

INTERNATIONAL HUMANITARIAN LAW

Synopses

In 1985 and 1986, the International Review of the Red Cross published a series of synopses devoted to various aspects of international humanitarian law. These summaries, written by Mr. Jean de Preux, former Legal Adviser at the ICRC, addressed the following topics:

- I. Protecting power (March-April 1985);*
- II. Protection of civilian populations against the effects of hostilities (May-June 1985);*
- III. Special protection of women and children (September-October 1985);*
- IV. Identification—Fundamental principle (November-December 1985);*
- V. Capture (March-April 1986);*
- VI. Relief (September-October 1986).*

People involved in the dissemination of international humanitarian law and academic circles have found these synopses so useful that the Review has decided to publish a further three summaries in 1989, thereby completing this series of instructional texts on humanitarian law.

Synopsis No. VII which follows deals with “Combatant and prisoner-of-war status”.

Combatant and prisoner-of-war status

A. GENERAL POINTS

Only the members of the armed forces of a Party to a conflict (other than medical personnel, chaplains and military personnel engaged in civil defence) are combatants (Hague Regulations¹, Art. 1 and 3; P. I, Art. 43 and 67)².

Combatants are entitled to take direct part in the hostilities (P. I, Art. 43), i.e. to commit acts of war which are intended by their nature or their purpose to hit specifically the combatants and other military objectives of the enemy armed forces.

Any combatant who falls into the power of an adverse Party is a prisoner of war (P. I, Art. 4).

B. ARMED FORCES

General definition

The armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces must be subject to an internal disciplinary system which must enforce compliance with the rules of international law applicable in armed conflict (P. I, Art. 43).

Included in the definition of armed forces are:

— the army of a Party to a conflict (Hague Regulations, Art. 1; C. III, Art. IV; P. I, Art. 43, 44);

¹ Regulations respecting the laws and customs of war on land.—Annex to The Hague Convention of 18 October 1907.

² The Roman numerals refer to the First (I), the Second (II), the Third (III) and the Fourth (IV) Geneva Conventions (C). The abbreviation P. I stands for Additional Protocol I. The articles are indicated by Arabic numerals.

- militia and volunteer corps forming all or part of the army (Hague Regulations, Art. 1; C. III, Art. 4; P. I, Art. 43);
- members of the merchant marine organized to take direct part in the hostilities (C. III, Art. 4) and actually doing so;
- the members of a levy *en masse*, i.e. the population of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading troops, provided they carry arms openly and respect the laws and customs of war (Hague Regulations, Art. 2; C. III, Art. 4);
- Police forces (paramilitary or armed law enforcement agency) if the other Parties to the conflict have been duly notified (P. I, Art. 43).

All categories of persons mentioned above are combatants.

Conditions for the recognition of armed forces

The conditions are as follows:

- subordination to a Party to the conflict;
- military-style organization;
- a command responsible to that Party;
- enforced compliance with the rules of international law applicable in armed conflict (P. I, Art. 43).

A levy *en masse* is not required to have a military-style organization and be under a responsible command as specified above, but recognition of it is valid only while the invasion lasts (Hague Regulations, Art. 2; C. III, Art. 4).

Composition of armed forces

Armed forces are composed of:

- combatants (see below);
- non-combatants (medical, religious and civil defence personnel) who are not entitled to take part in hostilities (C. I, Art. 21, 22; C. II, Art. 34, 35; P. I, Art. 43, 67);
- civilians who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces (C. III, Art. 4). Such people are, of course, also non-combatants.

C. COMBATANTS

Status

Combatants, and only combatants, are entitled to strike at the enemy (Hague Regulations Art. 1; P. I, Art. 43). If captured, they become prisoners of war, which means that they may not be punished in any way for having committed hostile acts (P. I, Art. 44).

Respect for the law of armed conflict

Combatants are obliged to comply with the rules of international law applicable in armed conflict (P. I, Art. 44). If they do not comply with these rules, they may be punished but do not lose their status (C. III, Art. 85; P. I, Art. 44), unless they have been convicted of a war crime in one of the Socialist countries (reservation made to Art. 85 of the Third Convention). For the exception relating to their visual distinguishability, see below.

General condition that combatants must be distinguishable

Combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack (P. I, Art. 44).

Exceptional circumstances

In exceptional circumstances (occupied territory, uneven conflict, anti-guerrilla operations) combatants may be freed from this obligation but only by decision of their high command, which must be responsible to the Party to the conflict (P. I, Art. 44). It is then sufficient if they distinguish themselves from the civilian population by carrying arms openly during each military engagement, and during such time as they are visible to the adversary while they are engaged in a military deployment preceding the launching of an attack in which they are to participate (P. I, Art. 44), (i.e., according to widely held opinion, during any movement toward a place from which an attack is to be launched).

Loss of status

A combatant who is caught violating the provision relating to exceptional circumstances, either because he is not bearing arms openly

as provided for or because he is making improper use of such a situation, forfeits his combatant status (P. I, Art. 44). Losing combatant status means losing prisoner-of-war status and possibly even entails prosecution for the mere fact of having carried a weapon. He remains, however, entitled to treatment equivalent to that accorded to prisoners of war, including procedural guarantees in the event of penal proceedings (P. I, Art. 44).

Scope of the rule that combatants must be distinguishable

This rule is not intended to change the generally accepted practice of States regarding the wearing of uniforms by combatants assigned to regular armed units of the Parties to the conflict (P. I, Art. 44). It is primarily destined for combatants using guerrilla tactics, unless the Parties to the conflict prefer even in such situations to operate with troops in uniform or bearing at all times a fixed a distinctive sign recognizable at a distance (C. III, Art. 4; P. I, Art. 44).

Special cases

- a mercenary who is not a member of the armed forces of a Party to the conflict is not entitled to combatant (or prisoner-of-war) status (P. I, Art. 47);
- a person caught in the act of spying is not entitled to combatant (or prisoner-of-war) status even if he is a member of the armed forces (P. I, Art. 46);
- in principle, a child of less than fifteen years of age is not entitled to combatant status and may not be recruited (P. I, Art. 77);
- a parliamentarian loses his entitlement to immunity if he has taken advantage of his privileged position to provoke or commit an act of treason (and in certain circumstances may be treated as a spy) (Hague Regulations, Art. 34);
- the status of a combatant belonging to a national liberation movement not recognized by the adverse Party is uncertain (P. I, Art. 43). If the adversary in question is a State Party to Protocol I, combatant status may not be refused if the national liberation movement has made the declaration provided for in Art. 96, para. 3 of the Protocol.

D. PRISONERS OF WAR

Preliminary remarks

A person having the status of prisoner of war is necessarily entitled to the corresponding treatment. Nevertheless, certain categories of persons are entitled to be treated as prisoners of war—at least temporarily—without having that status:

- either because their combatant status has not yet been decided;
- or because, as non-combatants, it is impossible for them to have prisoner-of-war status.

The difference for such persons lies in their relative freedom of movement or early repatriation (for example, for medical personnel and chaplains) (C. I, Art. 30; C. II, Art. 37; C. III, Art. 33). It also resides in other preferential measures (military internees: C. III, Art. 4; child combatants: P. I, Art. 77) or, if combatant status is definitively refused, in prosecution for bearing arms (C. III, Art. 5; C. IV, Art. 68; P. I, Art. 45); this latter does not apply to child combatants.

Prisoner-of-war status

The following have prisoner-of-war status if captured:

- *combatants* (C. III, Art. 4; P. I, Art. 44), except:
 - persons caught in the act of spying (P. I, Art. 46);
 - mercenaries (P. I, Art. 47);
 - combatants who, in the exceptional circumstances provided for (P. I, Art. 44), do not carry weapons openly in combat or abusively exploit the said exceptional circumstances.
- *civilians authorized to accompany the armed forces* (C. III, Art. 4);
- *crew members*, including masters, pilots and apprentices, of the merchant marine and crews of civilian aircraft (unless they benefit by more favourable treatment) (C. III, Art. 4);
- *the civilian population in a levy en masse* (C. III, Art. 4);
- *military personnel serving in civil defence* (P. I, Art. 67);
- *citizens of neutral countries enlisted in the armed forces of a Party to a conflict* (Hague Convention No. V, Art. 17).

Treatment as a prisoner of war

If captured or interned, the following are entitled to the same treatment as prisoners of war though they do not have that status:

- the armed forces' medical personnel and chaplains, including staff of relief societies attached to the armed forces (C. I, Art. 28; C. III, Art. 33);
- military internees in occupied territory (C. III, Art. 4);
- military internees in a neutral country (C. III, Art. 4);
- any person who has taken part in the hostilities and whose status is not yet determined (C. III, Art. 5; P. I, Art. 45);
- pending adjudication by a tribunal, combatants caught in the act of spying or suspected of serving as a mercenary (P. I, Art. 45);
- combatants who have forfeited their right to prisoner-of-war status by not visibly distinguishing themselves as combatants or by failing to carry their arms openly (P. I, Art. 44);
- child combatants (P. I, Art. 77);
- parliamentarians held in temporary detention (Hague Regulations, Art. 33).

Escaped prisoners of war

A neutral power which receives escaped prisoners of war must leave them at liberty. If it allows them to remain in its territory, it may assign them to a place of residence.

The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral power (Hague Convention No. IV, Art. 13).

Prisoners of war released on parole

Prisoners of war released on parole and recaptured violating the commitments they had entered into retain prisoner-of-war status (C. III, Art. 21; contrary to The Hague Convention No. IV, Art. 12).

Captured combatants who are nationals of the detaining power

According to prevailing legal opinion, a combatant who falls into the hands of the power of which he is a national is not entitled to treatment as a prisoner of war unless he has dual nationality (C. III,

Art. 87). In the case of the wars of liberation to which the Conventions and Protocol I apply, the criterion of nationality is not applicable as such.

Combatant of a national liberation movement

In theory, unless a person is recognized as having combatant status (see “Combatants”), he cannot be recognized as having prisoner-of-war status. In fact, however, if a national liberation movement is recognized by the international community or a representative section thereof, its members who are taken prisoner should be given treatment which corresponds in every way to prisoner-of-war status, including exemption from prosecution for bearing arms (Charter of the United Nations, Art. 1, Chap. 2, principle of self-determination).

Status after prisoner-of-war status has been definitely refused, if necessary by court of law

Such people are civilians protected under the Fourth Convention. This applies to:

- spies (subject to the provisions of Art. 5 of the Fourth Convention);
- mercenaries;
- persons who have taken part in the hostilities without belonging to the armed forces, thus without having combatant status (P. I, Art. 45);
- members of armed forces interned in occupied territory and then released (C. III, Art. 4);
- child combatants, who are not treated as prisoners of war (but are not subject to prosecution);
- deserters.

Combatants who have the same nationality as the captor are not protected by the Fourth Convention (C. IV, Art. 4) but by Art. 75 of Protocol I. Those with dual nationality should be protected by the Third Convention.

Procedure for establishing status

A person who takes part in hostilities and falls into the power of an adverse Party must be presumed to be a prisoner of war. Should any

doubt arise, he must continue to enjoy such status until such time as his status has been determined by a competent tribunal (which may be an administrative tribunal). If he is prosecuted (for example, for bearing arms) the status of the accused must again be examined, but by a judicial tribunal (P. I, Art. 45; C. III, Art. 5). The burden of proof that the person in question is not entitled to prisoner-of-war status rests with the captor (P. I, Art. 75, 4d).

Status of persons who are refused protection under the Fourth Convention or have that protection restricted

Basically, Art. 75 of Protocol I applies here (except for spies as regards their rights of communication), in spite of Article 5 of the Fourth Convention.

Finally, in all cases for which provision has not been made, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience (“Martens clause”, Hague Convention, Preamble; P. I, Art. 1).

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