to outright military operations and which remain, however, below the level of regular, open battles. Taken thus, the term comprises *inter alia* a sophisticated use of the elements of mobility, dispersion and surprise in combating superior enemy forces; their aim is as much to do the enemy harm wherever he is found, as to dislodge him from specific positions (fortifications, defended towns, or even entire regions). It should be emphasized that the use of guerrilla tactics in this narrow sense is not reserved to guerrilla fighters : these tactics may equally be applied by combat units of the regular armed forces in the course of raids or similar military operations.

A less narrowly restricted meaning of guerrilla tactics, on the other hand, may include such elements as seeking support of the population (including the use of intimidation, terrorism, etc.), setting up of a shadow-administration and -government, and so on.

However, so soon as elements of this kind are allowed to enter into the concept, the danger is apparent that a limitation is effected in another respect, namely, to the revolutionary type of guerrilla warfare. In other words, in a discussion of the various aspects of revolutionary guerrillas, elements such as those mentioned above cannot be left out. But guerrilla warfare can develop in other situations as well, for instance, in the event of a popular uprising against an occupying power, or of infiltration across the border into enemy territory. As elements like the seeking of support from the population, terrorism, or the need to organize some sort of administration will vary in importance according to the particular characteristics of the situation in which guerrilla warfare is resorted to, it seems advisable to omit those elements from our definition of guerrilla tactics and to restrict this to the narrow, military meaning set forth above.

Even so restricted, it should be added, however, that a *conditio sine qua non* for any sustained application of guerrilla tactics is a base of operations : a « sanctuary », whether within or outside the territory of the State where the fighting is going on, and serving as a safe retreat for the guerrilla fighters (*Reaffirmation*, p. 114).

## 2. Guerrilla fighters as irregular combatants.

The above is already sufficient to indicate that « guerrilla » is a vague concept which covers a whole range of different meanings, running from « irregular combatant » through a specific form of fighting to a particular type of armed conflict. It does not seem easy to point out any common denominator. Is it the irregular combatant status of the guerrilla fighters (who are characteristic participants in guerrilla warfare), or the irregular character of the tactics employed, or again some other distinctive feature? Indeed, the concept has an « undefinable and elusive character » (*Reaffirmation*, p. 115). It seems, moreover, that the definition given will depend on the angle from which the concept is viewed : different descriptions will emerge according to whether the subject is approached from the point of view of, e.g., political science, contemporary history, military science, or the law of war.

In view of the fact that the object of the present report is to contribute to the clarification of the legal issues which

arise in connection with the frequent recurrence of guerrilla warfare in present times, and in particular of those issues which directly concern the fate of individual human beings, the viewpoint adopted here gives primary emphasis to the position of guerrilla fighters as irregular combatants and, consequently, to the humanitarian and military aspects of their status and mode of fighting.

### 3. Non-international armed conflicts.

The point deserves some emphasis that the situation envisaged above is one of armed conflict. While this embraces both international armed conflicts and those not of an international character, it does not include those internal situations which, while characterized by a high level of political tension and perhaps even by a certain degree of violence, do not amount to an armed conflict properly speaking. Two questions arise in this respect : where lies the dividing-line between armed conflicts and mere tense situations, and (a question which lies largely outside the scope of the present report) which rules or principles of international law, if any, are applicable in the latter situations ?

As regards the first question, no definite answer has yet been found. The situation is moreover obscured by the frequent unwillingness of Governments to recognize that a situation amounts to an armed conflict, because this implies a recognition of the applicability of Article 3 of the Geneva Conventions of 1949. The ICRC stresses rightly, however, that that article « is applicable in *armed conflict in which armed forces are engaged in hostilities* » (*Protection of Victims of Non-international Conflicts, report submitted to the XX1st International Conference of the Red Cross, 1969, p. 4*). When those conditions are fulfilled, the applicability of the article cannot justifiably be denied.

But the question remains : when can a situation be said to have developed into an armed conflict « in which armed forces are engaged in hostilities » ? In this respect, the ICRC refers to the definition proposed in 1962 by a Committee of experts, according to whom « the existence of an armed conflict is undeniable, in the sense of Article 3, if hostile action against a lawful Government assumes a collective character and a minimum of organization. The duration of the conflict, the number and leadership of rebel groups, their installation or action in parts of the territory, the degree of insecurity, the existence of victims, the means adopted by the lawful Government to re-establish order, all have to be taken into account » (*Reaffirmation, pp. 99-100*).

This definition consists of two distinct parts : (1) an indication of the distinctive features of an armed conflict as opposed to a situation of political tension and disorder (viz., an organised group opposing the Government and the actions of which assume the character of hostilities), and (2) an enumeration of factors to be taken into account in assessing whether the situation is one of armed conflict, in particular as regards the nature of the group opposing the Government and the hostile character of its actions. While the definition seems to give a correct summing-up of the main criteria it is far from precise, so that the difficulty will obviously lie in its application to concrete situations.

Would it be possible to arrive at a more exact definition of armed conflict? The experts consulted by the ICRC in February 1969, while approving the criteria elaborated in 1962, « considered they could usefully be reverted to and completed » (*Reaffirmation*, p. 100), without, however, indicating in which direction such a completion ought to be sought. On the other hand, the urgency of such a re-definition seems to diminish as the opinion gains ground that, while the determination of a situation as an armed conflict may be a condition for the applicability of Article 3 as a treaty provision, it need not be decisive for the applicability of certain humanitarian principles.

#### 4. Distinction between international and non-international armed conflicts.

A similar problem of definition arises in respect to the legal characterization of infiltrations and similar international situations of the guerrilla type. While the activities of infiltrators are in some cases dismissed as illegal entrance and possession of arms, they have in other instances been considered to amount to an armed conflict. In this respect, it should be realized that a situation of this type can constitute either an international armed conflict (involving the applicability of the laws of war and notably of the Geneva Conventions of 1949 in their entirety), a non-international armed conflict (involving as a minimum the applicability of Article 3 of the Geneva Conventions), or a mere international incident or local disturbance.

The first-mentioned distinction (between international and non-international armed conflicts) is of limited importance in the present context : the humanitarian principles of the law of war apply in either type of armed conflict. Thus, GA Resolution 2444 (XXIII) of 19 December 1968 recognizes in its first preambular paragraph « the necessity of applying basic humanitarian principles in all armed conflicts »; *Reaffirmation*, An-



nexes, p. 030. The difference lies mainly in the application of all the detailed, more or less technical provisions contained in the Conventions and which elaborate the said principles : while their application is obligatory in international armed conflicts, it depends on voluntary undertakings in the event of non-international armed conflicts. This is not to say that the text of Article 3 resembles anything like an ideal codification of the humanitarian principles involved; indeed, recent practice has brought to light several serious inadequacies, *inter alia* the absence of any recognition of the need of supervision for humanitarian purposes by an independent, neutral body such as the ICRC.

The distinction between international and non-international armed conflicts is on the other hand not wholly irrelevant to the present inquiry, as one of the specific problems of guerrilla warfare seems to lie precisely in the difficulty to apply certain of the more detailed regulations (for instance, the rules concerning the internment of prisoners of war). So, it seems necessary to point out that these two types of armed conflicts are as little divided by a hard and fast line as non-international armed conflicts and minor political disturbances. This element of uncertainty is not solely a consequence of the understandable inclination of governments to reserve to themselves a margin of discretion in such extremely important political matters : to a large extent it is the result of the practical impossibility of giving a precise definition of either of the two concepts.

##### 5. Factors turning non-international armed conflicts into international armed conflicts.

The ICRC in its report to the Istanbul Conference (*Reaffirmation*, p. 100) gave express attention to the question under discussion, though only from a specific point of view : viz., that of certain factors turning non-international conflicts into international ones. Two factors were mentioned in particular : foreign intervention, and the concept of a conflict as a war of liberation. As regards the first element, those of the experts who expressed themselves on the point « admitted that foreign military intervention, on the side of either Party to a conflict, transformed a non-international conflict into an international conflict » (*ibid.*, p. 101). This, however, obviously leaves the question open of what constitutes « foreign military intervention ». Does this require that foreign troops take part in force in the hostilities, or is it sufficient that military advisers, instructors, specialists in the fields of communications and logistics, and other similar members of the foreign armed forces who do not themselves take an active part in the fighting, lend

their services to one or the other party to the conflict? Again, does the mere fact that military supplies are being sent in quantity (and in fact are indispensable to the war effort) suffice for characterizing an armed conflict as « international »? To my mind, only the active, sustained participation of foreign combat forces would have that result; but opinions may differ widely — and are likely to be influenced by the political appreciation of this or that actual armed conflict, e.g. in Vietnam, or Biafra.

Even more problematical is the concept of « wars of liberation », a concept which is tied up with the right of self-determination and with the rôle played by the General Assembly in the decolonization process. According to some of the experts, « since Resolution 1514 (December 14, 1960) of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples, these wars should be admitted as entering into the category of international wars. The groups fighting against colonial governments should thus be considered subjects of international law ». A little farther on, however, the report points out that « While several experts thus endeavoured to find grounds for the political-legal conception of wars of liberation, the majority stressed that the formulation of humanitarian rules applicable to such conflict took first place » (*Reaffirmation*, p. 102). Indeed, it seems somewhat arbitrary to place the « wars of liberation » which are covered by the General Assembly's decolonization resolution in a separate category and to characterize these as international conflicts irrespective of their size, the presence or absence of effective outside support and similar factors, while other conflicts involving issues of self-determination would not be so characterized. In my view, there is little merit in attempts to attribute a particular status to certain armed conflicts merely on account of their cause.

In short, it is suggested that the discussions reported in *Reaffirmation* have not brought the issue significantly nearer to its solution. It should be immediately added, however, that I do not see such a solution either, any more than the ICRC or the experts consulted by it in February 1969. In other words, the qualification of armed conflicts as « international » or « non-international » remains to my mind a matter of assessment of available data in each separate case and of basing a conclusion on such relatively vague grounds as scope and duration of the conflict, presence of foreign military intervention, et cetera. Recognition of the insurgents as a belligerent party by the lawful Government will of course be of decisive importance; but such a step is as rare as it is important.

## 6. Delimitation between international armed conflicts and international incidents.

After the above discussion of various problems attending the definition and delimitation of « non-international » and « international armed conflicts », little need be said about another boundary problem, viz., the delimitation between international armed conflicts and mere incidents. Here, again, the political decision of the parties concerned will be of decisive importance, in particular if it amounts to an express recognition by one or both of the parties to the conflict that this constitutes an international armed conflict. Indeed, such a recognition may be less rare here than in the event of an initial internal disturbance having assumed international proportions. However, as the ICRC observes, even here the situations are variously « qualified as " police operations ", " legitimate defence ", " assistance to an ally with domestic difficulties ", etc. » (*Reaffirmation*, p. 94), while they may on an objective appraisal present all the characteristics of an international armed conflict.

But which objective criteria distinguish an international armed conflict from a mere incident? It is submitted that similar more or less imprecise criteria may be applied here as were laid down in the formula of the experts of 1962 for the determination of non-international armed conflicts. Firstly, the basic consideration will be the recurrence of hostile actions in enemy territory by armed forces (whether regular or irregular) which as a minimum can be said to have the support of their own Government, or at any rate of a Government; secondly, it will be necessary to take into account — and to evaluate — factors like the duration of the conflict, the number and command structure of the forces taking part, the territorial scope of the hostilities, the degree of embarrassment caused to the enemy Government by the hostilities going on in its territory, the means employed by it to ward off the threat.

By such a process of evaluation of relevant factors it may prove possible to arrive at something like an objective distinction between a situation like the initial Indonesian infiltrations in the then Netherlands New Guinea (now West Irian) and the guerrilla-like activities of Pakistani fighters across the Indian border.

## 7. Vagueness of the resulting definitions.

Recapitulating the above, we have not found a definition of guerrilla which is either precise, unequivocal, or universally accepted, but rather a variety of meanings of the term. As in the context of the present inquiry the greatest importance

attaches to the legal and humanitarian problems affecting individual human beings, rather than to the political or military-strategic side of guerrilla warfare, I have selected as a starting-point a definition which lays full emphasis on the position of the guerrilla fighters as irregular combatants. It should be added that this viewpoint is no great novelty : R.R. Baxter wrote already in 1951 that « The word " guerrilla " is most usefully applied in a legal context to armed hostilities by private persons or groups of persons who do not meet the qualifications established in Article 4 of the Geneva Prisoners of War Convention of 1949 or corresponding provisions of the earlier Conventions » (« Spies, Guerrillas and Saboteurs », in *British Yearbook of International Law*, 1951, Vol. 28, p. 323, at p. 333).

It was found, moreover, that guerrilla warfare can amount to (or can form part of) an international armed conflict or an armed conflict not of an international character. The degree of force may even be below the level of either category and, thus, amount to nothing more than an international incident or internal disturbance. None of these different legal categories, however, could be defined with any degree of accuracy or certainty.

It need hardly be pointed out that any margin of appreciation which is thus left will be taken advantage of by governments and guerrilla leaders alike, according to their respective interests. This may seriously impede the endeavours of third parties, such as the ICRC, to intervene in the humanitarian interest. For the time being, however, it seems that this situation cannot be mended in any positive way. Thus, the only available method seems to be that of some exercise of external pressure (by world public opinion, etc.) on the authorities in question, with a view to making them accept the applicability of the humanitarian laws of war and the combatant status of their opponents in situations which they were at first unwilling to recognize as armed conflicts.

## 8. The concept of irregular combatants.

A matter which needs some clarification at this stage is the significance attached in the foregoing to the concept of « irregular combatants ». This term, like the other expressions discussed previously, can be used in more than one way. It can, for instance, be a synonym for « combatants not entitled to prisoner of war status », or, more precisely and narrowly, « combatants not entitled to prisoner of war status under Geneva Convention No. III of 1949 ». As it was seen in para. 7, this was the meaning attached to the term by Baxter

(who, it may be added, on the quoted page referred in one breath to « hostilities in arms by persons not of the armed forces » and such hostilities « by persons not entitled to be treated as prisoners of war »).

The term, however, can also convey a slightly different meaning (or at any rate be defined from a different point of view); it can indicate all those persons who take an active part in the hostilities without belonging to the regular armed forces of one of the belligerent parties.

What is the exact difference between the two meanings of the term? At first sight, this difference seems quite considerable. It may be argued that in an internal armed conflict only the forces on the side of the lawful Government are regular armed forces and that the guerrilla fighters, while probably meeting the conditions for prisoner of war status as established in Art. 4 of Geneva Convention No. III of 1949, cannot be regarded as armed forces in the classical sense of the term.

Upon closer scrutiny, however, the question appears less easily answered. For, on the one hand, it is to beg the question to state that the forces of the guerrilla fighters can in no circumstances be put on a par with traditional armed forces. So soon as the insurgent party exercises effective territorial authority in a sufficient degree, it may be contended that nothing is in the way of attributing the character of armed forces to its combat units, even though their methods of fighting the enemy (the lawful Government) within its own territory may be unorthodox. On the other hand, so long as this stage has not been reached, it may well be that the guerrilla fighters do not meet the requirements for prisoner of war status either.

It seems, therefore, that the answer to the question put depends on the interpretation of the notion of « armed forces » on the one hand, and of the requirements for prisoner of war status on the other. To both these questions of interpretation we shall revert below.

## II. — TREATMENT OF GUERRILLA FIGHTERS.

### 9. Questions to be discussed.

In this chapter, the issue of guerrilla warfare is approached from the angle of the fate of guerrilla fighters as war victims. Their fate will in fact depend, firstly, on whether they are refused or granted quarter; in the latter instance, the further decision will be whether or not to grant them treatment as prisoners of war.

### 10. Obligation to give quarter.

With respect to the issue of whether or not to grant quarter, two provisions of the 1907 Hague Regulations on Land Warfare are relevant, Article 23 sub c, which prohibits « to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion », and Article 23 sub d, according to which it is forbidden « to declare that no quarter shall be given ». These provisions form part of Section II of the Hague Regulations, entitled « Hostilities », and they must obviously be understood in that context. In other words, the scope of the provisions is limited to situations constituting « hostilities ».

This concept is perhaps not so clear today as it was when these rules were formulated. Hostilities in that period took place in the operations zone; this might be more or less extended both in breadth and in depth, but usually it was sufficiently well-defined to permit a distinction to be made between the zone and the rest of the territory. At present, however, and particularly in guerrilla fighting, no such clear distinctions obtain for the greater part of the territory where the guerrilla fighting is being waged. Guerrilla fighters may be found everywhere and may be engaged in battle throughout the territory.

In view of this development, it seems necessary to make a distinction between three types of situations : firstly, the meeting between guerrillas and the armed forces of the enemy which assumes from the outset — or rapidly acquires — the character of an actual battle; secondly, the situation of guerrillas caught in a hostile act not amounting to a fight with the enemy armed forces, and who surrender without putting up any armed resistance; and thirdly, the search operation carried

out among the population with a view to detecting any guerrillas who might be hiding among it.

To begin with the third supposition, it is submitted that to finish off on the spot any guerrilla fighters so detected and who do not put up any resistance, would be tantamount to plain murder and would be inexcusable in any view. It is moreover hardly to be expected that in this situation a guerrilla fighter would be immediately recognizable as such : he can at most be identified as a suspected person, and the determination that he is indeed a guerrilla fighter can be arrived at only after some sort of an investigation. This implies, however, that the suspect must be apprehended first and kept in custody — that is, alive — so long as the investigation has not been brought to an end. So, in this situation the question is not whether quarter should be granted to suspected persons who might or might not be guerrilla fighters, but how they should be treated once their status as guerrilla fighters has been established, a question that shall be discussed below.

As regards the first situation envisaged above, it is submitted that the quoted provisions of Article 23 apply, either by analogy or directly. I am strongly inclined to accept the latter view, as there is nothing in the text of the Article to suggest that the « enemy » who « has surrendered at discretion » can only be a lawful combatant in the sense of Articles 1 and 2 of the Hague Regulations. Nor would it, to my mind, make any difference whether the surrendering guerrilla fighter is or is not recognizable as such by a uniform or other distinctive sign : the mere fact of his armed resistance is sufficient evidence that he belongs to the guerrillas; and, on the other hand, the act of surrendering does in fact convert him into a momentarily defenceless human being, who may be punished, perhaps even with death, for any crimes which he may have committed, but who may not be killed summarily on the spot.

This submission may be strengthened by two further arguments. Firstly, to allow the merciless killing of enemies who have put up armed resistance but have surrendered, may adversely affect the morale and discipline of the own armed forces, and so prove detrimental to the own cause. Secondly, a sustained policy of refusing quarter will no doubt lead to an increased cruelty, ruthlessness and disregard of the laws of war on the side of the guerrilla fighters, whereas the opposite policy might lead to a different result.

This leaves the second of the three situations distinguished above, that of guerrilla fighters who are caught in a hostile act not amounting to a fight with the enemy armed forces. When these persons make clear their willingness to surrender

at discretion, may they then be killed off nevertheless? Does it in this case make any difference whether they are or are not uniformed or otherwise provided with a distinctive sign? Or does such a difference result from the nature of the hostile act, act of terrorism, act of sabotage, act of reconnoitring or espionage, and so on?

I can imagine that the psychological urge towards killing them without mercy may be great in certain of these cases. But I cannot imagine that this psychological fact would ever be turned into a rule, to the effect that such killing (which for the rest is completely unnecessary from a military point of view) would be permissible. In other words, here, as in the previous cases, I see no reason to abandon the principle that quarter should be given to a man who surrenders at discretion.

#### 11. **Guerrillas not regarded as prisoners of war.**

What will be the fate of guerrilla fighters who fall into the hands of the enemy and are in fact given quarter? Let us consider first the case of those who are not regarded as prisoners of war. Their legal position will depend on the applicability of Geneva Convention No. IV of 1949. In the event of an international armed conflict, this Convention extends its protection to those persons « who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals » (Article 4). A consequence of this formulation is, that in case of an essentially internal guerrilla conflict which, however, by virtue of one factor or other has assumed the character of an international armed conflict (Vietnam), the guerrilla fighters who technically are nationals of the lawful Government cannot claim the status of protected persons under Article 4, but are entirely dependent on such protection as Article 3 extends to « persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause ». Needless to say, the latter Article will be the only basis for the protection of captured guerrillas in the event of an internal armed conflict. (In either case, the applicability of other provisions of the Civilians Convention can be achieved by special agreements to that effect between the belligerent parties; Article 3, para. 3.)

To what extent does this difference affect the situation of the captured guerrillas? In other words, are guerrilla fighters who belong to the category of the protected persons under Article 4 any better off than those who come under the terms of Article 3?



## 12. Effect of Article 3 of the Geneva Conventions.

As for the latter category, Article 3 lays down the principle that they « shall in all circumstances be treated humanely », and it elaborates this principle into a prohibition *inter alia* of the following acts : « violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture », and « the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples ». These prohibitions apply « at any time in any place whatsoever » within the territory of the State concerned.

According to these rules, execution of guerrilla fighters is permissible, subject to the requirement of a previous judgment by a competent court duly respecting the essential judicial safeguards (such as notification of indictment, observance of minimum rules of evidence, reasonable opportunity to defend one's cause). The Article does not allow summary justice falling below these minimum requirements of fair trial. On the other hand, nothing is provided concerning outside supervision, nor about the composition of the courts, nor again about the acts which are punishable with death. In this respect, it is submitted that many of the acts of which guerrilla fighters are likely to be suspected (such as hostile acts with arms in hands, espionage, sabotage, terrorism and so on) will be widely considered as sufficient to warrant the death penalty.

## 13. Scope of Article 4 of the Civilians Convention.

With respect to protected persons in the sense of Article 4 (that is, in the event of an international armed conflict) the situation is rather more complex. Firstly, even the essential principle in Article 27 that protected persons « shall at all times be humanely treated », is found in a section (I) of Part III of the Convention (« Status and Treatment of Protected Persons ») which is entitled « Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories ». In the system of the Convention, this means that the protection offered here extends to « aliens in the territory of a Party to the conflict » (Section II) and to protected persons in « occupied territories » (Section III), and not to enemy aliens in non-occupied enemy territory. In other words, guerrilla fighters who operate in the territory of the enemy State and are captured there, are protected by the Convention, and so are guerrillas captured or held in enemy-occupied territory. Technically, however, the provisions of these Sections do not apply

to guerrillas who are captured and held by the enemy in their own territory, so long as that cannot be regarded as occupied territory.

This may seem an all too technical approach, but its importance is evident when the situation is considered which arises when an invading army is opposed by guerrilla activities. These may conceivably have the effect of preventing the enemy army from establishing its *de facto* authority in the invaded territory, so that this does not become an occupied territory in the sense of Article 42 of the Hague Regulations. In this situation the guerrilla fighters who fall into enemy hands will not enjoy the full protection extended to protected persons in occupied territory. It is submitted, however, that they will not be entirely without protection. The principles expounded in Article 3 for the non-international armed conflict provide at the same time a minimum below which belligerents may not go in other situations either. In support of this argument one may point to Article 158, para. 4 of Convention No. IV which obligates the belligerents to respect in all circumstances « the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience ».

In my view, the protection of these seemingly unprotected guerrillas is even less restricted. While certain of the rules laid down in Convention No. IV can in reason be applied only in the relative calm of the domestic or occupied enemy territory, certain other of those rules — first of all the principle of humane treatment — can equally well find application in the turmoil of the operations zone. The principles and rules of the latter category, it is submitted, are applicable at least by analogy in the situation of non-occupation envisaged here, to all those who, in the words of Article 4, « find themselves, in case of a conflict..., in the hands of a Party to the conflict... of which they are not nationals ». To my mind, the strongest argument in favour of this thesis lies precisely in the element of their foreign nationality and, hence, allegiance to the opposite Party from the one which holds them in its power. Admittedly, however, an express provision of this purport would be vastly preferable.

#### **14. Fate of Guerrillas enjoying full protection of the Civilians Convention.**

What is the precise extent of the full protection envisaged in the preceding paragraph? And, in particular, what are the restrictions upon execution of guerrilla fighters?

In the first place, Article 5 of Convention No. IV is relevant.

Guerrilla fighters will, when apprehended by the enemy, without doubt fall in the category of those protected persons suspected of hostile acts who are not entitled to claim such rights and privileges as would, if exercised in their favour, be prejudicial to the security of the State (or, in the case of occupation, to military security).

The Article goes on to state, however, that « in each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention ».

In other words : if the detaining Power does not bring the guerrilla fighters to trial, their only protection lies in the prescription that they shall be « treated with humanity ». Any complaints which they might have in that respect, however, will remain unheard until such time as they are released, as the main right forfeited by them is that of communication (as is expressly mentioned for the case of occupation).

The guerrilla fighter who is brought to trial, on the other hand, enjoys the « rights of fair and regular trial prescribed by the present Convention ». The provisions in question are found in Articles 64-76, in the section dealing with occupied territories; Articles 71-76 are moreover applicable by analogy to internees in the territory of the detaining Power (Article 126). In the context of the present report, only those provisions are relevant which have a bearing on the crucial issue of whether the death penalty may or may not be imposed on those guerrilla fighters who do not enjoy treatment as prisoners of war.

In order to find an answer to this question, I shall consider first the case of a guerrilla fighter captured in occupied territory and suspected of hostile acts committed during the occupation. His fate is primarily governed by Article 68, which severely curtails the power of occupying Powers to impose the death penalty on protected persons. This penalty may not be imposed for « an offence which is solely intended to harm the occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them » : such an offence may at most be punished with internment or simple imprisonment. Indeed, the death penalty may be imposed « only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons ».

While this already amounts to a significant limitation of the power to impose the death penalty, this power is even

further restricted by the requirement of publication of penal provisions enacted by the occupying Power prior to their entering into force and the prohibition to give these retroactive effect (Articles 64, 65) and by the requirement that the offences for which the death penalty is provided « were punishable by death under the law of the occupied territory in force before the occupation began » (Article 68). The last-mentioned restriction has been the object of a number of reservations, however.

Furthermore, the death penalty may not be pronounced « unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance », nor against an accused « who has under eighteen years of age at the time of the offence »; (Article 68).

Suppose that a guerrilla fighter is caught in the act of doing damage to an oil tank of the occupying forces, that he surrenders and is granted quarter, but is not regarded as a prisoner of war : may this man be condemned to death ? The answer is yes — that is (to confine ourselves to the main restrictions) : if the act is considered to constitute a « serious act of sabotage against a military installation of the occupying Power », if the occupying Power had previously enacted and promulgated the necessary regulations rendering such acts of sabotage punishable with death and if also under the legislation in force in the territory prior to the occupation such acts, committed in similar circumstances, were so punishable. Taken together, this amounts to quite a considerable set of limitations indeed.

It is submitted that none of these restrictions apply in the event of an invasion countered by a guerrilla movement with such force that the invader does not succeed in establishing an effective occupation, thus creating a situation of prolonged contest in the territory. In such a situation the law of combat applies, and the view has been widely defended that this law permits the execution after trial of those found guilty of acts of « unprivileged belligerency », whether consisting in actual fighting, espionage, sabotage, or terrorism, and no matter how one might regard these acts from a viewpoint less biased than that of the enemy.

Once the situation has become one of occupation, Article 70 is applicable. This Article provides *inter alia* that protected persons shall not be tried for acts committed prior to the occupation, « with the exception of breaches of the laws and customs of war ». The precise purport of this provision seems a matter for debate : does the exception include only such acts as would constitute war crimes when committed by regular combatants or does it also embrace the fact of irregular com-

batancy? The latter interpretation, which perhaps is closest to previous State practice, would of course imply that a guerrilla fighter can be condemned to death for the mere fact of his irregular combatancy : indeed a case of « unprivileged belligerency » in the literal sense.

For the rest, the trial of the persons under consideration in this paragraph is governed by the rules of fair trial and outside supervision as expounded in Articles 71-76. For the zone of guerrilla operations which cannot be considered as occupied territory, a reservation must be made with respect to all the detailed, non-principal provisions and moreover to all references to the Protecting Power.

#### 15. Non-advisability of a policy of systematic executions.

So far, the question has been examined of whether it is legally permissible to execute, after due trial, guerrilla fighters who are not treated as prisoners of war. The answer found is that such execution is generally speaking permissible, although the power of belligerents in this respect is severely curtailed especially as concerns occupied enemy territory.

Quite a different matter is, of course, whether the execution of members of this group is a wise thing to do. In this respect, it is submitted that a distinction should be made between a policy of executing guerrilla fighters as a matter of principle, and incidental executions of those guilty of particularly revolting crimes. The opportunity of the latter type of executions is a matter of assessment in the context of the prevailing situation. A policy of frequent and systematic executions, however, seems as objectionable as would be a practice of refusing quarter : it will merely engender hatred and lead to increased ruthlessness and disregard of the laws of war on the side of the guerrillas. In this respect, a passage may be quoted of the ICRC's report to the Istanbul Conference (*Reaffirmation*, page 118) : « The principle of non-execution of prisoners seemed to the experts a measure, even if it failed to correspond to the positive law applicable, which would enable avoiding that either side resort to extremes ».

#### 16. Guerillas accorded treatment as prisoners of war.

The next question concerns the position of guerrilla fighters granted treatment as prisoners of war. In so far as this treatment is accorded on a non-obligatory basis, it may be argued that there is no real difference with the situation discussed above, as it is within the power of the detaining Power in respect to acts committed prior to capture by prisoners of this

category simply to leave out of consideration the rules pertaining to the institution of criminal proceedings against prisoners of war as these are embodied in the Prisoners of War Convention.

As regards those guerrillas, on the other hand, who are accorded prisoner of war status in virtue of the rules in force, Geneva Convention No. III of 1949 applies in its entirety. This Convention, it should be noted, does not exclude prosecution for acts committed prior to capture : Article 85 lays down that in that event the prisoners « shall retain, even if convicted, the benefits of the present Convention ». A number of States, however, have made a reservation with respect to the obligation to extend application of the Convention even to convicted prisoners. This reservation, the scope of which is widened by the operation of the principle of reciprocity, may have an important effect precisely in case of condemnation to death. For it deprives the convict of the « final guarantee against a judgement based on the circumstances of the moment, too often affected by emotional considerations » (*Commentary to the Convention*, edited by Jean S. Pictet and published by the ICRC, 1960, page 475) which lies in the combined effect of Article 101 prescribing a delay of six months before the execution of the sentence, and Article 107 which obligates the detaining Power to address a detailed communication concerning the sentence to the protecting Power in the event, *inter alia*, of a death sentence.

In case of a prosecution for acts committed prior to capture, the question of the applicable law seems to be governed by two Articles : viz., Article 99, which provides that « [n]o prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed », and Article 87 providing that only those penalties are allowed which are « provided for in respect of members of the armed forces of the [Detaining] Power who have committed the same acts ». Taken together, these Articles would allow the death penalty for any acts amounting to war crimes under the law of war, unless the law of the detaining Power does not threaten that penalty for similar acts when committed by members of its own armed forces.

The question can be raised, however, whether Article 87 can have decisive importance here. Some doubt may arise in this respect, when it is realized that among the categories of persons who according to Article 4 must be afforded treatment as prisoners of war, are such non-combatant groups as members of crews of merchant vessels. While acts of active belligerency committed prior to capture by persons belonging to this cate-

gory, e.g. initiating offensive actions, are likely to be regarded as grave war crimes, similar acts when committed by members of the armed forces would constitute normal, non-punishable acts of warfare. In this case, an automatic application of Article 87 would lead to the unlikely result that the crew members would have to go unpunished, on the ground that the punishment « provided for in respect of members of the armed forces of the [Detaining] Power who have committed the same acts » would be exactly nil. Does not this result, which the contracting Parties can hardly be imputed to have intended, strongly suggest an interpretation of Article 87 to the effect that its scope is limited to judicial proceedings against captured members of the enemy armed forces ?

It is suggested that this question may be answered along the following lines. The categories of persons enumerated in Article 4A can be distinguished in two main groups : those who are characterized by their combatant character (*nrs. 1, 2, 3, and 6*) and those who are essentially non-combatants (*nrs. 4 and 5*). It appears not open to doubt that in drafting Article 87 the non-combatant categories have been completely overlooked. The terminology used in Article 87 does even suggest that the combatant categories other than the members of regular armed forces would have been overlooked as well. On the other hand, so far as acts committed by combatants are concerned, the text of the Article could not very well refer to any category but the armed forces of the detaining Power : it could hardly be expected to mention equally a possible *levée en masse* or resistance movement springing up among the own population. So, it appears that the exclusive reference in Article 87 to the members of the armed forces of the detaining Power need not be interpreted so restrictively as to imply that the Article can find no application in relation to a category like the members of organized resistance movements.

It should be realized, however, that to accept the unrestricted applicability of this Article to prisoners of the category under consideration, with the ensuing limitation of the powers of the detaining Power to mete out punishment, is tantamount to accepting that combatants of this category are placed on the same footing as members of the armed forces for the purpose of assessing their belligerent acts. In other words, they may be irregular combatants, but their actions cannot justifiably be characterized as « unprivileged belligerency » any longer. In view of this conclusion, particular importance attaches to an examination of the conditions which guerrilla fighters must fulfil in order to be entitled to the status of « privileged belligerents ».

### III. — REQUIREMENTS FOR « PRIVILEGED BELLIGERENCY » OF GUERRILLA FIGHTERS.

#### 17. The conditions enumerated in the Prisoners of War Convention.

The most recent, authoritative statement of the requirements for « privileged belligerency » is found in Article 4 of the Prisoners of War Convention of 1949. Among the various categories enumerated in that Article, the one most likely to be relevant to the status of guerrilla fighters is the category defined under A (2) as the « Members of other militias and members of other volunteer corps, » (that is, other than those forming part of the armed forces of a Party to the conflict) « 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 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 ».

This is quite an impressive set of conditions, and the question has come up time and again whether guerrillas met, and could meet, all these requirements. It is not my intention, however, to give a survey of the extensive literature on this subject : some few references may suffice. Two of these could be mentioned at the outset : the previously quoted report of the ICRC (*Reaffirmation*, pp. 112-121), and the judgment dated 13 April 1969 of a military tribunal in Israel, in the matter of the *Military Prosecutor v. Omar Mahmud Kassem and others*.

#### 18. Requirement of belonging to a Party to the conflict.

The first condition which the groups defined in Article 4A(2) must fulfil, consists in « belonging to a Party to the conflict ». As it is stated in the quoted Commentary to the Convention, p. 57 :

It is essential that there should be a *de facto* relationship between the resistance organization and the party to international law which



is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting. But affiliation with a Party to the conflict may also follow an official declaration, for instance by a Government in exile, confirmed by official recognition by the High Command of the forces which are at war with the Occupying Power. These different cases are based on the experience of the Second World War, and the authors of the Convention wished to make specific provision to cover them.

Evidently, the wish of the authors of the Convention to cover in particular the situation experienced in the Second World War, may have led to a formulation which is not in the first place adequate to cover present-day situations of guerrilla warfare. In this respect, the experts consulted by the ICRC « were of opinion that this condition » (of belonging to a Party to the conflict) « was not easy to fulfil in some guerrilla conflicts (not only internal conflicts but those where a belligerent does not admit it is a Party to the conflict and the other Party uses this as a pretext for refusing to recognize that the guerrilla movement satisfies this condition). Generally speaking, however, it was recognized that international law excluded ' private war ' » (*Reaffirmation*, p. 115). This amounts to a recognition by the experts that the condition must be retained.

In the case of the *Military Prosecutor v. Omar Mahmud Kassem and others*, the accused belonged to the Popular Front for the Liberation of Palestine, one of the several Arab (or Palestinian) guerrilla groups operating against Israel. According to the judgment (which emphasizes « the condition that the irregular forces must be *affiliated* to a belligerent party » as the « most basic condition of the right of combatants to be considered upon capture as prisoners of war ») this particular organization did not fulfil this condition : on the basis of the available evidence, the tribunal concluded that « [n]o Government with which we are at war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine ».

It should be noted that the situation here is again different from the situations envisaged by the experts : it is neither an internal conflict, nor do the States opposing Israel refuse to admit that they are Parties to the conflict; what they refuse to acknowledge (and even on occasion strongly deny) is that the Popular Front is affiliated to them. This seems to be in the way even of a tacit agreement of the kind referred to in the quoted passage of the Commentary. On the other hand, one hesitates to characterize the operations of this and the other Arab guerrilla groups as a « private war ». It seems therefore that the operation of the rule is in this case not very satisfactory. It was perhaps this same feeling which induced the Israeli tribunal to « display extreme liberalism » and to try

« even with regard to such an illegal body to proceed on the assumption that each of its members is entitled upon capture to be treated as a prisoner of war if that body fulfils the four basic conditions » enumerated in the quoted text of Article 4A (2); an attitude for which the tribunal should certainly be commended.

#### 19. The responsible commander.

As regards the first of the four conditions set out in the quoted Article, viz., that of being commanded by a person responsible for his subordinates, the report of the ICRC states that « even if resistance movements are badly organized at the beginning of their operations and cannot easily satisfy the conditions laid down, this requirement of a certain degree of organization and a responsible leader seemed essential to the experts ». To this opinion of the experts, the ICRC adds the following in a footnote : « This is the most important condition, which in a way guarantees the legality of the armed struggle. It is moreover entirely compatible with the very nature of guerrilla warfare » (*Reaffirmation*, p. 116).

While one can accept this view, it is doubtful that the Israeli military tribunal correctly interpreted the condition at issue when it considered that « [i]t has not been proved to us that such a commander exists or that he, if he exists, is responsible for his subordinates before military courts ». The Article itself does not indicate in any manner whatsoever how the responsibility of the commander should be construed, and it seems more or less arbitrary to narrow it down to a responsibility « before military courts » (presumably of the Party to the conflict to which his movement is affiliated). From information in the news media one would gather that in any event the Front has a headquarters which assumes (and sometimes eagerly claims) responsibility for certain actions. This, however, seems not sufficient to meet this particular condition.

#### 20. The fixed distinctive sign.

The second condition is that there should be a fixed distinctive sign recognizable at a distance. According to the report of the ICRC, this « seemed to the majority of the experts somewhat difficult to fulfil. But as the World Veterans Federation had said ' this sign should be distinctive to enable identification in relation to the peaceful population,..., fixed in the sense that the resistant should wear it throughout the operation in which he is taking part and... recognizable at a distance by analogy with uniforms of the regular army ' » (*Reaffirmation*, p. 116).

In actual fact, guerrilla fighters often wear some kind of a uniform, more or less suited to distinguish them from civilians. Thus, members of the Viet Cong operating in South Vietnam generally wear a black pyjama-like uniform very similar to the peasant's wear. The United States authorities have not used this as an argument to deny combatant status to the persons concerned, however.

The members of the Popular Front for the Liberation of Palestine, on the other hand, had infiltrated into Israel-occupied territory wearing dark green uniforms and mottled peaked caps. One witness, a sergeant of the Israeli army, had testified that at a distance of 900-1 000 metres he had not recognized the infiltrants as non-civilians. In spite of this testimony the tribunal considered, however, that « we are prepared to concede that civilians resident in the area of the encounter with the Israeli forces do not usually wear green clothes or mottled peaked caps and that the accused, therefore, fulfilled the condition under reference ». This, again, appears a satisfactory decision, in conformity with modern views concerning the obligation to wear uniform.

## 21. The obligation to carry arms openly.

Thirdly, guerrillas must « carry arms openly ». This can hardly be interpreted to mean that the arms carried must be constantly visible : a more probable interpretation is that accepted by the World Veterans Federation and not contested by the experts consulted by the ICRC, to the effect that « when the resistance fighter was engaged in operations, he should carry the weapons in his possession in a similar way to members of the regular forces » (*Reaffirmation*, p. 117 and *Annexes*, p. 070).

Crucial in this formulation are of course the words « when the resistance fighter was engaged in operations ». I would be inclined to interpret these to mean : when engaged in operations which can be expected to involve the use of weapons. The argument of the Israeli tribunal in this respect lacks clarity. A witness for the prosecution had testified to the effect that « [t]he members of the organization sometimes wear military uniforms and carry arms openly outside inhabited areas and sometimes do not wear uniforms and do not carry arms openly for fear of being caught ». The tribunal considered furthermore that « [o]bviously, while in contact with Israeli troops the accused used their weapons, but, on the other hand, the presence of arms in their possession was not established until they began to fire at the Israeli forces, and it should be recalled in this connection that witness No. 1 for

the prosecution, Sergeant Erdos, said that when he saw the two persons in green he did not identify them as soldiers and did not see their weapons and therefore walked on openly, exposed, until shots were fired by the accused. » The question here is obviously whether an attempt at infiltration into enemy (or, as in this case, enemy-occupied) territory should be regarded as an « operation » in the sense as defined above.

Even less do I understand the following sentence in the relevant paragraph of the judgment : « The phrase ' carrying arms openly ' should not be understood to mean carrying arms in places where they and the persons carrying them cannot be seen, nor does it mean carrying arms, such as Kalatchnikov assault rifles, whilst using them during an engagement ». I agree that little, if any, relevance attaches to carrying arms in the most open manner in places where the persons thus displaying their weapons are out of sight of the enemy. On the other hand, it escapes me why « carrying arms, such as Kalatchnikov assault rifles, whilst using them during an engagement » would not be sufficient to meet the test of carrying arms openly.

It should be added that the tribunal in its final conclusion on this score does not refer to the individual persons before it, but to the organization as a whole : « It does not seem to us, therefore, that the members of the Front for the Liberation of Palestine can be said to carry arms openly ». This shows that the references to the mode of acting of the indicated individuals merely served (in the eyes of the tribunal) to corroborate the evidence concerning the organization as a whole.

## 22. The obligation to conduct operations in accordance with the laws and usages of war.

A last requirement for guerrillas to be entitled to recognition as « privileged belligerents » is that of conducting their operations in accordance with the laws and usages of war. Is this a reasonable requirement : can guerrillas be expected to conduct their operations in that manner ?

This question has found widely differing answers. Thus, one author asserts that :

... there is nothing in the guerrilla form of warfare... which contravenes the norms of international law. Surprise and swiftness; the lightning blow and quick withdrawal in the face of heavy odds; the nocturnal attacks and the tactic of seeming to come from the east and attacking from the west; the strategy of attacking the hollow avoiding the solid — in fact, the whole strategy and tactics of guerrilla warfare are an art of combat waged by the weak to overcome the strong. There is nothing in international law which prohibits, to use Calvert's phrase, the surgical application of needle-tipped force to the vital points of the opponent's body politic. The

tactics in this kind of warfare can very well be subsumed under the rules relating to ruses and stratagems in international law. Once it is admitted that guerrilla warfare is not a ' wild cat scrimmage ' and that it is a highly developed art which depends for its success upon the support of the masses, it is easy to reconcile the stories of atrocities and sacrileges. They are the handiwork of a few bandits, anarchists, disappointed militarists, and vagabonds. They must be singled out and tried for crimes against the laws of war and for crimes against humanity. But the whole lot of guerrilla cannot *ipso facto* be treated as criminals. (R. Khan, « Guerrilla Warfare and International Law », in *International Studies* [Indian School of International Studies, New Delhi], Vol. 9, 1967, p. 103 at pp. 113-114).

While it is not contested that this may be a correct assessment of the possibility for guerrilla fighters to conduct at least part of their operations (« guerrilla tactics ») in conformity with the laws and usages of war, it seems on the other hand a gross under-estimation of the real problems attending guerrilla warfare in a wider sense and which cannot be summarily dismissed as the « handiwork of a few bandits, anarchists, disappointed militarists, and vagabonds ». For, in the first place, the suggestion is inaccurate that guerrilla fighters are generally law-abiding, while the « stories of atrocities and sacrileges » are exclusively accountable to a category of criminally inclined persons indicated as « bandits » etc. : acts of terrorism or sabotage are committed by the same guerrilla fighters who at another time are assigned more traditional jobs. And, secondly, guerrilla warfare does give rise to certain specific problems of a legal nature; to name only a few : can the swiftness and stealthiness characteristic of many guerrilla operations be reconciled with the obligation to give quarter and to treat prisoners humanely ? can the vital need of information be satisfied without recourse to a measure like the torture of prisoners ? where does the dividing-line run between ruses of guerrilla warfare and treacherous conduct ?

### 23. Terrorism.

The situation envisaged by Khan, it should be noted, was the infiltration of Pakistani guerrilla forces into Indian territory : a primarily military, international operation, though carried out with the aid of guerrilla tactics. Other situations are perhaps more suited to bring to light the various difficulties involved in guerrilla warfare. Thus, one of the experts consulted by the ICRC emphasized the point that in the first stage of a guerrilla movement developing in the territory of a State the movement, still being weak, « will be tempted to resort to extremist methods » (*Reaffirmation*, p. 115) and that in that phase terrorism « was perhaps the only arm available to guerrillas combating a Government preventing them from employing other methods. To condemn terrorism without

appeal would perhaps be equivalent, according to this expert, to depriving guerrillas of their only means of combat, and would therefore lack realism » (p. 120).

This opinion was not shared by the other experts, however; the majority held the view « that terrorism in the sense of indiscriminate attacks against the civilian population, should be condemned and that it outlawed guerrilla forces » (*ibid.*). The majority opinion, it should be noted, does not condemn attacks directed against particular members of the civil population; nor could it very well be otherwise : while the precise definition of the notion of « military objective » is a problem for which no final solution has yet been found, it seems hard to deny that certain key decision makers among the population can justifiably be considered as military objectives in any kind of warfare, let alone in guerrilla warfare.

The condemnation of indiscriminate terrorism is undoubtedly correct. In support, one may point to GA Resolution 2444 (XXIII) which affirmed the principle, applicable in all armed conflicts, that « it is prohibited to launch attacks against the civilian populations as such ». This principle also played an all-important rôle in the judgment of the Israeli tribunal in *re Military Prosecutor v. Omar Mahmud Kassem and others*, when it found that « the body which calls itself the Popular Front for the Liberation of Palestine acts in complete disregard of the international consuetudinary law accepted by civilized nations », as a number of attacks claimed by that organization « were all wanton acts of terrorism aimed at men, women and children who were certainly not lawful military objectives. They are utterly repugnant to the principles of international law, and... crimes for which their perpetrators must pay the penalty. Immunity of non-combatants from direct attack is one of the basic rules of the international law of war ».

#### 24. Treacherous conduct.

Having thus disposed of the extremes, one is left with the less extreme problems, some of which were enumerated at the end of para. 22. These problems may be divided into two categories : problems of interpretation of existing law (such as the distinction between ruses of war and treacherous conduct) and problems of a practical nature (such as the treatment of prisoners).

As regards treachery, the experts consulted by the ICRC suggested replacing the term by « perfidy »; and they pointed out that « it is no longer so much a matter of obtaining a spirit of chivalry on the battlefield or an ideal of loyalty, as of denouncing everything that can make a return to peace

more difficult ». Among these peace-thwarting modes of conduct they mentioned the « abusive employment of the white flag and above all of the red cross emblem »; but they were divided on such a crucial issue as the wearing of enemy uniform prior to battle (*Reaffirmation*, pp 80-81). I am inclined to agree with the experts that the necessity of an ultimate restoration of peace requires that a human attitude be preserved towards the enemy and thus dominates the issue of treachery. This basically humane and non-treacherous attitude is moreover urged by another argument, of a more trivial nature : viz., that guerrilla fighters must expect the enemy to base his attitude in this respect on reciprocity; as the experts pointed out elsewhere : « Guerrillas and their opponents should conform to the same rules » (p. 118).

Even so, it is evident that a further elucidation of the concept of « treachery » or « perfidy » would certainly be welcome. For, while it may be true that, as the ICRC observes (*ibid.*), either side in guerrilla fighting might be inclined to use the too precise character of specific rules as a pretext to avoid their application, a principle to the effect that everything should be avoided which can hamper the restoration of peace is altogether too vague.

## 25. Treatment of prisoners.

The more practical problems attending (or alleged to attend) guerrilla warfare, are also dealt with in the report of the ICRC. In respect to these, the attitude of the experts can be summarized as follows : guerrillas in order to be entitled to a position of « privileged belligerency » are required to recognize the obligations resulting from the principles of the law of war and in particular the humanitarian principles; and for such problems as might arise in this connection, practical solutions should be sought (*Reaffirmation*, pp. 118-119).

One such practical solution submitted by the ICRC and supported by the experts, concerns the issue of the treatment of prisoners in the hands of guerrillas. The point is emphasized that, no matter how extraordinary the combat conditions of guerrilla fighters may be, they are precluded from killing prisoners or seriously injuring their health. Instead, they « should... (as has occurred in some recent conflicts) after having been disarmed, be released where there are no facilities to care for them. They could also be handed over to an Ally or a neutral State, as authorized in the IIIrd Convention » (*Reaffirmation*, p. 119). Such solutions might indeed be in the enlightened self-interest of the guerrillas, as they might contribute to weakening the morale and fighting spirit of the enemy armed forces.

## 26. Information.

A practical problem not touched upon in the report of the ICRC concerns the issue of information. There are, of course, many ways of gathering information which are tolerated by the law of war. Some methods are prohibited, however. Thus, Article 17 of the Prisoners of War Convention provides that « [n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind ». Similarly, Article 31 of the Civilians Convention provides that « [n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties ». In guerrilla warfare even more than in conventional armed conflicts the tendency will be strong to disregard these prohibitions, not only on the side of the guerrilla fighters but equally on the side of the counter-guerrilla forces; for information, no matter how secured, is of vital importance for the success of any guerrilla or counter-guerrilla operation.

I see no practical way out of this dilemma, other than holding to the obligatory force of the quoted rules irrespective of whether the conflict being waged is of the guerrilla type, and accepting that the chance of their being violated is rather more pronounced in the event of a guerrilla than in case of other types of armed conflicts. In addition to this mainly negative conclusion, the point should perhaps be emphasized that violations of the rules in question can be of varying gravity : to my mind, while any form of coercion with a view to securing information amounts to a violation of the fundamental rights and freedoms of the human beings involved, there is a wide difference between such methods of torture as bring the victim on the verge of death and perhaps invalidate him for life, and methods consisting in the exposure to « unpleasant or disadvantageous treatment of any kind ». It is of course realized that such distinctions are dangerous, as they tend to diminish the awareness of the reprehensible character even of the lesser violations. On the other hand, if violations should be expected anyway, then it seems vastly preferable that in any event the resort to the more injurious methods of torture be avoided.

## 27. The conditions rest upon the guerrilla force as a body.

Two facts stand out from the foregoing paragraphs : firstly, that it is not impracticable for guerrilla fighters to meet the



conditions for « privileged belligerency » set out in Article 4 of the Prisoners of War Conventions; and, secondly, that in any event a group of experts such as those consulted in February 1969 by the ICRC were not prepared to conclude that any concessions should be made to guerrilla fighters in this respect, other than that the emphasis should be on general principles rather than detailed rules. This view-point seems acceptable, provided that this does not lead to the conclusion that those guerrilla fighters who fail to meet the said conditions are therefore outlaws at the mercy of the enemy.

Another matter of particular importance in the present context concerns the interpretation of the phrase in Article 4A(2) « provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions » (etc.). The question here is, whether this phrase implies that the conditions must be fulfilled by the individual member of such groups who falls into enemy hands, or by the groups as such, or without exception by all their members.

The first interpretation, it is submitted, is contradicted by the clear terms of the quoted text, which without any doubt refers to the collectivities rather than to individual captured members. Moreover, the interpretation would lead to the unacceptable result that the position of each captured member would be made to depend on his personal conduct rather than on his belonging to the group, thus restoring the old, but rightly abandoned, maxim that he who violates the law of war cannot himself claim the protection of the law of war.

On the strength of this argument it is submitted that the Israeli military tribunal was wrong when it considered at one place in its judgment « that, in order to be entitled upon capture by enemy forces to be treated as a prisoner of war, a member of an underground organization is undoubtedly required to fulfil all the four abovementioned conditions and that the absence of only one of them is sufficient to make him an unlawful combatant, not entitled to be regarded as a prisoner of war ».

Can the last interpretation be correct? This would amount to the assertion that a war crime committed even by one member of such an organization would have the effect of depriving all members of their status as « privileged belligerents ». To my mind, the suggestion of such an extreme collective responsibility is so evidently without merit that any further argumentation is superfluous.

This leaves the second of the three aforementioned interpretations, expressed by the Israeli tribunal elsewhere in its judgment in the following terms : « ... each of its members [i.e., of a body of irregulars] is entitled upon capture to be treated

as a prisoner of war if that body fulfils the four basic conditions... ». This, in our submission correct, interpretation of Article A(2) implies : that an individual member of such an organization does not lose his right to prisoner of war status when it appears that he himself does not fulfil all the four conditions; that he does even less lose this right on the mere ground that another member of the organization has failed to meet all those conditions; and that the only decisive criterion is whether the organization as such, viewed as a body, can be said to fulfil the conditions. In other words, the position of the individual members will depend on the general policy of the organization as this is evidenced by its activities, or on the consistent practice of a significant part of its members.

Applying this test to the facts as these were presented to it, the Israeli tribunal could be justified in finding « that the body which calls itself the Popular Front for the Liberation of Palestine acts in complete disregard of the international consuetudinary law accepted by civilized nations », and in rejecting on that ground the submission of Omar Mahmud Kassem and his colleagues that they were entitled to be treated as prisoners of war.

## 28. The classification of detainees in South Vietnam.

Classification of detained persons as prisoners of war or otherwise developed into a major problem in the guerrilla war waged in South Vietnam. In order to meet this problem, headquarters of the United States Military Assistance Command, Vietnam, on 27 December 1967 issued a directive that in its Annex A provided « Criteria for Classification and Disposition of Detainees » (*Am. Journal of International Law*, Vol. 62, 1968, p. 766). In para. 3 of this Annex, the enemy forces were distinguished in the following categories :

- a. Viet Cong (VC) Main Force (MF). Those VC military units which are directly subordinate to Central Office for South Vietnam (COSVN), a Front, Viet Cong military region, or sub-region. Many of the VC units contain NVA personnel.
- b. Viet Cong (VC) Local Forces (LF). Those VC military units which are directly subordinate to a provincial or district party committee and which normally operate only within a specific VC province or district.
- c. North Vietnamese Army (NVA) Unit. A unit formed, trained and designated by North Vietnam as a NVA unit, and composed completely or primarily of North Vietnamese.
- d. Irregulars. Organized forces composed of guerrilla, self-defense, and secret self-defense elements subordinate to village and hamlet level VC organizations. These forces perform a wide variety of missions in support of VC activities, and provide a training and mobilization base for maneuver and combat support forces.

- (1) Guerrillas. Full-time forces organized into squads and platoons which do not necessarily remain in their home village or hamlet. Typical missions for guerrillas include propaganda, protection of village party committees, terrorist, and sabotage activities.
- (2) Self-Defense Force. A VC paramilitary structure responsible for the defense of hamlet and village in VC controlled area. These forces do not leave their home area, and they perform their duties on a part-time basis. Duties consist of constructing fortifications, serving as hamlet guards, and defending home areas.
- (3) Secret Self-Defense Force. A clandestine VC organization which performs the same general function in Government of Vietnam (GVN) controlled areas. Their operations involve intelligence collection, as well as sabotage and propaganda activities.

According to para. 4, detainees of the following categories would be classified as prisoners of war :

- (1) A member of one of the units listed in paragraph 3a, b, or c, above.
- (2) A member of one of the units listed in paragraph 3d, above who is captured while actually engaging in combat or a belligerent act under arms, other than an act of terrorism, sabotage, or spying.
- (3) A member of one of the units listed in paragraph 3d, above who admits or for whom there is proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage, or spying.

To what extent does this directive fit in with the Prisoners of War Convention? In this respect, a preliminary remark is that at the time the directive was issued, the armed conflict in Vietnam could be said to have assumed an international character, so that the Geneva Conventions were applicable *in toto*. This view was expressly confirmed in another directive of the same United States Command, dated 15 March, 1968 (*Am. Journal of International Law*, Vol. 62, 1968, p. 768, at p. 769 : para. 5 [« Background »] under b). Consequently, the applicable provision here was Article 4.

In the directive, a clear distinction is made between two main categories : members of the VCMF, VCLF, and NVA on the one hand, and irregulars on the other side. The former categories are without reserve classified as prisoners of war; in the system of the Convention, this presumably indicates that they were regarded as « 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 » (Article 4A[1]).

As for the category of the « irregulars », however, no such unreserved classification is provided : they would only be granted treatment as prisoners of war if they were not suspected of having committed acts of terrorism, sabotage or spying. Does this mean that here Article 4A(2) was applied? According to the terms of the directive, the irregulars certainly were regarded

as « organized » groups, nor was their allegiance to a Party to the conflict thrown into doubt. Evidently, however, not all members of these groups did in the eyes of the United States authorities fulfil the condition of « conducting their operations in accordance with the laws and customs of war ». As it has been argued in para. 26, such a situation may lead to one of two alternative conclusions : either, that the organization is disqualified and its members are not entitled to prisoner of war status, or that the members are so entitled but may be held accountable for their individual acts.

On one interpretation, the directive may be construed to fit in with this view : viz., when it is assumed that the « irregulars » were regarded as disqualified as a body and that individual members who were not suspected of acts of terrorism (etc.), were granted prisoner of war treatment on a purely voluntary, non-obligatory basis. Another interpretation would be that the directive actually was based on the view, rejected in para. 26, that only those members of a body of irregulars are entitled to prisoner of war status as individually fulfil all the conditions enumerated in Article 4A(2). Assuming, however, that the first-mentioned interpretation is correct, it should be conceded that the United States adopted a remarkably liberal attitude towards the problem of interpreting Article 4 of the Prisoners of War Convention in the light of modern conditions of guerrilla warfare.

## 29. Conclusions.

In conclusion, it is submitted that :

- the provisions of the Prisoners of War Convention, taken together, not only have the effect of granting prisoner of war status to members of irregular forces meeting the conditions enumerated in Article 4A(2), but also afford them a position of « privileged belligerency »;
- the formulation of Article 4A(2) has been influenced considerably by the experiences of the Second World War, but the text as it stands lends itself to interpretations meeting modern forms of guerrilla warfare;
- it is possible, though certainly no light task, for guerrilla fighters to fulfil the conditions set forth in Article 4A(2), provided that in particular the obligation to respect the laws and customs of war is interpreted to refer to general principles rather than detailed rules of warfare;
- the test provided in Article 4A(2) should be applied to guerrilla forces as organized bodies, not to individual guerrilla fighters : while the latter may be held individually accountable for such of their acts as constitute

war crimes, they may not on that account be deprived of their status as prisoners of war and « privileged belligerents »;

- while under the terms of the Prisoners of War Convention the detaining Power is not prevented from punishing prisoners of war for war crimes committed prior to capture, it is a moot point whether this is a wise thing to do; in any event, the authorities who have to fight a guerrilla movement must be strongly advised against pursuing a policy of frequent application of the death penalty to guerrilla fighters who are in their hands as prisoners of war : such a policy will almost certainly have a reverse effect and cause the « irregularity » of guerrilla warfare to become, if anything, even more irregular.

## RESUME.

**La situation des combattants de guérilla  
au regard du droit de la guerre.**

*En guise de résumé, nous reprenons en français, les conclusions de l'étude du Professeur Kalshoven :*

- les dispositions de la convention sur les prisonniers de guerre, prises dans leur ensemble, ont non seulement comme effet de garantir le statut de prisonnier de guerre aux membres de forces irrégulières qui remplissent les conditions énumérées par l'article 4A(2), mais elles leur confèrent aussi une position de « belligérance privilégiée »;
  - la formulation de l'article 4A(2) a été considérablement influencée par l'expérience de la Seconde Guerre mondiale, mais le texte comme il se présente se prête à des interprétations applicables à des formes modernes de guerre de guérilla;
  - bien que ce ne soit pas facile, il est possible pour des combattants de guérilla de remplir les conditions prévues par l'article 4A(2), à la condition que l'obligation de respecter les lois et coutumes de la guerre soit interprétée comme se référant à des principes généraux plutôt qu'à des règles détaillées de conduite de la guerre;
  - les critères prévus par l'article 4A(2) devraient être appliqués aux forces de guérilla comme ensemble organisé et non aux combattants individuels. Car même si ces derniers peuvent être tenus pour individuellement responsables de leurs actes qui pourraient constituer des crimes de guerre, ils ne peuvent pas, pour cette raison, être privés de leur statut de prisonnier de guerre et de « belligérant privilégié »;
  - bien que d'après les termes de la convention sur les prisonniers de guerre il ne soit pas interdit à la puissance détentrice de punir des prisonniers de guerre pour des crimes de guerre antérieurs à leur capture, l'opportunité de ce point reste discutable; en tout état de cause, les autorités qui ont à combattre un mouvement de guérilla doivent être fermement mis en garde contre une politique d'application fréquente de la peine de mort aux combattants de guérilla qui sont tombés entre leurs mains comme prisonniers de guerre : cette politique aurait presque certainement un effet contraire et rendrait l'« irrégularité » de la guerre de guérilla encore plus irrégulière.
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