

Training with the Opposition: The Status of the “Free Iraqi Forces” in the US’ War against Saddam Hussein

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Introduction

In December 2000, Hungary gave permission to the United States to use the Tazsar air base for the training of 3000 Iraqi volunteers recruited from the Iraqi opposition as part of the US build-up for the war against Saddam Hussein.¹ Located 200 kilometres southeast of Budapest, the base has been used by the US since 1995 as a logistical support centre for peacekeeping missions in Bosnia-Herzegovina.² The training program of the so-called Free Iraqi Forces (FIF) was terminated in early April, when the first cohort of volunteers was sent to the Gulf.³ Controversy has arisen around the exact nature of the FIF. On one hand, the Hungarian Defence Minister declared that no military training was imparted. On the other hand, though, the American base commander, Maj. Gen. David Barno, confirmed that some of the volunteers had a military background. Iraqi opposition sources in London also declared that most of those selected were former officers in the Iraqi army.⁴

The aim of this paper is to determine the legal status of members of opposition groups, by studying the case of the Free Iraqi Forces employed by the US. According to whether these units are entrusted with military or civilian tasks, and depending on the nature of their relationship with the US armed forces, different consequences may apply, under international humanitarian law. One of the major issues is whether they could qualify as combatants, owning the privileges of prisoner of war status, in case of capture, or whether they may face criminal proceedings as civilians for unlawful participation in combat. Another important issue is whether

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¹ BBC, Hungary approves Iraqi training, BBC News World Edition, 18th December 2002, at <<http://news.bbc.co.uk/2/hi/europe/2587481.stm>>.

² BBC, Villagers fearful of Iraq training mission, BBC News World Edition, 16th January 2003, at <<http://news.bbc.co.uk/2/hi/europe/2664531.stm>>.

³ BBC, Hungarian Iraqi training halted, BBC News World Edition, 1st April 2003, at <<http://news.bbc.co.uk/2/hi/europe/2905881.stm>>; Ian Traynor, US closes exiles training camp after only 100 turn up, The Guardian, 2nd April 2003, at <<http://www.guardian.co.uk/international/story/0,3604,927739,00.html>>.

⁴ Nick Thorpe, Eyewitness: Iraqi training base in Hungary, BBC News World Edition, 21st January 2003, at <<http://news.bbc.co.uk/2/hi/europe/2679619.stm>>.

the wearing of the enemy's uniform may engage criminal proceedings for espionage, treason or perfidy by the captor.

In order to assess the situation, this paper will be structured as follows. The first part will introduce the facts, focusing on the nature of the training and the employment of the FIF. The second part will discuss the combatant status requirements under IHL and their application to the Iraqi volunteers. Since neither the US nor Iraq are parties to the 1977 Additional Protocols, the arguments will focus on provisions contained in the 1949 Geneva Conventions. The third and final part will draw the conclusions.

I. Factual Background

The first group of Iraqi volunteers left Taszar (Hungary) at the beginning of March 2003 to join US army units close to Iraq, in preparation for the war.⁵ These were later deployed in the Iraqi port of Umm Qasr, to support US units delivering humanitarian aid.⁶ They have apparently worked with Iraqi town officials in restoring the water supply, dredging the port and re-establishing the local police and fire departments.⁷ On order of the US Pentagon, the Free Iraqi Forces were later deployed to Baghdad to establish an interim government and police force for Iraq.⁸

The majority of the FIF coming from Taszar had undergone a four week training course in self-defence, use of small arms, first aid, landmine detection and various liaison skills between US forces and the civilian population. A requirement imposed by the Hungarian authorities on the US for the use of Taszar had been that the volunteers would not be trained for employment in combat.⁹ According to the official line, the main aim was in fact to prepare the FIF volunteers to serve as translators, guides and to fulfil other support functions to the US troops.¹⁰ The US,

⁵ BBC, Iraqi exiles end US training, BBC News World Edition, 1st March 2003, at <<http://news.bbc.co.uk/2/hi/europe/2806857.stm>>.

⁶ BBC, Hungarian Iraqi training halted, BBC News World Edition, 1st April 2003, at <<http://www.af.mil/news/opscenter/Apr2003/41003854.shtml>>.

⁷ Gilmore, at note 6.

⁸ Sharon Behn/Paul Martin, Chalabi's forces enter Baghdad, The Washington Times, 17th April 2003, at <<http://www.washtimes.com/world/default-20034171465.htm>>; Mike Williams, Marines free POWs, The Atlanta Journal-Constitution, 14th April 2003, at <http://www.accessatlanta.com/ajc/epaper/editions/monday/news_e3a9b4c5f6865197009b.html>.

⁹ BBC, Iraqi exiles end US training, at note 5.

¹⁰ Barbara Starr, U.S. offers training to Iraqi opposition, CNN Washington Bureau, 18th December 2002, at <<http://www.cnn.com/2002/US/12/18/sproject.irq.opposition.training/index.html>>. See also Tristana Moore, Inside Iraqi exiles' training camp, BBC News World Edition, 1st March 2003, at <<http://news.bbc.co.uk/2/hi/europe/2806857.stm>>; BBC, Hungarian Iraqi training halted, BBC News World Edition, 1st April 2003, at <<http://news.bbc.co.uk/2/hi/europe/2905881.stm>>; Maj. Gen. David Barno, Briefing on Free Iraqi Forces, Defense Link, US Dept. of Defense, 14th March 2003, at <http://www.defenselink.mil/news/Mar2003/t03142003_t0314barno.html>; US Dept. Of Defense, Staff Sgt. Fournier instructs Free Iraqi Forces volunteers with the aid of a translator at Taszar, Hungary, Defense Link, March 2003, at <<http://www.defenselink.mil/photos/Mar2003/030310-A-5792-002.html>>.

for example, denied the intention to employ them as spies.¹¹ However, according to the Iraqi National Congress, which selected part of the volunteers, the 1st Battalion of the FIF was integrated into Operation Iraqi Freedom to serve under Gen. Tommy Franks. The Battalion was reportedly involved in some fighting in Nasiriyah.¹² It also appears that the FIF was involved in the taking over of the Baath party headquarters in Kirkuk, along with US troops.¹³ But the role of these volunteer groups seems to have become unclear amongst some US commanders in the field. Notwithstanding the initial position of the Pentagon that their role in Iraq would be limited to civilian assistance, a few days before the beginning of the war the FIF units were apparently given special training in "civil affairs" and then set under the command of the US 352nd Civil Affairs Command, a section of US Army Special Operations.¹⁴ This was confirmed by Army Reserve Brig. Gen. John H. Kern, commander of the 352nd Civil Affairs Command, who was placed in charge of 69 FIF members. He asserted that the volunteers were working with U.S. Army and Marine Corps civil affairs units across Iraq,¹⁵ in particular with the advancing forces in Baghdad, Karbala, An Najaf, An Nasiriyah, Basra.¹⁶ Others, instead, had been apparently placed near front lines along with units like the 1st Marine Expeditionary Forces and the 101st Airborne.¹⁷ It is unclear, however, whether the Iraqi units involved in the fighting all belonged to FIF units coming from Taz-zar.¹⁸

The volunteers represent several ethnic and religious groups in Iraq, including Kurds, Shia Muslims, Sunni Muslims and Christians.¹⁹ They were recruited from Iraqi opposition groups around the world, although most were living in the United States.²⁰ Many of them are Iraqi expatriates who fled Iraq some twenty years ago.²¹ There are several members possessing dual US-Iraqi nationality.²²

Apparently all have been wearing battle-dress uniforms with a special square patch of the FIF, the Free Iraqi Forces.²³ According to some reports, however, these US issued uniforms²⁴ differ from the one used by the U.S. service members.²⁵

¹¹ BBC, Hungarian Iraqi training halted, BBC News World Edition, 1st April 2003, at <<http://news.bbc.co.uk/2/hi/europe/2905881.stm>>.

¹² Marian Wilkinson, The little man who would ..., The Sydney Morning Herald, 18th April 2003; Gilmore, at note 6; Jonathan S. Landay, Iraqi exile leader and troops flown to Nasiriyah to join U.S. forces, 6th April 2003, Knight Ridder Newspapers, Washington Bureau, at <<http://www.realcities.com/mld/krwashington/news/world/5573838.htm>>.

¹³ Wilkinson, at note 12; Gilmore, at note 6.

¹⁴ Wilkinson, at note 12; Gilmore, at note 6.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Stephen F. Hayes, Iraqi exiles go to war, The Weekly Standard, Vol. 8, Issue 29, 7th April 2003, at <<http://www.weeklystandard.com/Content/Public/Articles/000/000/002/457vejfd.asp>>.

¹⁸ Iraqi exiles headed to Iraq will be core of new army, Jane's Defence Weekly, 6th April 2003, at <http://www.janes.com/defence/news/jdw/jdw030406_1_n.shtml>.

¹⁹ BBC, Iraqi exiles end US training, at note 5; Barno, at note 10.

²⁰ BBC, Hungarian Iraqi training halted, at note 11.

²¹ Moore, at note 10.

²² Gilmore, at note 6; Hayes, at note 17.

II. Legal Qualification: Combatants, Civilians or Spies?

1. The IHL Criteria for Combatant Status

Under the 1949 Geneva Conventions, the definition of combatants is mirrored²⁶ by the definition of prisoner of war (POW) in Article 4 III GC. Generally, in fact, only combatants can obtain POW status.²⁷ These are divided into several categories. Two are mainly relevant for the case under discussion. The first is addressed in paragraph (A)(1), which refers to the members of the armed forces of a Party to the conflict, as well as the member of a militia or volunteer corps forming part of such armed forces. The second and more complicated one, instead, referred to in paragraph (A)(2), is that of irregulars.

Irregular combatants, under Article 4(A)(2) III GC, can be granted combatant and POW status on condition that they cumulatively²⁸ meet the criteria of:

- 1) belonging to a Party to the armed conflict
- 2) being commanded by a person responsible
- 3) having a fixed distinctive sign
- 4) carrying arms openly
- 5) conducting the operations in accordance with the laws of war.

Otherwise, they qualify as civilians who may be tried under common criminal law for having unlawfully taken up arms.²⁹ But Article 4 III GC is a discriminatory

²³ For several pictures, attesting also the wearing of the US uniform, see the website of the US army on Operation Iraqi Freedom Imagery, at <<http://www.army.mil/operations/oif/images16.html>>

²⁴ Peter Finn, Pentagon's Iraqi proteges go home to mixed welcome – Exiles seek interim control, Washington Post Foreign Service, 17th April 2003, at 27, at <<http://www.washingtonpost.com/wp-dyn/articles/A42322-2003Apr16.html>>.

²⁵ Barno, at note 10.; Jim Garamone, Free Iraqi Forces Committed to Democracy, Rule of Law, American Forces Press Service, 14th March 2003; Gilmore, at note 6.

²⁶ *The Prosecutor v Tadic*, AC, Judgement of 15th July 1999, Case No. IT-94-1, para. 92: "A starting point for this discussion is provided by the criteria for lawful combatants laid down in the Third Geneva Convention of 1949. Under this Convention, militias or paramilitary groups or units may be regarded as legitimate combatants if they form 'part of [the] armed forces' of a Party to the conflict (Article 4A(1)) or 'belong [...] to a 'Party to the conflict' (Article 4A(2)) and satisfy the other four requirements provided for in Article 4A(2). It is clear that this provision is primarily directed toward establishing the requirements for the status of lawful combatants."

²⁷ See also the definition of armed forces in Article 43 AP I. An exception is provided for non-combatants who form part of the armed forces. Yves Sandoz *et al.*, Commentary to the Additional Protocols of 1977 (Genève: 1986), para. 1667 (online version, at <<http://www.icrc.org>>). See also Article III of the Regulations annexed to the IV Hague Convention of 1907: The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war. Knut Ipsen, Combatants, in: Dieter Fleck, The Handbook of Humanitarian Law in Armed conflicts (Oxford: 1999), 65-104, at 71-72 and 81, para. 312; Regina Buss, Der Kombattantenstatus: Die kriegsrechtliche Entstehung eines Rechtsbegriffs und seine Ausgestaltung in Verträgen des 19. und 20. Jahrhunderts (Bochum: 1992), at 194, 233.

²⁸ Jean Pictet, Commentary to the III GC (Genève: 1956), at 49, 59; Buss, at note 27, at 207.

²⁹ Ipsen, at note 27, at 93, para. 317; Jean Pictet, Commentary to the IV GC (Genève: 1956), at 50: "The definition of protected persons in paragraph 1 Article 4 is a very broad one which includes members of the armed forces – fit for service, wounded, sick or shipwrecked – who fall into

provision. Whereas a regular soldier who violates IHL may face prosecution for war crimes, but retains his combatant and POW status, an irregular with the same conduct forfeits his right to combatant and POW status and face common criminal proceedings for unlawful participation in combat.³⁰

The situation is slightly different under Articles 43-44 AP I, stating that a combatant is either:

- a member of regular armed forces;
- a member of another armed group;
- who is under a command responsible to a party to the international armed conflict;
- subject to an internal disciplinary system;
- which complies with the rules of international law applicable in armed conflict.

These are the same criteria as set in Article 4(A)2 III GC. However, under Article 44(2) AP I, the violation of IHL shall not *per se* deprive a combatant of his status, unless he failed to distinguish himself from civilians and was caught red handed.³¹ In this event, he will only be able to retain combatant status, if proven that he was carrying his arms openly. Otherwise, he will forfeit his right to POW/combatant status, but will nevertheless have to be treated alike.³² Thus, under AP I, regular army members no longer automatically qualify as combatants/POWs by virtue of their membership. The position of guerrillas, instead, has been simplified. They still have to belong to a Party to the conflict and comply with IHL. However, if the situation was so exceptional that they could not be expected to distinguish themselves, they will be granted combatant/POW status, so long as they carried their arms openly. The situation can be summarised as follows:³³

enemy hands. The treatment which such persons are to receive is laid down in special Conventions to which the provision refers. They must be treated as prescribed in the texts which concern them. But if, for some reason, prisoner of war status – to take one example – were denied to them, they would become protected persons under the present Convention.³⁴

³⁰ Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, (1971) (XLV) *British Year Book of International Law* 173, at 193/200; M. Ruud, *The Term Combatant: an Analysis*, (1985) XXIV (3-4) *Revue de Droit Pénal Militaire et de Droit de la Guerre* 427, 435; Ipsen, at note 27, at 94, para. 317.

³¹ Ruud, at note 30, at 252-253; Ipsen, at note 27, at 80; Sandoz, at note 27, para. 1722: "Thus only a member of the armed forces captured in the act can be deprived of his status as a combatant and of his right to be a prisoner of war. For paragraph 4 to be applicable, it is necessary that the violation was committed at the time of capture or directly before capture. The link in time between violation and capture must be so close as to permit those making the capture to take note of it themselves."

See A. Bouvier/M. Sassoli, *How does Law Protect in War?* (Geneva: 1999), at 122. Thus, the first two requirements of Article 4(A)2 III GC are implicit in the definition of combatant under Article 44 AP I, no matter whether the combatants are "regular" or "irregular".

³² Articles 44 (3) and 44(4) of AP I.

³³ This scheme has been drafted on the basis of notes taken during the lecture of Maj. R. Calame at the ICRC course on international humanitarian law, Warsaw, 4.7.2001.

	Article 4 III GC	Article 43/44 AP I
Regular armed forces	They retain POW status at all times. ³⁴	They forfeit their POW status if they fail to distinguish themselves while engaged in an attack, but are nevertheless to be treated like POWs. ³⁵
Irregular armed forces	Unless they meet the four criteria of Article 4(A)(2), they cannot get POW status. ³⁶	Unless they meet the criteria of Articles 43 and 44(3) AP I, they cannot get POW status.

The conclusion, therefore, is that with regard to regular army members, the criteria set in Article 4 III GC are merely declaratory of combatant status, whereas with regard to irregular armed forces, they are constitutive. On the other hand, under Article 44 AP I, the criteria are constitutive.³⁷ Thus, AP I has mainly changed the position of regular army members.

Another major issue is whether the conditions set by Art. 4(A)2 III GC are collective or individual. According to Bar-Yaacov, they are all collective, even though it suffices that the group's majority fulfilled them.³⁸ In Meron's view, instead, only the requirements of belonging to a Party to a conflict³⁹ and to abide by the laws of

³⁴ Sandoz, at note 27, para. 1690: "Under the terms of Article 85 of the Third Convention, prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of that Convention. This means that violation by a combatant of the rules of international law applicable in armed conflict, does not deprive such a combatant of his right to be treated as a prisoner of war."; Knut Ipsen, at note 27, at 80, para. 311. Of different opinion, is Prof. Yoram Dinstein, according to whom 'regular forces are not absolved from meeting the cumulative conditions binding irregular forces. There is simply a presumption that regular forces would naturally meet those conditions.' Yoram Dinstein, *Unlawful Combatancy*, (2002) 32 *Israel Yearbook of Human Rights* 247, 258, on file with the author. The wording of the III GC, however, does not suggest that regular combatants must prove the respect of these criteria in each case. Otherwise, a big number of regular members of the armed forces who do not abide by IHL would lose combatant status and have to be treated as common criminals, rather than as war criminals.

³⁵ Buss, at note 27, at 238; Sandoz, at note 27, para. 1717 et seq., 1719: "such a prisoner can be made subject to the provisions of the ordinary penal code of the Party to the conflict which has captured him. At least, this was the view of the majority of the delegations."; Edward K. Kwaka, *The International Law of Armed Conflict: Personal and Material Fields of Application*, (Dordrecht: 1992), at 105: this means that the prisoners have to be given protection equivalent in all respects to those accorded to POWs.

³⁶ Sandoz, *ibid.*, para. 1689: "However, under the Hague Regulations, this did not apply to members of militias and volunteer corps, unless they gave evidence in the field that they did indeed fulfil the conditions listed in Article 1 of the Regulations. Thus they had to prove that they acted in accordance with the laws and customs of war in their operations. Article 4(A)2 of the Third Convention does not seem to have modified this situation with regard to members of resistance movements."

³⁷ Sandoz, *ibid.*, para. 1688: "armed forces as such must submit to the rules of international law applicable in armed conflict, this being a constitutive condition for the recognition of such forces, within the meaning of Article 43 (Armed forces)."

³⁸ Nissim Bar-Yaacov, *Some Aspects of the POW Status According to the Geneva Protocol I of 1977*, (1985) 20 *Israel Law Review* 243, at 251.

war⁴⁰ are collective,⁴¹ whereas the principle of openness⁴² applies individually.⁴³ He further distinguishes between an individual who violates this principle out of his own initiative or to follow a group's policy. In this latter event, the whole group, including the individual, will forfeit its right to POW (and combatant) status. Another position is held by Draper, instead, holding that the requirements of belonging to a party and be commanded by a person responsible are collective. The principle of openness and the respect of IHL rules, instead, must be met by the majority of the group.⁴⁴ However, if a member of a group, whose majority fulfils these last two conditions, does not meet these requirements, he will not lose his POW status, but will be liable for breach of the Conventions.⁴⁵ Of different view is Levie,⁴⁶ holding that in this case he will not be granted POW status.⁴⁷ Thus, the doctrine is divided.⁴⁸

Under Article 43 AP I, members of a group other than a regular army must at least belong to a Party to the conflict and be subject to an internal disciplinary system guaranteeing the respect of IHL, in order to be considered as a regular armed force. However, Article 44(2) AP I requires that also the movement's members comply with IHL. If not, they will not be generally deprived from combatant status, but if the violation is a breach of the principles of distinction (with the exception of special circumstances) or openness, they will forfeit POW/combatant status. This suggests that the respect of the laws of war is both a collective and individual requirement. When a whole group abides by IHL, only the individual who does not will forfeit his POW status. On the contrary, when the individual abides by IHL but the whole group does not, then also the individual will forfeit his

³⁹ Article 4A2(a).

⁴⁰ Article 4A2(d).

⁴¹ T. Meron, Arab Terrorists Claims to POW Status, in: Shlomo Shoham (ed.), *Of Law and Man* (Tel Aviv: 1970), at 24, citing Bindschedler: "Naturally this is an obligation incumbent on all belligerents, both for resistance organisations or guerrilla groups it has a constitutive effect. Indeed, it is only if the given movement or group in its entirety complies as a general rule with the laws and customs of war that its members may claim that these laws are applicable to themselves."

⁴² Article 4A2(b)(c): having a fixed distinctive sign and carrying arms openly.

⁴³ Meron, at note 41, at 23.

⁴⁴ Draper, at note 30, 196.

⁴⁵ Draper, *ibid.*, 198: "If the group's members, as a majority, always meet the legal conditions, the individual will answer only for his own misdoings, and then, as a prisoner of war who had the right to participate in the combat."

⁴⁶ Referred to by Bar Yaacov, at note 38, note 20: "Professor Levie, on the other hand, is of the opinion that the individual member must fulfil each of the four conditions in order to qualify for the status of prisoner of war."

⁴⁷ Meron seems to share this view, at note 41, at 21: "The requirements contained in letters (b) and (c) of Article 4A(2) ... are a reflection of the fundamental principle of openness in guerrilla warfare. The non fulfilment of any of these requirements by an individual member of a resistance movement suffices to deny him prisoner of war status."

⁴⁸ See also Yoram Dinstein, holding that the requirements of having a responsible commander, belonging to a Party to the conflict, being organised and having a fixed distinctive sign are collective criteria, whereas the condition of carrying arms openly and abiding by the laws of war are primarily individual. See Y. Dinstein, *Unlawful Combatancy*, *supra* note 34, at 267-268.

POW status. But the main question is the interpretation of the criteria contained in Articles 4(A)2 III GC and 43/44 AP I.

1.1. Belong to a party to the conflict ⁴⁹

According to the doctrine, there must be a *de facto* link between the resistance movement and “the party to international law which is in a state of war”.⁵⁰ Thus, organised resistance movements are entitled to benefit of the Convention, provided that:

“the general implementing conditions – Common Art. 2 – are fulfilled. Resistance movements must be fighting on behalf of a ‘Party to the conflict’ in the sense of Common Art. 2, otherwise the provisions of Art. 3 relating to non-international armed conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a ‘Party to the conflict’.”⁵¹

In Pictet’s view, this link “may find expression by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organisation is fighting”.⁵² In some authors’ view,⁵³ it can be inferred, for example, from the delivery of equipment and supplies – as it was the case during WWII between the Allies and the partisans – or by the passing of intelligence information, armament and other kinds of support. Others,⁵⁴ instead, hold that the State Party should additionally recognise a link with these movements, by regarding them as subject to its policy and command and accepting responsibility for it.⁵⁵ This link, however, cannot be inferred from silence.⁵⁶ The movement, on the other hand, must be ready to yield to the authority of that State.⁵⁷ The owning of the nationality of that State

⁴⁹ The requirement under Article 43 AP I is the same as under Article 4 (A)(2) III GC. See Sandoz, at note 27, at para. 1662: “If a resistance movement cannot be considered as a Party to the conflict within the meaning of the Protocol, it must belong to a Party to the conflict, within the meaning of Article 4A(2) of the Third Convention.”

⁵⁰ Pictet, at note 28, at 57/R. Buss, at note 27, at 208/Meron, at note 41, at 11.

⁵¹ Common Article 3 does not provide for POW status. Pictet, at note 28, at 57.

⁵² Pictet, at note 29, at 57.

⁵³ Ibid.; Buss, at note 27, at 209.

⁵⁴ Draper, at note 30, at 200; Meron, at note 41, cites Meyrowitz, at 11: “This link must exist between the resistance movement and a party to the conflict: that means, on the one hand, that the fact that the members of the resistance organisations have the nationality of a party to the conflict is not enough, and, on the other hand, that the organisations cannot be considered themselves as a party to the conflict. This party is not necessarily the State whose territory is occupied: it can be an allied power of that State ... This indispensable link between the organised resistance movement and a party to the conflict does not have to be formal, but it must be real. If there does not exist a party to the conflict which recognises, as to the belligerent State against which the action of the resistance movement is directed, a link with these organisations, these cannot claim the protection of Article 4A(2).”

⁵⁵ Meron, at note 41, at 13.

⁵⁶ Buss, at note 27, at 210.

⁵⁷ In *Military Prosecutor v Omar Mahmud Kassem*, in reference to the question whether member of the PFLP belonged to a party to a conflict, the Israeli Military Court stated that: “the Convention applies to military forces which, as regards responsibility under international law, belong to a State

party,⁵⁸ or the conducting of a fight against a common enemy, instead, is not a sufficient element.⁵⁹ Another insufficient element is the mere financial support, as was stated by the International Court of Justice (ICJ) in the *Nicaragua* Case.⁶⁰ According to this decision, a state can be held responsible for the activities of a proxy militia only if an "effective control" test is met, requiring that:

- a Party must be in effective control of a military or paramilitary group,
- the control must be exercised with respect to the specific operation in the course of which breaches may have been committed.⁶¹

However, the International Tribunals for the Former Yugoslavia (ICTY) introduced a new "control test" in the *Tadic* Judgement.⁶² According to this, it is not sufficient to prove that the rebel group was dependent, even completely, on the Party to the Conflict, for the necessities of war. It must be shown that the State exercised the potential for control inherent in that relationship of dependency or that the group had otherwise placed itself under the State's control.⁶³ However, like the ICJ, also the ICTY concluded that the establishing, equipping, supplying, maintenance and staffing of a rebel group is not *per se* sufficient for the finding of a *de facto* relationship. Effective control is required.⁶⁴ This decision was the subject of much controversy.⁶⁵ In the *Tadic Appeal* Judgement, the Court reanalysed this issue and observed that since IHL does not provide for a notion of control, this had to be defined in accordance with international rules of state responsibility.⁶⁶ It concluded that a difference must be drawn between private individuals, and individuals forming an organized and hierarchically structured fighting unit.⁶⁷ In the first case it is necessary to prove that the state had "issued specific instructions concerning the commission of the breach", or that it had "publicly given retroactive approval to the action of that individual".⁶⁸ With regard to organised groups, instead, which are already subject to the authority of a leader, it is sufficient to prove that the state exercised "overall control", requiring proof that:

engaged in armed conflict with another State, but it excludes those forces – even regular armed units – which do not yield to the authority of the State and its organs of Government". Cited by Meron, at note 41, at 18.

⁵⁸ Buss, at note 27, at 208-209; Meron, at note 41, at 11.

⁵⁹ Buss, at note 27, at 208-209.

⁶⁰ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v U.S.*) (Merits), 1986 I.C.J. Reports, para. 115.

⁶¹ *Prosecutor v Tadic, AC*, Judgement of 15.7.1999, Case No. IT-94-1, para. 100.

⁶² *Ibid.*, para. 588.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, para. 595.

⁶⁵ See *Prosecutor v Delalic, Mucic, Delic and Landzo (Celebici)*, TC, Judgement of 16.11.1998, Case No. IT-96-21-T, para. 209 et seq.; *Prosecutor v Aleksovski*, TC, 25.6.1999, Case No. IT-95-14/1, paras. 11 et seq. For a detailed analysis, see C. Byron, *Armed Conflicts: International or Non-International?*, (2001) 6(1) *Journal of Conflict and Security Law* 63, at 71 et seq.

⁶⁶ *Prosecutor v Tadic, AC*, 15 July 1999, Case No. IT-94-1, paras. 98, 105.

⁶⁷ *Ibid.*, paras. 118-121, 137. For details, see Byron, at note 65, at 74.

⁶⁸ *Prosecutor v Tadic, AC*, 15 July 1999, Case No. IT-94-1, para. 118.

“the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity”.⁶⁹

So what is required is:

“overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.”⁷⁰

This test was reconfirmed in other decisions of the ICTY⁷¹ and is the one currently applied to classify a conflict and determine whether a group “belongs to a Party to the Conflict”.⁷²

1.2. Commanded by a person responsible

Resistance movement should be commanded by a person responsible for action taken on his orders and actions that he could not prevent.⁷³ The leader can either be a civilian or a member of the military,⁷⁴ either imposed from above or elected from below.⁷⁵ What matters is whether he can ensure internal discipline and the respect of IHL.⁷⁶

1.3. Having a fixed distinctive sign

This condition was introduced for the case of partisans who did not have a uniform and who had to somehow distinguish themselves from civilians.⁷⁷ This sign must be visible at arms distance.⁷⁸ It must be used only by that organisation and

⁶⁹ Ibid., paras. 120, 131.

⁷⁰ Ibid., para. 145. For details, see para. 137.

⁷¹ *Prosecutor v Blaskic*, TC, 3.3.2000, Case No. IT-95-14, para. 75; *Prosecutor v Aleksovski*, AC, 24 March 2000, Case No. IT-95-14/1-A, para. 134; *Prosecutor v Delalic, Mucic, Delic and Landzo (Celebici)*, AC, 20.2.2001, Case No. IT-96-21-A, para. 26; *Prosecutor v Kordic and Cerkez*, TC, 26.2.2001, Case No. IT-95-14/2-T, para. 111.

⁷² For the granting of combatant status, it is not necessary that the group belongs to a Party recognised by the adverse Party, Article 4(A)(3) III GC; Pictet, at note 28, at 63.

⁷³ Pictet, *ibid.*, at 59.

⁷⁴ Ibid.; Draper, at note 30, 201.

⁷⁵ Ibid.

⁷⁶ See R. Arnold, *Command Responsibility: a Case Study of Alleged Violations of the Laws of War at Kham Detention Centre*, (2002) 7 (2) *Journal of Conflict and Security Law* 191, 202.

⁷⁷ Pictet, at note 28, at 59.

⁷⁸ Draper, at note 30, 202: “The individual must be so marked, and permanently, that he is distinguishable from an ordinary peaceful civilian at a distance at which weapons can be brought to bear by and upon such individuals.” In this respect, the British Army Manual of 1912 states – in Article 25– that in order to assume a sufficient distance “... the silhouette of an irregular combatant in the position of standing against the skyline should be at once distinguishable from the outline of a peaceful inhabitant, and this by the naked eye of ordinary individuals, at a distance at which the form of

has to be the same for all its members.⁷⁹ Camouflage is not impeded,⁸⁰ unless it leads to confusion with civilians. The aim is to guarantee fair combat.⁸¹ This principle was confirmed by the Israeli Military Court in *Military Prosecutor v Kassem*, which ruled that as long as the wearing of a uniform/clothing permits to distinguish combatants from civilians, the requirement set by Art. 4A2 is met.⁸² The drafters, however, failed to specify the nature, size and manner in which the sign should be worn.⁸³

1.4. Carrying arms openly

To carry arms “openly” does not mean that these have to be worn “visibly” or “ostensibly”. It is only required that the enemy must be able to recognise:

“partisans as combatants in the same way as members or regular armed forces, whatever their weapons. Thus a civilian could not enter a military post on a false pretext and then open fire, having taken unfair advantage of his adversaries.”⁸⁴

Irregular fighters should carry arms in the same way military units normally do.⁸⁵ According to the British Army Manual of Military Law,⁸⁶ irregular combatants may:

“be refused the rights of the armed forces if it is found that their sole arm is a pistol, hand grenade, or dagger concealed about the person ... or if it is found that they have hidden their arms on the approach of the enemy.”

Since this is an individual requirement,⁸⁷ it will have to be proven in each case.

1.5. Respecting the laws and customs of war

This is the “hurdle” provision. As seen, this requirement is discriminatory,⁸⁸ since it only applies to members of a resistance movement, under the III GC. Also under the AP I, the members of a regular armed force may only forfeit their right

an individual can be determined” (ref. in W.J. Ford, *Resistance Movements and International Law*, [1967] 79 IRRC 515, 524)

⁷⁹ Pictet, at note 28, at 60.

⁸⁰ Draper, at note 30, at 202.

⁸¹ Meron, at note 41, at 20.

⁸² Case referred to in Bouvier/Sassoli, at note 31, 806 et seq. The court stated that: “Under the conditions of present-day warfare, this [of Article 4A2] requirement was conceivably fulfilled if, by the uniform and other equipment, the accused could be clearly discerned as not being civilians but combatants. Since the accused were captured wearing special green clothes and caps, this condition was fulfilled.”

⁸³ Pictet, at note 28, at 60.

⁸⁴ Pictet, *ibid.*, at 61.

⁸⁵ Draper, at note 30, at 202.

⁸⁶ Referred to by Meron, at note 41, at 20.

⁸⁷ Meron, *ibid.*, at 23.

⁸⁸ As seen, for members of the armed forces it’s merely a declaratory element of combatant status, whereas for members of a resistance movement it is constitutive. See Meron, at note 41, at 24, citing Bindschedler/Draper.

to POW status for failure to comply with the principles of distinction and openness, not for breaches of IHL. With regard to the question whether this criterion is collective or individual, it seems that the requirement of respecting the laws of war pertains to the group as a whole.⁸⁹

2. Unlawful Combatants – a Legal Status?

Under IHL, someone is either a combatant, generally having the right to POW treatment in case of capture, or a civilian to be subject to common criminal proceedings, but protected by the IV GC. This is confirmed by Article 4 III GC, holding that only a person who is not already subject to the I, II or III Geneva Convention, can invoke the protection of the IV GC and Article 50 AP I. The only category of persons *not* covered by IHL is that of civilians who are:

- nationals of a State which is not bound by the Convention;
- nationals of a neutral State who find themselves in the territory of a belligerent State, and who has normal diplomatic representation in the State in whose hands they are;
- nationals of a co-belligerent State, that has normal diplomatic representation in the State in whose hands they are.⁹⁰

Otherwise, every person involved in a conflict must be granted a status under IHL.⁹¹

A possibility for derogation from the privileges of civilian status is provided by Article 5 IV GC. However, this is foreseen only for persons suspected of or engaged in activities hostile to the security of the State. In any case, though, this measure can be sanctioned only after the granting of a legal status, not *a priori*. This means that in each individual case, the protected person must first be qualified as either a POW or a civilian. Only at a later stage can it be decided whether he or she should be tried according to the laws of war or domestic criminal legislation. In this latter case, though, detention, requires a specific charge. POWs, instead, can be retained until the end of the hostilities without any particular procedure and reason.⁹² This difference is due to the fact that POWs are not criminals. Their detention has merely a preventive purpose, i.e. to impede them to rejoin their army.⁹³ Thus, someone is either a combatant having right to POW status, or a civilian protected by the IV GC,⁹⁴ to be tried in conformity with domestic criminal proce-

⁸⁹ Meron, at note 41, at 24 (the entirety of the group must fulfil this condition).

⁹⁰ Article 4 IV GC. See Pictet, at note 29, at 48.

⁹¹ Pictet, *ibid.*, at 51; Sandoz, 27, at para. 1678.

⁹² Bouvier/Sassoli, at note 31, at 125.

⁹³ Bouvier/Sassoli, *ibid.*, at 128.

⁹⁴ The only exception is provided for the *levée en masse*, in which case civilians are authorised to take up arms to face occupation. See Ipsen, at note 27, at 79, para. 309; Buss, at note 27, at 233; Pictet, at note 28, at 48. For the view that there is no middle category, see Pictet, at note 29, at 50: "But if ... prisoner of war status ... were denied to them, they would become protected under the present convention If members of a resistance movement who have fallen into enemy hands do

dures, in particular those related to detention without a specific charge.⁹⁵ In relation to the Guantanamo Bay detainees, however, the US have introduced a third category of so-called "unlawful combatants". This applies to irregulars involved in combat who have been in breach of IHL. The argument is that since they have been involved in combat, they do not qualify as civilians protected by the IV GC. At the same time, however, since they have been in breach of IHL, they cannot enjoy the rights of POW status. According to the US opinion, this position is justified under customary law. The argument is that the clear distinction between civilians and combatants is only provided in Article 50 AP I, which, however, is not applicable to the US, who are not a party to it. In the author's opinion, however, unlawful combatants are simply irregular combatants who have not met the criteria set by Article 4(A)2 of the III GC. Thus they are to be considered as civilians who have unlawfully taken up arms and who, for such acts, are to be treated under the domestic penal provisions. In the case of the US, however, the problem is that under domestic law, a suspect held without any specific charge must be released within 48 hours. Because the US government has no proof against the Guantanamo detainees, in particular the Al-Qaida members, the only "legal" basis for holding them in custody is by claiming that they are like POWs, who should be detained until the end of the hostilities. But this problem should be resolved by implementing appropriate domestic criminal law provisions, not by interpreting IHL *contra legem*. In any event, Article 5(2) III GC clearly provides that in case of doubt, the rights of the III GC should be granted until a competent tribunal has determined the status of the prisoners. Similar wording is contained in Article 45(1) AP I.⁹⁶

not fulfil those conditions [of Article 4A2 of the III Convention], they must be considered to be protected persons within the meaning of the present Convention. That does not mean that they cannot be punished for their acts, but the trial and sentence must take place in accordance with the provisions of Art. 64 and the Articles which follow it." Draper, at note 30, at 197, 200; Meron, at note 41, at 4; Ford, at note 77, 515, at 527. A different opinion is held by Dinstein, according to whom there is a third category of "unlawful combatants", which neither fits the category of regular combatants nor of civilians. This position seems to have been followed by the US government in relation to the Guantanamo Bay detainees. See Y. Dinstein, *The Distinction between Unlawful Combatants and War Criminals*, in: Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtei Rosenne* (Dordrecht: 1989), at 105.

⁹⁵ See Article 50 AP I; Ipsen, at note 27, at 92, para. 315(7); *Military Prosecutor v Kassem and Others*, Israel, Military Court sitting in Ramallah, April 13, 1969, in: Sassoli/Bouvier, at note 31, at 806 et seq.

⁹⁶ See on this issue Meron, at note 41, at 24, citing Bindschedler/Draper, at note 30, 204; Bar Yaacov, at note 38, at 253.

3. Spies

According to Article 29 of the 1907 Hague Regulations (HagReg):

“A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy’s army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.”

Article 30 of the HagReg further provides that a spy taken in the act shall not be punished without previous trial. However, an exception is granted by Article 31 HagReg, stating that a spy who has rejoined his armed forces before capture, shall be treated as a POW and shall incur no responsibility for his previous acts of espionage.

On the other hand, Article 46 (2) AP I states that :

“any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.”

However, a soldier sent by his own armed forces to gather information of military value shall not be considered as a spy if he was wearing the uniform of his armed forces. Another interesting provision regards residents of a territory occupied by an adverse Party who try to gather information on behalf of their own forces. In this case, Article 46(3) AP I provides that the soldier:

“shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.”

A final provision recalling Article 31 of the 1907 Hague Regulations is instead contained in Article 46 (4) API, ruling that:

“A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.”

4. The Specific Case of the Free Iraqi Forces

Neither the US nor Iraq are parties to the 1977 Additional Protocols (APs). Therefore, the discussion will focus on the provisions contained in the four 1949 Geneva Conventions (GCs), which are binding as conventional and customary law. Their applicability under common Article 2 is not going to be discussed, since the

US has openly declared war against Iraq.⁹⁷ Moreover, the presence of the US troops could qualify as occupation under the same provision.

The Free Iraqi Forces have been recruited on the basis of the Iraq Liberation Act of 1998, which provided for material and financial support, including defence articles, services, education and training, to seven groups authorized under the Iraq Liberation Act, namely the Iraqi National Congress, Iraqi National Accord, Kurdistan Democratic Party, Patriotic Union of Kurdistan, Supreme Council for the Islamic Revolution in Iraq, Islamic Movement of Iraqi Kurdistan, Constitutional Monarchists.⁹⁸ Section 4 on the "assistance to support a transition to democracy in Iraq" provides that:

"The President may provide the Iraqi democratic opposition organizations designated in accordance with Section 5 the following assistance:

1) Broadcasting Assistance

A) Grant assistance to such organizations for radio and television broadcasting by such organizations to Iraq.

B) There is authorized to be appropriated to the United States Information Agency \$ 2,000,000 for fiscal year 1999 to carry out this paragraph.

2) Military Assistance

A) The President is authorized to direct the drawdown of defense articles from the stocks of the Department of Defense, defense services of the Department of Defense, and military education and training for such organizations.

B) The aggregate value (as defined in section 644(m)) of the Foreign Assistance Act of 1961 to provide humanitarian assistance to individuals living in areas of Iraq controlled by organizations designated in accordance with section 5, with emphasis on addressing the needs of individuals who have fled such areas from areas under the control of the Saddam Hussein regime.

3) Restriction of Assistance – No assistance under this section shall be provided to any group within an organization designated in accordance with section 5 which group is, at the time the assistance is to be provided, engaged in military cooperation with the Saddam Hussein regime.

The question, therefore, is whether the FIF is a volunteer corps forming part of the US armed forces under paragraph (A)(1) of Article 4 III GC, or whether it constitutes a volunteer corps which may only "belong" to the US under paragraph (A)(2) of the same provision. This difference is important, since only in the second case, the fulfilment of the four criteria set forth in Article 4(A)(2) is constitutive of combatant – and therefore – of POW status. In the first case it is sufficient to belong to the members of the armed forces, independently from whether someone

⁹⁷ Pres. G.W. Bush, State of the Union Speech, Office of the Press Secretary, White House, 28th January 2003, at <<http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>>; Paul McInnes, World Leaders Decry US Attack, The Guardian, 20th March 2003, at <<http://www.guardian.co.uk/Print/0,3858,4629276,00.html>>.

⁹⁸ US Dept. Of State, Summary of US Assistance to the Iraqi Opposition since 1996, 1st February 2002, at <<http://usinfo.state.gov/regional/nea/iraq/text/0201iraqi.htm>>. This Act was signed into law by Bill Clinton on 31st October 1998. Full text available at <<http://news.findlaw.com/hdocs/docs/iraq/libact103198.pdf>>.

has combating or civilian support tasks. In fact, the armed forces are usually formed by combatants and non-combatants. Non-combatants members of the armed forces are those who are not entrusted with the task and right to fight.⁹⁹ These may be, for example, members of the military administration, or religious and medical personnel accompanying the armed forces. Although these members of the armed forces are civilians, in a technical sense, in case of capture they have the right to be treated like prisoners of war (Article 3 of the 1907 Hague Regulations).¹⁰⁰

4.1. Members of the US regular armed forces?

On one hand, the FIF could be subsumed to the notion of “volunteer corps” contained in Article 4 paragraph (A)(1) of the III GC. In fact, according to the Commentary, the expression was left with regard to certain countries that own militias and volunteer corps which, although part of the armed forces, are quite distinct from the army as such.¹⁰¹ This means that in case of capture by the Iraqis, these should be regarded as members of the US forces and, as such, be granted POW status, under IHL. A problem that may arise, though, is whether they would be considered as having fallen in the hands of the “enemy”. Since most members of the FIF are Iraqi nationals, this aspect may cause a problem. However, in *Ex parte Quirin et al.*,¹⁰² the US Supreme Court Case stated that:

⁹⁹ Ipsen, at note 27, at 66, para. 301.

¹⁰⁰ See Ipsen, *ibid.*, para. 312. Ipsen argues that following the drafting of Article 43 AP I, this distinction between combatants and non-combatants within the armed forces is no longer necessary and that Article 3 of the Hague Regulations is no longer useful. However, neither the US nor Iraq have become parties to AP I. Similarly, Prof. Frits Kalshoven argues that “in my understanding, a member of the military administration may be a full member of the armed forces, with right to fight if need be, and thus fall under art. 4A1 of GCIII (which for all practical purposes has taken the place of art. 3 HR). A civilian working in the armed forces administration, in circumstances exposing him/her to capture by the enemy, falls under art. 4A4 and thus is equally entitled to POW status. In one word: ‘being treated like’ is no longer part of the law.” Opinion expressed in an e-mail sent to the author on 14th July 2003 (on file with the author). However, in the author’s opinion, the 1907 Hague Conventions were simply completed, not replaced, by the 1949 Geneva Conventions. As observed by Jean Pictet, *supra*, note 28, at 49, Article 4 “was discussed at great length during the 1949 Diplomatic Conference and there was unanimous agreement that the categories of persons to whom the Convention is applicable must be defined, in harmony with the Hague Regulations”. And then, at 51: “At the Conference of Government Experts, the question arose as to the advisability of giving a more exact definition of armed forces by stating as in the Hague Regulations that the term covers both combatants and non-combatants. It was finally considered that this fact was usually implicit in any. Even if it may be argued that pursuant to the Art. 4 III GC, all captured members of the armed forces may be POWs, the III GC still seems to retain the distinction between combatant and non-combatant members. Thus, ultimately, from a legal point of view, non combatant members of the armed forces only have an analogous right to POW status to that of combatant members, so that the reasoning that they are to be treated like POWs is still legitimate. However, this difference is only legal-technical, with no correspondence in the practical treatment of the detainees.”

¹⁰¹ Pictet, at note 28, at 52.

¹⁰² US Supreme Court, 317 US 1 (1942), also available in Bouvier/Sassoli, at note 31, *supra*, at 691.

"Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."

Thus, it seems that under international humanitarian law the notion of "enemy" is not related to that of nationality. Following this position, also an Iraqi national who fights on behalf of the US armed forces would constitute an enemy.

The same conclusion is supported by the decision of the U.S. 4th Circuit Court of Appeals (CoA) in *Hamdi v Rumsfeld*.¹⁰³ Hamdi, a US citizen, was arrested by the US military as an 'enemy combatant' during the hostilities that arose in Afghanistan following the US armed response to the 11th September terrorist attacks. Initially detained in Afghanistan and then Guantanamo Bay, Hamdi was transferred to the Norfolk Naval Station Brig after it was discovered that he may not have renounced his American citizenship. The classification as 'enemy combatant' was determined by the U.S. executive branch and confirmed in an affidavit by the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, holding that:

'the military determined that Hamdi "traveled to Afghanistan in approximately July or August of 2001" and proceeded to "affiliate [] with a Taliban military unit and receive [] weapons training." While serving with the Taliban in the wake of September 11, he was captured when his Taliban unit surrendered to Northern Alliance forces with which it had been engaged in battle. He was in possession of an AK-47 rifle at the time of surrender. Hamdi was then transported with his unit from Konduz, Afghanistan to the Northern Alliance prison in Mazar-e-Sharif, Afghanistan and, after a prison uprising there, to a prison at Sheberghan, Afghanistan. Hamdi was next transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, interviews with Hamdi confirmed the details of his capture and his status as an enemy combatant.'¹⁰⁴

The American citizenship had entitled Hamdi to file a petition for a writ of habeas corpus in a civilian court to challenge his detention, including the military's determination that he is an "enemy combatant" subject to detention during the ongoing hostilities. The Court concluded that:

'Hamdi and the amici [curiae] make much of the distinction between lawful and unlawful combatants, noting correctly that lawful combatants are not subject to punishment for their participation in a conflict. But for the purposes of this case, it is a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case. It is true that unlawful combatants are entitled to a proceeding before a military tribunal before they may be punished for the acts which render their belligerency unlawful. *Quirin*, 317 U.S. at 31. But they are also subject to mere detention in precisely the same way that lawful prisoners of war are. *Id.* The fact that Hamdi might be an unlawful combatant in no way means that the executive is required to inflict every con-

¹⁰³ *Hamdi v Rumsfeld*, U.S. 4th Circuit Court of Appeals, 8th January 2003.

¹⁰⁴ *Ibid.*, para. I.

sequence of that status on him. The Geneva Convention certainly does not require such treatment.¹⁰⁵

Hamdi's contention was that:

'although international law and the laws of this country might generally allow for the detention of an individual captured on the battlefield, these laws must vary in his case because he is an American citizen now detained on American soil. As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime.'¹⁰⁶

But the US 4th Circuit CoA responded that:

'as we have previously pointed out, Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war. Hamdi's citizenship rightfully entitles him to file this petition to challenge his detention, but the fact that he is a citizen does not affect the legality of his detention as an enemy combatant.'¹⁰⁷

It further held that:

The *Quirin* principle applies here. One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such.¹⁰⁸

Thus, also this case, like *Ex parte Quirin*,¹⁰⁹ proves that the notion of 'enemy' is not related to that of nationality.

A different view in this regard, however, is held by Prof. Dinstein, according to whom a criterion for combatant – and thus POW – status is that the detainee neither had the nationality nor owed a duty of allegiance to the Detaining Power.¹¹⁰ Prof. Dinstein observes that although this requirement is not specifically mentioned in the Geneva Conventions, it is derived from case law, in particular the *Koi* case.¹¹¹ The case revolved around the status of several Indonesian para-

¹⁰⁵ Ibid., para. III, A.

¹⁰⁶ Ibid., para. V, B,2.

¹⁰⁷ Ibid., para. V, B,2.

¹⁰⁸ Ibid., para. V, B,2.

¹⁰⁹ Prof. Kalshoven, supra, note 100, observes that although he has nothing contrary to the conclusion that the notion of enemy is not related to that of nationality. "I do not believe that *Quirin* has anything to do with it. At that point in its argument, the Court was not arguing in terms of, or thinking of, IHL: instead, both give its habitual frame of mind and taking into account the case at issue, it placed the finding of 'enemy belligerence' in the framework of the U.S. Constitution and the interpretation of its powers under habeas corpus law. (As we might say: the question was whether these persons could have access to the U.S. federal court system in a common-law human rights matter; answer: no: these people are enemies in the hands of the President; the same stance as copied many years later in by the Appeals Court in *Hamdi*.)" It is true that *Quirin* and *Hamdi* were not primarily focused on IHL. However, particularly in *Hamdi*, the qualification of the appellant as an "enemy combatant" was determinative to justify a detention without specific charge until the end of the hostilities, under IHL. Thus, indirectly, the conclusion in both cases that also a US citizen may be detained and treated for violations of the laws of war as an enemy combatant, pursuant to IHL, implies that he may have to enjoy also the rights granted by IHL to "enemy combatants", specifically POW status.

¹¹⁰ Dinstein, at note 34, at 263.

troopers, including some of Malay origin, who had landed and been captured by the Malaysian authorities. The Privy Council held that nationals of the Detaining power, including other persons owing it a duty of allegiance, are not entitled to POW status.¹¹² As reported by Prof. D i n s t e i n, although this condition does not appear in Article 4(A) III GC, other provisions of the III GC – namely Articles 87 and 100 – clearly state that prisoners of war are not nationals of the Detaining Power and do not owe to it any duty of allegiance.¹¹³ It may be argued that, *e contrario*, this means that a prisoner of war cannot be someone holding the same nationality or owing allegiance to the Detaining Power. However, Article 87 III GC simply states that in the case of prosecution of a POW, when fixing the penalties, the authorities should:

'take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.'

The *ratio legis* of this clause was to permit to mitigate the guilt of those prisoners who had violated the laws of the Detaining Power in the belief that they were entitled to do so, in that they owed no allegiance to this.¹¹⁴ For similar reasons, Article 101 III GC provides that the death sentence cannot be pronounced on a POW unless the court has taken into consideration the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance. These two provisions, simply indicate that where nationality and duty of allegiance may play an important role as a mitigating factor for the violation of the laws of the Detaining Power, these should be taken into consideration in fixing the sentence – particularly for offences punishable with the death penalty. However, to conclude that every prisoner of war must necessarily be someone owing a nationality different from that of the Detaining Power would lead to several problems, particularly in relation to members of the armed forces owning a double nationality. Thus, in conclusion, the author is of the view that as long as an individual decides to enrol with the armed forces of a specific country, in case of capture this shall be considered as an 'enemy combatant' pursuant to IHL and, thus, entitled to POW status in case of capture, pursuant to IHL. A different issue is whether he may additionally be tried for treason.

This holds true also for the Iraqi members of the FIF who, moreover, have been wearing a US issued uniform. In this regard the Commentary observes that:

"The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily

¹¹¹ *Public Prosecutor v Koi et al*, (1967), [1968] A.C. 829, partially reported also in Bouvier/Sassoli, note 31, at 764.

¹¹² *Public Prosecutor v Koi et al*, (1967), [1968] A.C. 829, paras. 856-858.

¹¹³ Dinstein, at note 34, at 264, analysing *Public Prosecutor v Koi et al*, (1967), [1968] A.C. 829, paras. 857.

¹¹⁴ Pictet, at note 28, at 430.

distinguishable from members of the enemy armed forces or from civilians. The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt. If need be, any person to whom the provisions of Article 4 are applicable can prove his status by presenting the identity card provided for in Article 17.¹¹⁵

The FIF have clearly been granted a US issued uniform, apparently distinct from the one assigned to the US servicemen, and they have additionally been given a square FIF insignia. Therefore, under IHL, the situation is quite clear: the Iraqi volunteers may constitute combatants having the right to POW treatment in case of capture by Iraqi governmental forces. The same conclusion applies to members of the armed forces who have merely civilian functions and who, therefore, do not constitute combatants *stricto sensu*. According to Article 3 of the Regulations annexed to the IV Hague Convention of 1907, they have to be granted POW status, too.

As mentioned, however, problems may arise under Iraqi domestic law. The Iraqi nationals may face consequences for treason, for example. With regard to those with double nationality, similar problems arise, in that while in the US they amount to US nationals, whereas while in Iraq, they amount to Iraqi nationals.

4.2. Members of an irregular group “belonging to the US”?

In alternative to Article 4(A)(1) of the III GC, the FIF may fall under the second paragraph of the same provision. As previously seen, unlike for members of the regular armed forces of a state, the requirements set forth therein are constitutive of combatant status. An irregular who does not meet the four criteria will not be granted POW status and may face domestic criminal prosecution as a civilian for unlawful participation in combat.

With regard to the first requirement, i.e. that of belonging to a Party to the conflict, the link between the FIF and the US armed forces cannot be established by the mere fact that they are fighting against a common enemy.¹¹⁶ However, its existence is supported by a legal document, namely the 1998 Iraq Liberation Act. According to Section 4 of the Act, the US provides military and financial support to the Iraqi opposition groups, a fact confirmed by the use of Tazsar air base in Hungary for the training of these troops. This conclusion is moreover supported by the application of the “overall control test” established in *Tadic*.¹¹⁷ The US meet the test factually by having an “overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations” of FIF.¹¹⁸ Moreover the FIF has been set under the

¹¹⁵ Pictet, at note 28, at 52.

¹¹⁶ Buss, at note 27, at 208-209.

¹¹⁷ *Prosecutor v Tadic*, TC, Judgement of 7.5.1997, Case No. IT-94-1-T, para. 588.

¹¹⁸ Pictet, at note 29, at 57; Buss, at note 27, at 209.

command of US superiors. This means further that, in case of violation of IHL rules by FIF, the US commanders would be individually responsible for them.¹¹⁹

With regard to the other criteria, these do not raise too many difficulties. As mentioned, they were commanded by persons responsible, such as, for example, General Tommy Franks¹²⁰ or General John Kern.¹²¹ They were wearing a fixed distinctive sign, namely the FIF insignia. They were carrying arms openly, namely side arms,¹²² and they were trained in conducting their operations in the laws and customs of war.¹²³ Moreover, up until now, there have not been any reports of their disregard of the laws and customs of warfare.

With regard to those units, which only had "civilian functions", the same conclusions as above apply, since Article 3 of the Regulations annexed to the IV Hague Convention of 1907 establishes that these have to be granted POW status, too.

4.3. Consequences for wearing an "enemy" uniform under IHL: perfidy, mercenarism, spies?

The wearing of US issued uniforms does not constitute perfidy in the sense of Article 24 of the 1907 Hague Regulations, since this is restricted to acts which invite the confidence of an adversary to induce him to believe that he is entitled or is obliged to protection under the rules of IHL.¹²⁴

Similarly, under IHL, they would not constitute spies. Under IHL, in particular Article 29 (1) of the 1907 Hague Regulations, spies are persons who clandestinely, or under false pretences, i.e. not wearing the uniform of their armed forces, gather information in the territory controlled by the adversary. This case does not apply to the FIF volunteers, as they are in fact wearing uniforms. Moreover, since Iraq is not a Party to AP I, Article 46 does not apply. In the opposite case, an issue is whether the Iraqi members of the FIF could be considered as residents. The aim was in fact to employ the volunteers in their area of origin. However, Article 46 (3) AP I would only apply to members of the Iraqi forces who reside in territories occupied by the US and who have been caught while spying against the US. In the present case study, instead, the alleged "residents", i.e. the FIF members, were spying on behalf of the opposite side. At best they would fall under paragraph (4). In this case, though, they would only lose their POW status and face the risk of trial for espionage under IHL, if they were caught before having rejoined their armed forces. Therefore, if AP I applied, there may be the risk that FIF members engaged in gathering information in Iraq and caught while acting so may face trial for espio-

¹¹⁹ *Prosecutor v Tadic*, AC, 15 July 1999, Case No. IT-94-1, para. 145. For details, see para. 137.

¹²⁰ Wilkinson, at note 12; Gilmore, at note 6; Landay, at note 12.

¹²¹ Gilmore, at note 6 <<http://www.af.mil/news/opscenter/Apr2003/41003854.shtml>>.

¹²² Barno, at note 10.

¹²³ Garamone, at note 25; Barno, at note 10.

¹²⁴ Bouvier/Sassoli, at note 31, at 180.

nage under IHL. This outcome, however, would only apply if, while doing so, they had not been wearing the US issued uniforms, according to Article 46(2) AP I.

To conclude, the FIF members are not mercenaries, either, since this status requires acting for private gain.¹²⁵ The FIF volunteers, instead, have joined the US forces with the aim to bring democracy back to Iraq.

This, however, is the situation under IHL. Problems may nevertheless arise under Iraqi domestic law. It is namely possible that the Iraqi nationals of FIF may be tried for treason. This, however, is not a problem of international law.

III. Conclusions

The legal basis for the military and financial assistance of the US to the FIF has been provided by the 1998 Iraq Liberation Act. On this basis, it is legitimate to consider the members of the Free Iraqi Forces as either a voluntary corps forming part of the US armed forces, in the sense of Article 4(A)(1) of the III Geneva Conventions, or, at least, as a voluntary corps belonging to the US in the sense of paragraph (A)(2) of the same provision. This means that in the event of capture by the Iraqi governmental forces, they would be entitled to POW status under Article 4 of the 1949 III GC. The concept of “enemy”, in fact, is not associated with nationality, as indicated in the US Supreme Court Case *Ex parte Quirin* and confirmed by the US 4th Circuit Court of Appeals in *Hamdi v Rumsfeld*.

The fact of wearing a US issued uniform does not constitute perfidy, under Article 24 of the Regulations annexed to the IV Hague Convention of 1907, since this is restricted to acts which invite the confidence of an adversary to induce him to believe that he is entitled or is obliged to protection under the rules of IHL. In the present case, the wearing of the US issued uniform is not treacherous but, on the contrary, reflects the real, *de facto* belonging of the FIF to the US armed forces. The FIF do not fall within the category of mercenaries, either, since this qualification requires a motivation for private gain. Last but not least, the FIF members do not amount to spies under Article 29 (1) of the 1907 Hague Regulations, since this provision applies only to persons who do not wear any uniform. This, however, is the situation under international humanitarian law. A completely different issue, which was beyond the scope of this paper, is the situation under domestic legislation. It is in fact possible that these volunteers may face criminal prosecutions under Iraqi domestic law for treason, in case of capture. In fact, POW status does not impede the custody state to initiate criminal proceedings. However, Article 85 III GC provides that POWs prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

¹²⁵ This is in fact a requirement under Article 47 AP I and Article 1 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, to which, however, neither the US nor Iraq are parties.