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The Right to Resistance in Occupied Territory

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Summary

Resistance movements in occupied territory have been accepted as a concept since WWII. However, the exact characteristics of these movements and which rules apply to them, their rights and duties, have never been really clear. This thesis looks at the development of the concept of organized resistance movements and the efforts to regulate such organizations in international humanitarian law, culminating with the Additional Protocol to the Geneva Conventions, drafted in 1977. The main questions to be answered are whether these rules are adequate and if improvements are needed to protect civilians and combatants in occupied territory.

Preface

This thesis has been a long time in the making, not entirely due to me. A book that should exist, but of which there is no record anywhere, caused a frustrating delay. Thank you to Lena Olsson for helping me! Thank you also to my supervisor, Göran Melander, who gave me the tip of writing about this subject. Mom, Dad, thanks for your patience – not always the easiest – and your support in every way! Annika, Maja – the two best babes in the world! Johan – I love you.

Abbreviations

AJIL	American Journal of International Law
AP	Protocols Additional to the Geneva Conventions of 12 August 1949
BYIL	British Yearbook of International Law
CPA	Coalition Provisional Authority
GC	Geneva Conventions of August 12 1949
GCIH	Geneva Convention Relative to the Treatment of Prisoners of War
GCIV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War
HReg	Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague (IV) Convention
IMT	International Military Tribunal

1 Introduction – the law of occupation

1.1 Purpose

The purpose of this thesis is to clarify the rights and duties of an Occupying Power and of resistance movements within occupied territory. It is important to establish the right that has emerged in the last century of resistance movements to exist and to operate in occupied territory. This is an area that has developed during the last 50 years; before WWII, the rule was that resistance movements had no rights and were treated accordingly. The last half century's violence and wars have shown that resistance movements are not scared off by international rules; instead, they have emerged despite such rules. In such cases, the question should not be how to force resistance movements to comply with outdated rules, but rather how to modify existing rules to accommodate for the situation today.

In my thesis I will take a brief look at the rules of occupation as they have grown since WWII, but my focus will be on the development of rules concerning resistance movements. The two main questions I aim to answer are:

1. Are the rules regarding resistance movements in occupied territory adequate for today's world?
2. Can these rules be improved, to encourage resistance movements and occupying powers to follow them?

1.2 Limitations

At the outset, I find it necessary to state that there are several different forms of resistance, but my focus will be on resistance emerging from or during occupation of a State's territory. In this area, the rules are unclear, or at least less clear than in the case of other forms of resistance. Further, there are several different types of occupation, but I will analyze the situation of belligerent occupation, that is, occupation by a belligerent during and directly after armed conflict.

There are many cases of occupation and resistance that may be brought forward in a treatment such as mine, but for reasons of space and focus, I have chosen to concentrate on just a few. The German occupation of France, the Netherlands, Denmark, and Norway are a good starting point of the development of the rules of resistance.

Another area of occupation and resistance I could look at is Israel/Palestine. However, that situation is extremely complex and involves so many more

questions of international law that it is not practical to look into it for the purpose I have with this thesis.

I will be looking at the Coalition occupation of Iraq during 2003-2004, partly because it is extremely relevant at this time, but very much also to put the spotlight on the problems with today's rules.

The thesis will look only at armed resistance, and thus will not concern civil resistance, such as the right of public officials and judges to abstain from fulfilling their functions for reasons of conscience, or of other civilians refusing to work for the occupying power in any specific form, as laid down in Article 54 GCIV. The right to civil resistance, and the rules regulating it have not been put to question to the same degree as armed resistance, and is not, in my opinion, as controversial a point of humanitarian law as that of armed resistance.

Further I will only be looking at rules of International Humanitarian Law, not into state law (except in the chapter regarding Sweden and the United Kingdom). Certain actions by individuals within a country may be illegal according to national law, whilst still legal or not regulated in International Humanitarian Law

In the chapter relating to the situation in Iraq, I have chosen not to take into consideration developments after 28 June, 2004, when administrative authority was handed over to the Iraqi Interim Government.

1.3 Theory and Methodology

My theory is that the legal protection of resistance fighters has evolved mostly during the last century as an answer to factual occurrences in wars during this period. I believe that the will of rulers was not, in the beginning, to grant resistance fighters this protection, but rather to discourage civilians to take up arms. By introducing a strict definition of combatant and civilian, it was hoped that people would abide by these definitions. However, this was not the case, and civilians banded together in different constellations in different wars to resist the occupier, in blatant defiance of existing rules. Thus, it was necessary to change the rules to reflect the real situation. My theory is that this development is ongoing, depending on the evolution of warfare and the globalization of the world. Resistance to this development is strong among the larger states, but the reality of the situation today will make further legal protection necessary.

As this will to a large extent be a historic look at humanitarian law during the last century, my methodology has very much consisted of literary searches and analyses, both of books and of periodical journals. Many of the writings are dated, but reflect the opinion of the times and show the rationale that dominated the period. I have looked at transcripts from the Nuremberg IMT, and from the meetings held in Geneva in 1949 and in

1974-77. Looking at the factual situation in Iraq during the last year, the Internet has been the best source of updated information. I have tried to find a balance of sources so as to attain as high a level of objectivity as possible.

1.4 Disposition

The first part of the thesis is a quick enumeration of the rights and duties of the Occupying Power, according to the rules in practice today.

The second part of this treatment will concern the historical point of view, concentrating on WWII and its aftermath at the Nuremberg trials. I will then analyze the discussions regarding resistance movements that were held at the Diplomatic Conference in Geneva in 1949, leading to the adoption of the four Geneva Conventions. Looking at the historical developments of the 1960s and 1970s, I will also look at the discussions at the second Diplomatic Conference in Geneva, in 1974-1977, which resulted in the adoption of the two Additional Protocols.

The third part of the thesis regards the theoretical and practical application of the rules on resistance movements today. I will briefly compare the national legislation of two countries, Sweden and the United Kingdom, to see whether these two countries, with different historical outlooks, and different foreign policies today, differ in their application of the relevant rules. Then I will take a brief look at the events in Iraq during the Coalition occupation to see if and how the rules are applied in practice.

2 The development of occupation law

Since my thesis will focus on resistance to occupation, this chapter will only shortly summarize the rights and duties of the Occupying Power. However, I have found it necessary to at least mention these rights and duties to better explain when and how resistance movements emerge, and when the Occupying Power does not fulfil its duties according to existing international law.

Before the 19th century, an occupation generally entailed complete annexation of the occupied territory, i.e. the occupied territory became an integrated part of the state that conquered it. This practice changed over time, and today occupied territory is at all times considered part of its original State, no matter how long the occupation lasts. The Occupying Power must administrate the area whilst there, and ensure that the regular day-to-day life of civilians in the occupied territory may continue as normally as possible.

At the outset, there must be a clear definition as to when a territory is occupied. This is regulated in Article 42 of the Hague Regulations, which states the need for a *de facto* occupation, i.e. that the territory in question must be actually placed under the authority of the hostile army. The occupation does not reach further than the area where the authority of the Occupying Power has been established and where this authority can be exercised.

2.1 Obligations and rights of the Occupying Power

When looking at the rules of occupation, it is important to remember that, since the occupied area still remains part of its original State, the inhabitants of the occupied territory are not bound by any allegiance to the occupying State and may not be forced to swear allegiance.¹ Their allegiance remains with the occupied State, and the occupied territory does not fall under the sovereignty of the Occupying Power, like it used to in past centuries.

This means that the Occupying Power has a twofold obligation. On the one hand, the Occupying Power shall take all the measures in its power to restore, and ensure, as far as possible, public order and safety; and on the

¹ Article 45 HReg.

other hand, in doing so it must respect, unless absolutely prevented, the laws in force in the country.²

The duties of the Occupying Power basically concern the rights of the civilian population to continue living their lives as normally as possible under the circumstances. Thus, the administration of the occupied territory by the Occupying Power is compelled to ensure that the basic needs of the population are fulfilled. Deportation and forcible mass transfers are always forbidden.³ However, other infringements on peoples' right to move freely may be undertaken, if demanded by imperative military reasons or for the security of the population.⁴

The Occupying Power has an obligation to ensure that the civilian population is clothed and fed, that it has access to medical aid and supplies,⁵ that the spiritual needs of the population are met,⁶ that children have access to schools,⁷ and that public order and safety is maintained.

Since the civilian population (and, of course, the occupation forces) need clean water, electricity, and a working infrastructure, the Occupying Power must do all in its power to ensure the availability of such services. The Occupying Power does not have to use its own national funds and resources to finance the administration of the occupied territory. It has access to the occupied State's funds and may levy taxes, but may only use these funds to ensure that the infrastructure of the Occupied Territory is intact and that the administration of the area is operational.⁸ No funds, property or individual of the occupied territory may be used in the Occupying Power's military efforts.⁹ As stated above, the role of the Occupying Power is that of administrator, not sovereign ruler. As such, it shall work to facilitate as much as possible the return of the administration of the occupied territory to its sovereign authorities as soon as possible after the close of hostilities.

The legislation of the occupied territory shall remain in force and may not be repealed or suspended by the Occupying Power, unless the legislation constitutes a threat to the Occupying Power or if it is an obstacle to the execution of GCIV.¹⁰ Further, new penal legislation may only be introduced to enable compliance with GCIV, to maintain the orderly government of the occupied territory and to ensure the security of the Occupying Power.¹¹

² Article 43 HReg.

³ Article 49 GCIV.

⁴ Kalshoven & Zegveld, *Constraints on the Waging of War*, p. 66.

⁵ Article 55 GCIV.

⁶ Article 58 GCIV.

⁷ Article 50 GCIV.

⁸ Article 48-49 HReg.

⁹ Article 51 GCIV, Article 23 HReg.

¹⁰ Article 64.1 GCIV.

¹¹ Article 64.2 GCIV.

The Occupying Power has the discretion to remove any judge or public official from office as it pleases.¹² If, however, it chooses not to do so, public officials and judges must be allowed to continue to carry out their duties, without interference, harassment or discrimination by the Occupying Power.¹³ As long as the Occupying Power retains the occupied territory's courts, it is bound to respect the independence of the courts and their judges.¹⁴ In the same way that judges and public officials should be free to work, they must also be allowed to leave their posts if they cannot continue for reasons of conscience. Here, too, the Occupying Power must refrain from harassment and discrimination. Even though these individuals are employed by the Occupying Power, their principal allegiance is to their sovereign, which takes precedence in such cases.¹⁵

However, the matter of resignation because of reasons of conscience becomes more complicated when read in conjunction with Article 51 GCIV. This Article enumerates the areas of work where the Occupying Power may compel civilians to work. Any civilian over 18 may be compelled by the Occupying Power to help with the needs of the occupation forces, public utility services, or with feeding, sheltering, clothing, transportation or health of the civilian population. As stated above, the work shall not entail any labor that would aid the military operations of the Occupying Power in any way.

One question that arises is where the line shall be drawn between work deemed necessary for the maintenance of the occupation forces, and work benefiting the Occupying Power's belligerent forces. Permitted work would entail road repairs, laying telephone lines, etc., while constructing fortifications and aerial bases would not be permitted.¹⁶

In light of the Occupying Power's fundamental obligations set forth in Article 43 HReg, there will be a need for labor within the public sector, i.e. for jobs dealing with health, education, water and power supplies, and peace and security of the population. For example, since the Occupying Power has a duty to ensure and maintain the functions of hospitals, etc., the Occupying Power has a right to compel doctors, nurses and other individuals tied to these areas to work. However, the Occupying Power may not assign any individual to a work place far from where they lived and worked up to that point.¹⁷ This is in line with the prohibition of transfers in Article 49 GCIV.

But our original question remains. Since judges and public officials are needed for the Occupying Power to be able to fulfil its obligation, it is uncertain whether the Occupying Power's right to compel individuals to work takes precedence over judges' and public officials' right to resign for

¹² Article 54 GCIV.

¹³ Article 54 GCIV, Commentary to GCIV, p. 304.

¹⁴ Commentary to GCIV, p. 304.

¹⁵ Ibid.

¹⁶ Ibid, p. 294.

¹⁷ Article 51.3 GCIV.

reasons of conscience. The Commentary to this Article states a preference for this solution, noting that judges and public officials should, at the very least, feel a moral obligation to remain at their posts to work for the good of their country and its inhabitants.¹⁸ The Occupying Power must, however, ensure the independence and freedom of these individuals.

2.2 Beginning and end of application - the ‘one-year rule’ in Article 6 GCIV

The rules in GCIV relating to occupation begin to apply as soon as the territory is occupied by a hostile power.¹⁹ The difficulty arises in determining when GCIV ceases to apply. There were prolonged discussions on this question at the Diplomatic Conference in Geneva in 1949, where some states advocated an official end of hostilities, i.e. a peace treaty, to signal the end of application,²⁰ whilst others wanted a more flexible solution.²¹ Discussions ensued on how to define the end of hostilities. It was finally agreed that the general close of military operations means “when the last shot has been fired”.²² It was also decided that the nature of an occupation was such that all rules of GCIV need not apply for the duration of the occupation. As has been seen through history, an occupation can continue for a very long time, depending on when hostilities ceased and on the speed of reconstruction of the occupied territory by the Occupying Power. However, at the end of hostilities, i.e. when the last shot has been fired, the Occupying Power is obliged to begin extensive work to prepare for handing over administration of the territory to its sovereign ruler. This must be done as quickly as possible, with regard to both the Occupying Power and the occupied territory itself and its inhabitants. The line has been set at one year after the general close of military operations, after which only certain rules continue to apply.²³ The most specific rules, regarding acute measures to be taken for the safety and health of the civilian population, cease to apply once reconstruction has begun. Thus, certain provisions of GCIV are only of importance during the conflict itself.²⁴ For example, the entire section on Regulations for the Treatment of Internees²⁵ is only applicable during and immediately after the hostilities.

The general close of military operations is supposed to entail a return to normality. The Occupying Power may not just pack up and leave as soon as

¹⁸ Commentary to GCIV, p. 306.

¹⁹ “Territory is considered occupied when it is actually placed under the authority of the hostile army”, Article 6 GCIV, Article 42 HReg.

²⁰ Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II:A, p. 624.

²¹ Ibid. p. 625.

²² Ibid. p. 815.

²³ These rules are enumerated in Article 6 GCIV.

²⁴ Final Record of the Diplomatic Conference of Geneva of 1949 Vol. II:A, p. 816.

²⁵ Articles 79-141 GCIV.

the fighting is over, but is, at the same time, not obliged to remain an Occupying Power longer than absolutely necessary. When the acute needs of the civilian population are taken care of, and the infrastructure of the territory is restored, it is in the interest of both Parties that administration return to the original sovereign.

To parties to the Additional Protocol to the Geneva Conventions, Article 3.b AP1 replaces Article 6 GCIV. According to Article 3.b, the entire Protocol is applicable during the entire occupation, that is Articles 42-56 HReg regarding occupation, apply for the duration of the occupation.

3 Resistance to occupation

The right to self-defence is a long-established right between sovereign states. In the 20th century, the most notable expression of this right has been in Article 51 of the United Nations Charter. However, this relates only to the rights of States to self-defence.²⁶ How do individuals protecting their homes, individuals repelling enemy forces, etc. fit into the picture? What rights do these individuals have?

3.1 Developments up to WWII

The legal notion of a resistance movement or a guerrilla fighter is a relatively new one. It is not until the 20th century that these groups really have become accepted as a (legitimate) phenomenon of armed conflict.

Up until the second half of the 19th century wars were, for the absolute most part, conducted between the regular armies of two sovereign monarchs, the stage being set on a battlefield. Civilians were not often directly involved in the actual hostilities (although, of course, they were victims of the belligerent armies' advances through the land). Any individual who was not part of the regular army but who resorted to violence against the opponent was sure to be punished severely, most probably by death.

Things began to change, however, during the Napoleonic wars, when both Spanish and Russian civilians began spontaneously rising against the advancing French army. These groups were only loosely organized, but succeeded in harassing the French troops and delaying their advance. These activities were, of course, illegal in the eyes of the French army, and any individual caught was summarily executed.²⁷

During the American Civil War, the same tendencies could be seen among the Southern population. Thus Lieber²⁸, in his Instructions for the Government of Armies in the Field (the Lieber Code), warned against guerrilla parties, saying that they were, in essence, outlaws conducting extortion and destruction, and generally giving no quarter to soldiers opposing them.²⁹ He warned against these bands' habit of picking up and laying down weapons at their convenience, assuming the pose of a civilian, and recommended that they be treated as they always had been in Europe,

²⁶ G. v. Glahn, *The Occupation of Enemy Territory*, p. 53.

²⁷ G.I.A.D. Draper, 'The status of combatants and the question of guerrilla warfare', in *BYIL 1971*, p. 177.

²⁸ Dr Francis Lieber, of German origin, was asked by the chief command of the Union Army during the American Civil War, to compile a set of instructions of rules and usages of war. Dr Lieber was a professor at the University of South Carolina until the Civil War.

²⁹ G.B. Davis, 'Doctor Francis Lieber's Instructions for the Government of Armies in the Field', in *AJIL 1907*, pp. 15-18.

namely as brigands.³⁰ Civilians who rose against an occupation were not to be recognized as prisoners of war.³¹

The Brussels Conference of 1874 was the first real effort in attaining an international consensus on what was permissible and what was forbidden in war. Official opinion on the matter had begun to sway, partly because of the nature of the recent conflicts and the emergence of smaller states in Europe. Also, thoughts of democracy were gaining momentum, putting the population more and more in the center.³² In the area of occupation and resistance to occupation, attitudes were beginning to change. First and foremost, occupation no longer automatically led to annexation of the territory.³³ It was admitted, further, that the civilian population could rise against the Occupying Power (although the right to do so was uncertain). The issue at stake, however, was the legal status of the individuals who rebelled. It had already been decided to divide a state's population into three categories: 1. the regular army, 2. irregular armed forces, and 3. civilians. The second category meant members of irregular armed forces who had not had time to organize themselves when the enemy came. It was implied that these forces would organize themselves and eventually become incorporated with the regular forces of the country.³⁴

But what, then, of the right of individuals to rise against the Occupying Power? Opinions differed greatly between large countries with regular armies, and smaller countries with defences based on a militia-style army. The differences arose from States' capabilities to mass their forces upon attack from an enemy. States with large, permanent armies were against the idea of the civilian population rising to defend their land, arguing that allowing anyone and everyone to rise with arms would result in a return to the barbarism of centuries past. States such as Holland and Switzerland, on the other hand, depended on civilians to act as a line of first defence, giving the government time to muster its forces.³⁵

³⁰ G.B. Davis, 'Doctor Francis Lieber's Instructions for the Government of Armies in the Field', in *AJIL* 1907, pp. 15-18.

³¹ Article 85 of the Lieber Code. I.P. Trainin, 'Questions of Guerrilla Warfare in the Law of War', in *AJIL* 1946, p. 537. Relevant to note is that Lieber wrote the code for the Union side. The potential situation of occupation he envisaged was that of Northern occupation of the South and thus he authored rules to the benefit of Union troops.³¹ It would be interesting to see what his recommendations would have been, had he been allied with the Confederacy.

³² For example, Engels wrote to Marx in 1870: "“Everywhere that a people permitted its subjugation only because its army was not able to provide opposition it has been treated with general scorn, as a nation of people in loincloths; and everywhere that the people carried on guerrilla warfare energetically the enemy very quickly was convinced that it was impossible to be governed by the ancient code of blood and fire.” I. P. Trainin, 'Questions of Guerrilla Warfare in the Law of War', in *AJIL* 1946, p. 540.

³³ *Ibid*, p. 542.

³⁴ *Ibid*, p. 541.

³⁵ L. Nurick & R.W. Barrett, 'Legality of Guerrilla Forces Under the Laws of War', in *AJIL* 1946, p. 565. I.P. Trainin, 'Questions of Guerrilla Warfare in the Law of War', in *AJIL* 1946, p. 541.

It was suggested by one of the large countries that an Article be added, in line with the Lieber Code, forbidding all uprisings.³⁶ At the time, any temporarily successful revolt in occupied territory that was ultimately crushed led to a right of the occupant to use severe methods of punishment. They saw these individuals' acts as violations of international law, allowing the Occupying Power to prosecute them as "war criminals" for "illegitimate hostilities in arms".³⁷ The smaller countries refused to agree to this, pressing on every individual's right (and, in some cases, even a duty³⁸) to defend themselves. They felt that there should not exist such a right, but the majority feeling at the time was for keeping the status quo, which meant that such individuals were classed as war rebels.³⁹

The Brussels Conference ended up not mentioning any right to rise against an Occupying Power, but recognized the right of smaller countries to employ militias and volunteer corps. The Conference laid down four criteria to be fulfilled by such corps:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war. In countries where militia constitute the army, or form part of it, they are included under the denomination 'army',⁴⁰

Further, levées en masse, or the spontaneous rising of civilians at the approach of the enemy, was recognized in Article 10, provided they respected the laws and customs of war and provided the territory was not already occupied. This was a concession to the smaller countries and their defence systems, but did not recognize such a right in already occupied territory.⁴¹

Twenty-five years later, at the First Hague Conference in 1899, and later, at the Second Hague Conference in 1907, the question of risings was again taken up, but again there was no success in reaching a satisfactory consensus. The Conference actually began to indicate a return to the position held before the Brussels Conference, that war should be fought by legitimate forces recognized and led by a government, giving no room for smaller bands of individuals without official governmental ties.⁴²

³⁶ R.R. Baxter, 'The Duty of Obedience to the Belligerent Occupant', in *BYIL* 1950, p. 254.

³⁷ *Ibid.*

³⁸ *Ibid.*, p. 255.

³⁹ I.P. Trainin, 'Questions of Guerrilla Warfare in the Law of War', in *AJIL* 1946, p. 542; G. v. Glahn, *The Occupation of Enemy Territory*, p. 49.

⁴⁰ Article 9 Brussels Convention.

⁴¹ I.P. Trainin, 'Questions of Guerrilla Warfare in the Law of War', in *AJIL* 1946, p. 542.

⁴² L. Nurick & R.W. Barrett, 'Legality of Guerrilla Forces Under the Laws of War', in *AJIL* 1946, p. 568.

The duty of obedience of the civilian population was still a widely held truism at the time of the Hague Conferences. It was thought that the civilian population should obey the Occupying Power, in return for protection. In the same way that the population had an obligation to the occupant, so did the occupant have an obligation to the population.⁴³ Only when this protection failed, if the “contract” between occupant and occupied were broken, would the population have the possibility to protest.⁴⁴ The discussion was also motivated by the wish of larger states to protect their forces in the event of an occupation. By making a clear distinction between civilians and combatants, the Occupying Power could ensure that the civilians in the occupied territories truly were civilians and pacified, so that they entailed no threat to the occupying forces. Any civilians breaking these rules were punished severely.⁴⁵ This situation was, however, not regulated in the Regulations annexed to the Hague (IV) Convention (HReg).⁴⁶

Article 1 of HReg restates the four conditions to be fulfilled by combatants enumerated in Article 9 of the Brussels Convention. What is new in the Hague (IV) Convention (and its annexed regulation) in relation to the Brussels Convention is the Preamble, which states that “Until a more complete code of the laws of war has been issued, [...] the inhabitants and the belligerents remain under the protection and the rule of 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 public conscience” (the so-called Martens Clause). This basically means that although the HReg does not regulate a certain phenomenon, it does not mean it is either forbidden or accepted. This makes it clear that the intention was not to shut out all resisters who didn’t fall within the exact scope of Article 1 HReg; it is also a direct concession to smaller states, without officially recognizing the rights of resistance movements.⁴⁷ As will be seen in the next section, the effects were to be seen during WWII, when Germany interpreted the laws of war verbatim when dealing with organized resistance movements, while the Allies indirectly referred to the Martens Clause.

3.1.1 WWII and resistance in Europe

When looking at the development of resistance movements, the most interesting and eventful time is WWII. Never before had civilians been so affected by and involved in a war of such magnitude. WWII brought a shift in the consciousness of the civilian population toward active defense of their homes and their lives. As stated above, wars had previously mainly been fought by armies meeting on a set battlefield. Since the development of

⁴³ Article 43 HReg. See also R.R. Baxter, ‘The Duty of Obedience to the Belligerent Occupant’, in *BYIL* 1950, p. 259.

⁴⁴ G. v. Glahn, *The Occupation of Enemy Territory*, p. 45-46.

⁴⁵ SOU 1984:56, p. 71.

⁴⁶ G. v. Glahn, *The Occupation of Enemy Territory*, p. 48.

⁴⁷ A. Roberts, *Occupation, Resistance and Law: International Law on Military Occupations and on Resistance*, p. 124.

airplanes and weapons with farther-reaching range than before, it became possible to harass the enemy long before they actually met on the battlefield. This did not only disturb the enemy forces' advances and planned deployments, but also disrupted supply lines and destroyed arms manufactures. All this affected the civilian population to a large degree, since many civilians worked with the war effort in one way or another. But bomb raids on enemy cities were also intended to frighten the enemy and lower morale, demonstrating the belligerent's superiority.

The German occupation of the Netherlands, part of France, and of Norway and Denmark, sparked intense nationalistic feeling among the citizens of these countries. Everywhere, small groups of resistance did what they could to disrupt the activities of the occupying forces and to help fellow citizens that were in the focus of the Occupying Power (mainly Jews and political dissidents). Although most of the governments of these States were working in exile, they supported the resistance movements in various ways, including airdropping weapons, forwarding military intelligence, and providing them with military commanders and other personnel.⁴⁸

As an Occupying Power, Germany was harsh, demanding obedience and forbidding rival political parties. Local police was ordered to support the actions of the occupying forces as well as those of any national organizations in support of Germany (for example, in Norway, where the Hird, Quisling's bodyguard force, harassed teachers, etc.).⁴⁹

3.1.1.1 Resistance in Denmark, Norway, the Netherlands, and France

3.1.1.1.1 Denmark

Germany advanced into Denmark in 1940 on the premise of protecting the country against an imminent invasion by the Allies. However, the neutrality and independence that was promised turned out to be a mere fabrication.⁵⁰ The Danish Government remained in power, but only nominally. For example, the Danish Ambassador in Washington refused to obey any orders issued by the Danish Government, stating that as long as the German occupation continued, Denmark was not a free and independent country.⁵¹

The official Danish policy of collaboration prompted many civilians to organize themselves into resistance groups. However, they did not receive any support from the Danish Government, but acted, for most of the occupation, in defiance of official policy. The resistance movement gained

⁴⁸ G. v. Glahn, *The Occupation of Enemy Territory*, p. 51.

⁴⁹ T. Gjelsvik, *Norwegian Resistance 1940-1945*, p. 33.

⁵⁰ J. Haestrup, 'Denmark's Connection With the Allied Powers During the Occupation', in *European Resistance Movements 1939-1945: Proceedings of the Second International Conference on the History of the Resistance Movements Held at Milan 26-29 March 1961*, p. 282-283.

⁵¹ *Ibid*, p 285.

momentum and finally gained de facto recognition by the Danish population and by the Allies, due to the fact that it only acted against the German occupation and not in pursuit of any individual political goals.⁵²

The de facto recognition of resistance movements by the British Government resulted in the establishment in 1940 of the Danish section of SOE (Special Operations Executive), a British organization for clandestine relations in Europe.⁵³ Actions by this group led to German reprisals, which in turn led to strikes and demonstrations all over Denmark. The ultimate result of these activities was that Germany took over administration of Denmark and the Danish Government ceased to exist.⁵⁴

3.1.1.1.2 Norway

Resistance in Norway consisted mainly of non-violent protest against the German occupation,⁵⁵ since the Norwegian Nazi party (Nasjonal Samling, or NS), with Vidkun Quisling at the head, cooperated with the occupying forces in searching out and eliminating resistance in the countryside.⁵⁶ Freedom of speech and of the press was curtailed,⁵⁷ and many labor and other organizations were reorganized with new leadership appointed by the NS.⁵⁸ Faced with countrymen betraying them and the German Occupying Power coming down hard on its opposition, resistance leaders became very cautious in their actions.⁵⁹

The main Norwegian resistance movement was the MILORG, founded mainly by Norwegians who had participated in the initial defense against the German invasion. At first, MILORG was just a collection of small bands of civilians conducting surreptitious intelligence gathering and preparing for an eventual invasion by the Allies.⁶⁰ Individuals of these groups who were

⁵² Ibid, p 288.

⁵³ The SOE had as its main objective the sabotage of the German war effort and the encouragement of resistance in areas occupied by Germany. F.W. Deakin, 'Great Britain and European Resistance', in *European Resistance Movements 1939-1945: Proceedings of the Second International Conference on the History of the Resistance Movements Held at Milan 26-29 March 1961*, p. 102.

⁵⁴ J. Haestrup, 'Denmark's Connection With the Allied Powers During the Occupation', in *European Resistance Movements 1939-1945: Proceedings of the Second International Conference on the History of the Resistance Movements Held at Milan 26-29 March 1961*, p 291.

⁵⁵ N. Kogan, 'American Policies Towards European Resistance Movements', in *European Resistance Movements 1939-1945: Proceedings of the Second International Conference on the History of the Resistance Movements Held at Milan 26-29 March 1961*, p. 75.

⁵⁶ Ibid, p. ix.

⁵⁷ T. Gjelsvik, *Norwegian Resistance 1940-1945*, p. 8.

⁵⁸ Ibid, p. 37, 39.

⁵⁹ S. Kjelstadli, 'The Resistance Movement in Norway and the Allies 1940-1945', in *European Resistance Movements 1939-1945: Proceedings of the Second International Conference on the History of the Resistance Movements Held at Milan 26-29 March 1961*, p.328. See also T. Gjelsvik, *Norwegian Resistance 1940-1945*, pp. 11-13, and p. 88.

⁶⁰ T. Gjelsvik, *Norwegian Resistance 1940-1945*, p. 72.

caught by the occupying force were summarily executed, and often these groups were infiltrated by members of the NS.⁶¹

MILORG was recognized by the Norwegian government-in-exile in London and was supported by the British SOE.⁶² The caution observed by MILORG in the beginning of the occupation eventually caused the British to send a letter accentuating the importance of sabotage against the Occupying Power.⁶³ The British supplied MILORG with equipment and training, which gradually enabled MILORG to expand its field of sabotage and armed resistance. However, the main objective of MILORG remained the protection of industries and communications, and members of the organization were under orders not to unnecessarily provoke the Occupying Power.⁶⁴

3.1.1.1.3 The Netherlands

The situation of occupied Holland was very different from that of other countries occupied by Germany, mainly because of its geography. Holland is a small country, with only about 100 km from the German border to the main cities. The country is flat and only sparsely forested, making it easy for troops to move through the area. This made resistance to the occupation difficult; contact with the Government-in-exile in London could only be made through complicated routes via Sweden and Switzerland.⁶⁵

The Occupying Power appropriated large portions of Holland's industrial products and foodstuffs and many Dutch civilians were sent to work in Germany. Holland's relatively large Jewish population was persecuted, but, apart from that, the civilian population was generally treated well by the occupiers.⁶⁶ This, however, did not stop dissatisfaction among the population. The main action of resistance made by the Dutch was not an armed one, but consisted of hiding Dutch Jews from the Germans, including forging identity papers and providing ration cards.⁶⁷ Whatever sabotage was carried out was mainly done by individuals, and was never formally organized. It was not until the last year of the occupation that the resistance movements were organized into a larger formation. Under the name "Binnenlandse Strijdkrachten" (BS), organized sabotage operations were

⁶¹ Ibid, p. 75.

⁶² S. Kjelstadli, 'The Resistance Movement in Norway and the Allies 1940-1945', in *European Resistance Movements 1939-1945: Proceedings of the Second International Conference on the History of the Resistance Movements Held at Milan 26-29 March 1961*, p. 325.

⁶³ Ibid, p. 329.

⁶⁴ Ibid, p. 337-8.

⁶⁵ L. de Jong, 'The Dutch Resistance Movement and the Allies 1940-1945', in *European Resistance Movements 1939-1945: Proceedings of the Second International Conference on the History of the Resistance Movements Held at Milan 26-29 March 1961*, p. 347-348.

⁶⁶ Ibid, p. 348.

⁶⁷ Ibid, p. 352. The resistance also helped move downed Allied airmen from the occupied territory to Belgium and France.

carried out, and armed resistance escalated at the approach of the Allied forces.⁶⁸

3.1.1.1.4 France

Resistance in France began in small scale, mainly as civil disobedience, with secret meetings and spreading of subversive papers as the main activities. Most groups emerged from political circles, mainly leftist groups, like the Socialists and the Communists, as well as from Catholic groups, and were in opposition both to the German occupation and to the Vichy Government.⁶⁹ These groups usually had a political agenda of their own, and operated not only to rid themselves of the German occupiers, but also to reach power themselves.

When the German occupation began in earnest to pursue its doctrine of racial purity and slave labor, opposition intensified into armed resistance. Some resistance groups collaborated with or were aided by the French Secret Service, giving them better access to strategic information on the whereabouts of occupation forces.⁷⁰ Other, small groups joined forces to become more effective, like the Mouvements de Libération Nationale (MLN).⁷¹ This organization soon had coordinated activities all over France, which also entailed several para-military groups. These para-militaries concentrated on collecting information on the German occupiers and incapacitating enemy agents, as well as sabotaging and stealing munitions.⁷²

Following the Allied invasion of Normandy in June 1944, the para-military activities of the different resistance movements took on a more official character. These groups provided significant help to the Allied forces, attacking communication lines, harassing the enemy behind their lines, and protecting fortifications vital to the Allies.⁷³

Not all resistance groups were aided by or collaborated with the Allies. Many groups operated on their own, without regard to any of the rules of war established by the Hague Conventions. Looking at the make-up of these organizations, it is highly probable that groups led by or containing remnants of the French Armed Forces or leaders thereof respected the laws of war, while other militant groups were completely ignorant of these rules.

3.1.1.2 A special case – resistance in Italy

⁶⁸ Ibid, p. 355.

⁶⁹ G. A. Almond, 'The Resistance and the Political Parties of Western Europe', in *Political Science Quarterly*, Vol. 62, No. 1 (March 1947), p. 28-29.

⁷⁰ Ibid, p. 28.

⁷¹ Ibid, p. 31.

⁷² M. Baudot, 'La Résistance en France et les Alliés', in *European Resistance Movements 1939-1945: Proceedings of the Second International Conference on the History of the Resistance Movements Held at Milan 26-29 March 1961*, p. 387.

⁷³ Ibid, p. 369.

Italy forms a special case in the history of resistance movements during WWII. This was the only belligerent state that had an organized resistance movement dedicated to toppling its own sovereign and joining the Allies. Although Mussolini held an iron grip on the nation and, at the outset, was seen as the savior who had liberated the country from an uncomfortable existence as a monarchy, opinion soon changed among parts of the population. These groups felt that Italy should be on the Allied side, fighting for democracy and against fascism.⁷⁴ When, in July 1943, Mussolini's regime fell, both the efforts of monarchists trying to recapture power and the fast-growing anti-Fascist movement also vying for power, failed. Germany occupied the country, and the resistance found itself facing a new enemy.⁷⁵

These events deepened the resolve of the Italian resistance to free themselves from unwanted rule, and they set out to free themselves from oppression and join the Allied side.⁷⁶ Aided and armed by the American OSS (Office of Strategic Services)⁷⁷ and the British SOE, Italian partisan groups conducted several armed operations, particularly during the last half of 1944.⁷⁸ These operations greatly aided the Allied advance through Italy.

The reaction of Germany to Italian resistance was harsh, mainly because of the betrayal they felt the Italians had committed. Surrendering to the Allies and then fighting on the Allied side was not something that was looked upon with kind eyes in Berlin.

3.1.1.3 The legal position of the resistance movements

As has been seen, the resistance movements in the above-mentioned countries varied greatly in character and magnitude. Denmark retained its government within the country, making it difficult for the resistance to gain support and legitimacy. Both Denmark and Norway were aided by the British SOE, but resistance in Norway was made difficult by the harsh treatment of Norwegian civilians by the German occupiers. Resistance in the Netherlands was hampered by the country's geography and proximity to Germany itself.

France was never totally occupied, and resistance in the occupied North was different from that in the "free" South. The efficiency of the resistance was further cramped by the different political aspirations of many of the underground organizations, making cooperation difficult.

⁷⁴ F. Parri & F. Venturi, 'The Italian Resistance and the Allies', in *European Resistance Movements 1939-1945: Proceedings of the Second International Conference on the History of the Resistance Movements Held at Milan 26-29 March 1961*, p. xiii.

⁷⁵ Ibid, p. xvii.

⁷⁶ Ibid, p. xviii.

⁷⁷ "What was OSS", CIA homepage.

⁷⁸ One famous example is that of the battle for Monte Battaglia in September 1944, where 400 partisans killed a number of Germans. This operation enabled US General Clark to take the mountain, a definitive advantage to the future of the Allied advance in Italy. Ibid.

The resistance in Italy went through two phases, first operating against an oppressive Italian regime, and then against German occupation. The resistance evolved from a mainly civil resistance, to an armed one.

Interesting to note is that most of these resistance movements were organized to some extent and many of them had contact with governments in exile, ex. Norway and France.

3.1.1.4 German reprisals

The general policy of Germany toward these resistance organizations was harsh. In many of the occupied areas, reprisals by German troops against suspected civilians and their families were common. These reprisals mainly entailed the taking and executing of hostages, and were sanctioned by the German High Command of the Armed Forces.⁷⁹ Germany partially based its actions on earlier wars, where it had acted in similar manner, and had a long-standing tradition of disregarding Hague rules and other international agreements, calling them “absolutely opposed to the nature and aims of war”.⁸⁰

In an order of 16 September 1941 dealing with the suppression of resistance movements in occupied territories, Fieldmarshal Keitel, the Chief of the German High Command, established that any and all action by resistance groups or guerrillas was to be assumed to be of Communist origin, and that the death of one German soldier by such groups would demand the execution of 50 to 100 Communists as retaliation.⁸¹ In a further order, of 16 December 1942, Keitel expounded his earlier order, declaring that “[t]his fight has nothing to do with soldierly gallantry or principles of the Geneva Conventions” and that “[i]t is therefore not only justified, but is the duty of the troops to use all means without restriction – even against women and children – as long as it ensures success”.⁸²

Keitel’s orders were applied by all High Commands in Europe. Deputy Wehrmacht Commander Southeast Kuntze ordered in 1942 that reprisal measures were to be sharpened, and that, if the perpetrators of insurrectional

⁷⁹ Reprisals were also taken against property belonging to the civilian population. The *Trial of Franz Holstein* described Germans burning down three farms for every German soldier killed. These forms of reprisals were, however, not as common as reprisals against individuals. A. R. Albrecht, ‘War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949’, in *AJIL Vol. 47, 1953*.

⁸⁰ E. Hammer & M. Salvin, ‘The Taking of Hostages in Theory and Practice’, in *AJIL, Vol. 38, 1944*, p. 23.

⁸¹ Case No. 47. The Hostages Trial. Trial of Wilhelm List and Others. United States Military Tribunal, Nuremberg. Part 1, p. 39.

⁸² Report of British War Crimes Section of Allied Force Headquarters on German Reprisals for Partisan Activities in Italy, Annex “A”.

actions were not found, further reprisals were called for, like the killing of all male civilians from the nearest villages, according to a set ratio.⁸³

In Belgium the German Governor ordered that at least five hostages should be shot for every German soldier killed.⁸⁴ In Italy Lt. Col. Kesselring ordered that “should troops etc. be fired at from any village, the village will be burnt down”.⁸⁵ On many occasions, Germany killed hostages who did not have any connection at all to the perpetrated crime for which they were killed, and in many instances the hostages were killed even after the perpetrators were arrested and killed.⁸⁶ For instance, during the German occupation of Byelorussia an order was issued, stating, “[a]ny hostile manifestations on the part of the population toward the German armed forces is punishable by death. If a guerrilla remains undiscovered, hostages should be taken from the population. These hostages are to be hanged if the culprits or their accomplices are not delivered within twenty-four hours. Within the next twenty-four hours double the number of hostages should be hanged on the same spot”.⁸⁷

3.2 Definition of resistance movements

The actions of the German occupation forces around Europe prompted sharp protests from the Allies, who condemned the “German practice of executing scores of innocent hostages”⁸⁸. Unfortunately, the law was not completely on their side. That is, reprisals against the civilian population and the taking of hostages were not per se forbidden at the time, and the right of the civilian population to resist an occupation was not expressly acknowledged. Nothing is said in the HReg on hostages, and the enactment of reprisals was, under certain circumstances, considered perfectly legal.⁸⁹ Article 2.3 of the 1929 Geneva Convention on Prisoners of War forbids reprisals against prisoners of war, and Article 50 HReg forbids general penalty upon the civilian population for acts for which they cannot be held collectively responsible.⁹⁰ The latter rule may, however, be partly set aside to

⁸³ Case No. 47. The Hostages Trial. Trial of Wilhelm List and Others. United States Military Tribunal, Nuremberg. Part 1, p. 41. See below, under “The Nuremberg IMT” for details of the criminal procedure against Commander Kuntze and his superior, List.

⁸⁴ E. Hammer & M. Salvin, ‘The Taking of Hostages in Theory and Practice’, in *AJIL*, Vol. 38, 1944, p. 29.

⁸⁵ Report of British War Crimes Section of Allied Force Headquarters on German Reprisals for Partisan Activities in Italy, Annex “C.”

⁸⁶ E. Hammer & M. Salvin, ‘The Taking of Hostages in Theory and Practice’, in *AJIL*, Vol. 38, 1944, p. 30.

⁸⁷ E. Hammer & M. Salvin, ‘The Taking of Hostages in Theory and Practice’, in *AJIL*, Vol. 38, 1944, p. 30.

⁸⁸ S. D. Stein, *Trials, Crimes and Laws. Overview*. This particular comment was made by Roosevelt in 1941.

⁸⁹ The Hostages Trial. Trial of Wilhelm List and Others. United States Military Tribunal, Nuremberg. Notes on the Case, pp. 77, 80.

⁹⁰ A. R. Albrecht, ‘War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949’, in *AJIL* Vol. 47, 1953, p. 591.

accommodate for military necessity, as long as the principle of proportionality is upheld and reprisals are not used simply as revenge.⁹¹

Indeed, Oppenheim had called for legal regulation of these areas, as had been done in the 1929 Geneva Convention on the Treatment of Prisoners of War, albeit only concerning prisoners of war, but this showed that it was possible to lay down rules concerning reprisals.⁹² This discussion was taken up again during the Nuremberg IMT.

3.2.1 The Nuremberg IMT

The Nuremberg IMT took up a number of cases concerning German occupation and how Germany handled resistance within those territories. One of those, the trial against Wilhelm List and others, concerned Commander List's and others' actions in Yugoslavia, Greece, and Albania following Fieldmarshal Keitel's order of September 16, 1941, referred to in the previous chapter. Yugoslavia had been invaded on April 6, 1941, and on April 28, 1941, Athens fell. The population remained peaceful at the beginning, but soon resistance groups emerged, sabotaging communication lines, and conducting surprise attacks on German troops.⁹³ As a consequence, Commander List, the Wehrmacht Commander Southeast, issued an order stating that all men in the occupied territories were to be treated as potential insurgents, and that investigations into their actions should be made.⁹⁴

When the Nuremberg Tribunal took up the case against List, the first question to be resolved was that of the status of the partisan groups operating in the occupied territories. The general defence of Germany was that resistance to the German occupation was illegal and that the German forces thus had the right to enact reprisals and punish the perpetrators.

Germany stated that it merely followed international law at the time verbatim, and hence was harsh with resisters. This attitude is mirrored by Oppenheim who, in 1940 reiterated the opinion that, although private individuals cannot be prohibited by international law to take up arms, they should then be regarded as war criminals.⁹⁵ Oppenheim continued:

“Hostilities in arms committed by private individuals are war crimes, not because they really are violations of recognized rules

⁹¹ E. Hammer & M. Salvin, 'The Taking of Hostages in Theory and Practice', in *AJIL*, Vol. 38, 1944, p. 30.

⁹² The Hostages Trial. Trial of Wilhelm List and Others. United States Military Tribunal, Nuremberg, Notes on the Case p. 80-81.

⁹³ The Hostages Trial. Trial of Wilhelm List and Others. United States Military Tribunal, Nuremberg, The Judgement of the Tribunal, p. 56.

⁹⁴ The Hostages Trial. Trial of Wilhelm List and Others. United States Military Tribunal, Nuremberg, pp. 39-40.

⁹⁵ L. Nurick & R.W. Barrett, 'Legality of Guerrilla Forces Under the Laws of War', *AJIL* 1946, p. 569-570.

regarding warfare, but because the enemy has the right to consider and punish them as acts of illegitimate warfare. The conflict between praiseworthy patriotism on the part of such individuals and the safety of the enemy troops does not allow of any solution.”⁹⁶

What Oppenheim meant was that there was a conflict between the rights of the occupied population and the safety of the occupying forces, and that, in such cases the safety of the occupying forces came first. Germany followed this line of thought, and further held fast to the requirement of some form of association between the resistance organization and an existing government. This, too, followed Oppenheim and was in line with the Hague Conventions.⁹⁷

In the prevalent case, the Tribunal found that, although there were groups that did indeed fulfil the requirements of lawful belligerents, the majority of resistance groups did not. “The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.”⁹⁸ The Tribunal found that there was no common uniform, and any insignia worn (such as the Soviet Star) could not be recognized at a distance. Further, arms were not carried openly, and there was seldom any recognizable military organization or command.⁹⁹ Any captured members of these groups did not have a right to prisoner of war status and were to be treated as *francs tireurs*.¹⁰⁰ The Tribunal was very clear in its position: “If the requirements of the Hague Regulation, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one.”¹⁰¹

As has been shown above, one of the main ways the German Occupying Power sought to ensure the safety of its forces was by taking hostages among the civilians and enacting reprisals against the population for subversive acts.¹⁰² The taking and potential killing of hostages in war was

⁹⁶ Ibid, p. 568-569.

⁹⁷ Ibid, p. 567.

⁹⁸ The Hostages Trial. Trial of Wilhelm List and Others. United States Military Tribunal, Nuremberg. The Judgement of the Tribunal, p. 57.

⁹⁹ Ibid.

¹⁰⁰ The tribunal went on to say, “We agree, therefore, with the contention of the defendant List that the guerrilla fighters with which he contended were not lawful belligerents entitling them to prisoner of war status upon capture. We are obliged to hold that such guerrillas were *francs tireurs* who, upon capture, could be subjected to the death penalty. Consequently, no criminal responsibility attaches to the defendant List because of the execution of captured partisans in Yugoslavia and Greece during the time he was Armed Forces Commander Southeast.” Ibid, p. 75.

¹⁰¹ Ibid, p. 59.

¹⁰² A German General Staff ordinance, dated November 1940, reads: “If acts of violence are committed by the inhabitants of the country against members of the occupation forces, if offices and installations of the Armed Forces are damaged or destroyed, or if any other attacks are directed against the security of German units and service establishments, and if, under the circumstances, the population of the place of the crime or of the immediate neighborhood can be considered as jointly responsible for those acts of sabotage, measures

not prohibited by International Law at the time, if done in order to guarantee that the occupied population remained peaceful.¹⁰³ Likewise, reprisals were not forbidden, although general penalties inflicted on the population on account of acts by individuals for which the general population is not collectively responsible was forbidden by Article 50 HReg. Reprisals were seen as an inevitable occurrence to stave violations of the laws of war.¹⁰⁴

The German defence rested on the British Manual of Warfare and the American Manual of Land Warfare, which allowed for reprisals and hostage taking. However, looking closer at these two compilations, it is clear that these rules are heavily restricted.¹⁰⁵ The British Manual stated that hostages are allowed to be taken, but may not be killed, and the American Manual confirmed the principle of proportionality.¹⁰⁶

The Prosecution rested its case on the Hague Convention, seeing that, although that Convention did not expressly forbid such practices, one must look at the Martens Clause in the Preamble, which states that, even though a certain concept is not regulated in the Convention, both civilians and combatants are protected by the principles of international law, customary law, and the “dictates of public conscience”.¹⁰⁷ The Prosecution argued that most authors in the field of International Law agreed, “that the killing of hostages [...] is unlawful, and that the continued confinement of hostages is as far as the occupying power is permitted to go”.¹⁰⁸

The Tribunal, like the German defence, referred to the British Manual of Military Law and the US Rules of Land Warfare in this respect, but stressed that the taking and executing of such hostages was subject to certain limitations.¹⁰⁹ Among these limitations it was stated that “‘the population generally’ must be a party ‘either actively or passively,’ to the offences whose cessation is aimed at” and that there must be proportionality between the hostages shot and the severity of the action it responds to.¹¹⁰

The Tribunal took its lead from an article in the American Journal of International Law, where it was stated that, “[t]he Germans have violated every duty of the occupying power to the civilian population. Automatically then the oppressed populations are released from any obligation of

of prevention and expiation may be ordered by which the civil population is to be deterred in future from committing, encouraging, or tolerating acts of that kind...” The Nuremberg Trials. Presentation by the Chief Prosecutor for the French Republic, p. 120.

¹⁰³ The Hostages Trial. Trial of Wilhelm List and Others. United States Military Tribunal, Nuremberg. Part III, p. 60-61.

¹⁰⁴ O. Bring, 'Det folkrättsliga repressalieinstitutet och diplomatkonferensen om krigets lagar', in *Svensk Juristtidning* 1978, p. 489.

¹⁰⁵ The Hostages Trial. Trial of Wilhelm List and Others. United States Military Tribunal, Nuremberg. Notes on the Case, p. 87.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, p. 81.

¹⁰⁸ Ibid, p. 81-82.

¹⁰⁹ Ibid, p. 77.

¹¹⁰ A. R. Albrecht, 'War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949', in *AJIL Vol. 47, 1953*, p. 605.

obedience: they cannot be denied the right of self-defense. The taking of hostages by the Germans for the purposes of reprisal and, generally, to maintain order in Europe, can have no legal sanction. [...] In no way do they mitigate the illegality of the German position. By destroying the basic legal relationship between the occupant and the civilian, the Germans have created a reign of terror”.¹¹¹ This showed further the need for regulating said area in international humanitarian law.

Kalshoven, in 1971, commented on the German reprisals against inhabitants of occupied territories during WWII, which he found to be illegal, stating, “...in face of such a perverted occupation régime the populations had acquired a *positive right of resistance* based on the fundamental right of self-defence of communities immediately threatened as to their very existence”.¹¹² Since the populations had acquired such a right to resist, then their actions could not, according to Kalshoven, be regarded as unlawful. Thus fell one of the basic criteria for engaging in reprisals. Further, the German reprisals did not strike solely at individuals responsible for resistance, but at the innocent population, which is forbidden, and lastly, the reprisals were not proportionate to the damage caused by the resisters, but rather were based on a standard set by the German High Command.¹¹³ With none of the criteria for reprisals fulfilled, Germany was, according to Kalshoven, definitely in the wrong, and indeed were themselves the perpetrators of violations against the laws of war.¹¹⁴

This was not, however, the prevalent view before 1945. Hall writes that it might sometimes be necessary, however repugnant the thought might be, to take reprisals against innocent civilians when the actual perpetrators of offences cannot be found.¹¹⁵ The important question dealt with by the Nuremberg IMT was that of the nature of the reprisals, that Germany had not fulfilled the criteria for reprisals, like those of proportionality, investigation into the offence, etc. The main objection by the IMT was the practice of the German High Command to issue orders containing fixed ratios of hostages to be killed for every German soldier killed or injured. This is illegal, according to the IMT.¹¹⁶ Killing 10 or 50 hostages as reprisal against the death of one German soldier is far from proportionate; it is excessive.

¹¹¹ E. Hammer & M. Salvin, ‘The Taking of Hostages in Theory and Practice’, *AJIL*, Vol. 38, 1944, p. 27. The Hostages Trial. Trial of Wilhelm List and Others. United States Military Tribunal, Nuremberg. Notes on the Case, p. 87.

¹¹² F. Kalshoven, *Belligerent Reprisals*, p. 204. *Emphasis added*. In n. 10 on the same page, he added, “The Germans have violated every duty of the Occupying Power to the civilian population. Automatically then the oppressed populations are released from any obligation of obedience: they cannot be denied the right of self-defence”.

¹¹³ *Ibid*, pp. 209-210.

¹¹⁴ *Ibid*, *Belligerent Reprisals*, p. 221.

¹¹⁵ Trial of General Von Mackensen and General Maelzer. p. 3.

¹¹⁶ A. R. Albrecht, ‘War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949’, in *AJIL Vol. 47, 1953*, p. 606.

Hostage-taking is a part of reprisals, a necessary step before anyone may be killed. There has to be a difference made clear between hostages and reprisal prisoners. The former are taken before the reprisal is ordered, and the latter is taken as a result of the ordering of the reprisal.¹¹⁷

It is interesting to note that it was the victorious side which had benefited from the efforts of the various resistance movements, and who were thus positively inclined toward these movements, which pushed for legalization and recognition of resistance movements, even though such were not expressly legal at the time.¹¹⁸ A new practice was created in Nuremberg, allowing for civilians to organize themselves into resistance groups against an Occupying Power. This was a very broad and vague right, which in the long run was not a durable solution for the international community.

3.2.2 The Geneva Conventions

After the close of WWII and the Nuremberg trials, discussion ensued on the existence and legality of organized resistance. It was quite obvious to all parties that resistance was a reality that could not be ignored. The question then, was how to address this phenomenon.

A fundamental question in dealing with the right to resistance is the definition of a combatant. This is also the area that causes the greatest difficulty, because of the clandestine nature of resistance movements. Who is considered part of the civilian population and is protected as such, and who is encompassed by the rules of war and engagement and thus entitled to POW status?

Due to the relatively vague regulations in the HReg, and due to the fact that resistance movements are not even mentioned therein, the international community felt that a discussion was needed in order to clarify exactly what criteria need to be fulfilled in order for a resistance group to be regarded as lawful belligerents. Discussions were long and arduous at the Diplomatic Conference in Geneva in 1949, with ideas and suggestions going back and forth between the delegates. It soon became clear that there were two camps: the larger States, potential future Occupying Powers, wished for more extensive regulations, while smaller States, potential occupied States, felt that resistance movements should not be held to a higher standard than regular armed forces.¹¹⁹

The Conference based its discussions on a Draft Convention prepared in Stockholm in 1948. Regarding the definition of combatants, the Stockholm Draft Convention stated:

¹¹⁷ Trial of Albert Kesselring, p. 14.

¹¹⁸ G. v. Glahn, *The Occupation of Enemy Territory*, p. 52.

¹¹⁹ Final Record of the Diplomatic Conference of Geneva of 1949 Vol. II:A, p. 468.

“ARTICLE 3. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

[...]

6. Persons belonging to a military organization or to an organized resistance movement constituted in an occupied territory to resist the occupying Power, on condition:

- a. That such organization has, either through its responsible leader, through the Government which it acknowledges, or through the mediation of a Party to the conflict, notified the occupying Power of its participation in the conflict.
- b. That its members are under the command of a responsible leader; that they wear at all times a fixed distinctive emblem, recognizable at a distance; that they carry arms openly; that they conform to the laws and customs of war; and in particular, that they treat nationals of the occupying Power who fall into their hands in accordance with the provisions of the present Convention.”¹²⁰

The Stockholm Draft Convention suggested that, apart from fulfilling the four criteria taken from the HReg, an organized resistance movement should notify its opponents of its intent to fight. The UK delegate explained that this last norm had not been seen as necessary in the HReg, because it was assumed at the time that belligerent Parties, who were all supposed to be government controlled (or at least recognized by the government), were capable of communicating. If the Conference was to accept organized belligerents who were not recognized by a government it was not certain that these groups would be sufficiently organized to be able to communicate with their opponents. Therefore it was suggested to add this criterion.¹²¹

The USSR, supported by Hungary, felt that this extra norm would become very difficult to prove in practice, and might become subject to arbitrary interpretation.¹²² The Netherlands argued that the ability to communicate was implicit in the criterion “under the command of a responsible leader”, and that any extra regulations would only increase the difficulty for resistance movements to comply with the rules.¹²³

In the end, the suggested rule on communication was deleted, but instead a criterion was added, requiring militias, volunteer corps, and organized resistance movements to “belong to a Party to the conflict”, that is, to be in some way associated with one of the belligerent Parties. The relationship does not have to be close, but there has to be a de facto association.¹²⁴

¹²⁰ Final Record of the Diplomatic Conference of Geneva of 1949 Vol. I, p. 74.

¹²¹ Final Record of the Diplomatic Conference of Geneva of 1949 Vol. II:A, p. 242-243.

¹²² Ibid, p. 428.

¹²³ Ibid, p. 429.

¹²⁴ Commentary to GCIII, p. 57.

Articles 33-34 GCIV deal with reprisals, forbidding the use of reprisals against civilians and the taking of hostages. The rule on hostages was suggested by the Stockholm Draft Convention, and was passed at the Geneva Convention without discussion.¹²⁵ The question of reprisals was discussed, although briefly. Article 50 HReg did not exclude the possibility of collective sanctions for individual acts for which populations might be considered collectively responsible. This meant that reprisals like the ones enacted by Germany during WWII were allowed (except for the problem of proportionality). The Italian delegate stressed that this principle was alien to Roman law, and had led to many abuses during WWII. He felt that it was very important to introduce this principle to international humanitarian law, to prevent future atrocities.¹²⁶

With the enactment of the four Geneva Conventions, all individuals affected by war were protected. That is, combatants were included under GC I-III and civilians under GCIV. There was no longer room for unclear situations, or situations where an individual suddenly was not covered by any rules at all. This had been the dilemma of resistance movements up until the Geneva Conventions: they were accepted neither as civilians nor as combatants. With clear lines drawn between civilians and combatants, these individuals were also protected. If they fulfilled the four criteria in Article 4.A.2 GCIII, they were considered as combatants. If they did not fulfil the criteria, they were considered as civilians, albeit as civilians who had broken national laws (murder, sabotage, etc) during their clandestine operations.¹²⁷

The term “unprivileged belligerency” was introduced in 1951, covering individuals who were recognized as not committing a crime according to international law, but whose offences were instead against the regulations of the occupant.¹²⁸ As Baxter wrote in 1951:

“As long as partisan warfare is inspired by genuine allegiance rather than a desire for pillage and as long as guerrilla activities are looked upon as licit and laudable by the state on whose behalf they are undertaken and by third parties to the conflict, it is highly unreal to regard them as internationally criminal.”¹²⁹

3.2.3 After the Geneva Conventions

The characteristics of war have changed dramatically since WWII. Already during WWII partisan warfare was becoming an accepted concept, and during the post-war years it has become the dominant form of warfare.

¹²⁵ Final Record of the Diplomatic Conference of Geneva of 1949 Vol. II:A, p. 651.

¹²⁶ Ibid, pp. 648-649.

¹²⁷ A. Roberts, *Occupation, resistance, and law*, p. 156.

¹²⁸ Ibid, p. 149.

¹²⁹ R.R. Baxter, ‘So-called ‘unprivileged belligerency’: spies, guerrillas, and saboteurs’’, in *BYIL 1951*, p. 337.

The post-war period has been seen as the era for self-determination: around the world, colonies have fought for freedom and national liberation, and political revolutions have changed the map of the world. These wars were fought on the basis of ideologies, involving the civilian population to a much larger degree than ever before. This was due to the population becoming much more aware of their rights and wishes than they had been, and an increased willingness to engage in military conflicts to assert their rights. Guerrilla wars were often started by small bands of partisans joining together to harass the oppressor (the government or colonial power). This happened alongside with ideological malcontent amongst the civilian population, who very often aided and protected the partisans.

It could be argued that the very nature of resistance movements gives them a very large chance of success, providing, however, that they have the support of the civilian population.¹³⁰ Guerrilla warfare is most often fought in remote areas, where small groups can operate to their best advantage. The members of the bands usually have very good knowledge of the terrain and are light and mobile, giving them an extra edge against the enemy forces. They depend on the civilian population for food and other resources, but on a much more direct level than large armies: if the resistance movement carries support with the civilian population, there will be no shortage of food or protection.

The capability of resistance movements to show up from nowhere, attack enemy forces, and then disappear could be a potential source of frustration to army commanders. Although this scenario may upset regular troops, these actions are, by themselves, not contrary to humanitarian law, and should not be a reason for depriving the partisans of the right to combatant status. If the enemy were consisted of regular troops, an ambush by them would be part of combat; the same should apply for an ambush by resistance movements. It could be argued that the fact that guerrillas usually do not carry their arms openly, and do not wear distinct insignia would, in an ambush situation, not change anything. The government forces would know who their attackers were as soon as the ambush began, it would make no difference if the enemy were wearing uniform or not.¹³¹

Gerhard v Glahn felt that the rules established in 1949 were unrealistic and impractical, since no guerrilla force would care to jeopardize its position and risk pursuit by the enemy by fulfilling all the criteria. He agreed that all forces, regular and guerrilla, must follow the rules of war, but he felt that the demands of insignia and visible weapons were too rigid. "...If such a band, pledging its allegiance to the lawful sovereign and operating in accordance with the rules of war except for insignia and open display of weapons, seeks to drive the Occupying Power's forces out of the occupied territory, then such a group should be included among the categories of individuals entitled to the status of lawful combatants."¹³²

¹³⁰ M. Walzer, *Just and Unjust Wars. A Moral Argument*, p. 185.

¹³¹ M. Walzer, *Just and Unjust Wars. A Moral Argument*, p. 182.

¹³² G. v Glahn, *The Occupation of Enemy Territory*, p. 52.

This brings forth the issue of the difference between group and individual conditions to be fulfilled, and why regular troops are treated differently from resistance movements and militias. The demands of internal organization, belonging to a Party to the conflict, and command by a responsible person are, according to Draper, criteria applicable to the group collectively, while the conditions of wearing distinctive insignia, carrying arms openly, and operating according to the laws of war are both collective and individual conditions.¹³³ If a resistance group fulfils all the criteria, but an individual guerrillero fails to carry his arms openly, the individual may, if he is captured by the enemy, be tried as a POW for failing to wear his arms visibly. But he does not lose his identity as a member of a resistance movement that recognizes and fulfils the requisite criteria. If, however, the majority of individuals in the group fail to distinguish themselves from civilians, then the whole group fails to attain combatant status.¹³⁴

It is the neglect of partisan groups to wear distinctive signs and carry arms openly which is the point of conflict, or rather the groups' ability to hide amongst civilians when not conducting operations. How are the forces of the government to fight these groups if they cannot find them? One author, Michael Walzer, suggests that perhaps we should look less at the obligations of resistance movements, and more at the obligations of the civilian population. He suggests that the right of the population to spontaneously take up arms at the approach of the enemy should pass over to the resistance movements who have the support of the population. His argument is based on the idea that regular troops act as political instruments, and that partisans, as long as they enjoy the support of the population, should be seen the same, and thus enjoy the protection of the Geneva Conventions. If the guerrillas operate against popular support, they would instead be regarded as regular bandits.¹³⁵

This viewpoint may be a bit radical, but it illustrates the problematic situation that arose when there was no adequate regulation of the position of resistance movements and guerrillas. It was obvious that a review of existing international humanitarian law was needed.

3.2.4 Additional Protocol 1 to the Geneva Conventions

One of the main questions raised by the Diplomatic Conference in Geneva 1974-77 was that of the classification of wars of national liberation. Were they to be regarded as international or internal armed conflicts? While the Western states traditionally regarded such conflicts as internal, since the goal was to create independent states, most Third World governments felt

¹³³ G.I.A.D. Draper, 'The Status of Combatants and the Question of Guerrilla Warfare', in *BYIL* 1971, p. 196.

¹³⁴ *Ibid*, p. 197.

¹³⁵ M. Walzer, *Just and Unjust Wars. A Moral Argument*, p. 185

that the conflicts were international, since they were fighting a colonial power which had invaded and occupied their territory.¹³⁶ This was a very intense political question at the time, owing to the number of wars of national liberation that were then being fought. It became less a question of adapting the rules of war to reality, and more a propaganda tool to be used by or against the Western, colonial powers.

The UN General Assembly had recognized wars of national liberation against alien domination as international armed conflicts in its 1973 Resolution 3103. Further, pt 4 of the resolution states:

“The combatants struggling against colonial and alien domination and racist regimes captured as prisoners are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the [GCIII].”¹³⁷

The resolution confirmed that colonial powers had no rights of sovereignty over colonial territories and peoples. Although the General Assembly resolution is not binding, it shows the direction the discussions on self-determination and wars against colonial domination were taking. However, the subject was not fully settled, and long discussions ensued at the 1974-77 Diplomatic Conference in Geneva on the incorporation of these ideas into binding law.

The discussions surrounded the wording of Article 1 regarding the scope of the Protocol. Six amendments were submitted to the proposed Article, all but one mentioning fight against colonial and alien domination and the right to self-determination. These amendments were mainly submitted by African and other Third World countries.¹³⁸ The remaining amendment, put forth by several developed countries¹³⁹ did not mention this form of conflict, but instead suggested adding a version of the “Martens clause”.¹⁴⁰

Many Third World countries, like Nigeria and Tanzania, were enthusiastic and supportive of the proposed Article. They emphasized that the aim of the Diplomatic Conference was to develop international humanitarian law from the 1949 Geneva Conventions, which had not taken into account wars of national liberation because such had barely existed before the 1950s.¹⁴¹ Further, since several international instruments had recognized wars of national liberation as international armed conflicts (for example, the Friendly Relations Declarations and the above-mentioned UN General Assembly Resolution 3103), it was necessary that the proposed Protocol should reflect the reality of the day.

¹³⁶ K. Suter, *An International Law of Guerrilla Warfare*, p. 143.

¹³⁷ UN GA Res. 3103 (XXVIII) 12 December 1973.

¹³⁸ Official Records of the Geneva Diplomatic Conference (1974-1977), vol. III, pp. 5-9.

¹³⁹ Argentina, Austria, Belgium, West Germany, Italy, the Netherlands, Pakistan, and the United Kingdom.

¹⁴⁰ Official Records of the Geneva Diplomatic Conference (1974-1977), vol. III, p. 6.

¹⁴¹ Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VIII, p. 13.

The main objection against the proposed amendments was their making the motives behind a conflict a criterion for the application of international humanitarian law.¹⁴² Legal and humanitarian protection should be blind to political divergences and should never vary depending on the motives of those fighting in the particular conflict.¹⁴³ It must be made clear, according to the delegate from France, that there were two concepts in play, a legal and a political idea. The United Nations was a political body tasked with finding adequate political solutions for international problems. The job of the Diplomatic Conference was providing adequate protection for all war victims at all times, something that should not so easily be influenced by political flows.¹⁴⁴

Finally, an amendment was suggested, amalgamating the different amendments and including both a reference to colonial domination and alien occupation, and a reference to the Martens clause.¹⁴⁵ The proposed amendment was put to a vote and passed.¹⁴⁶ However, all were not satisfied with the procedure, and felt the amendment had not been discussed enough. It was felt that the point of having the motives of a struggle decide whether the conflict is of international or internal character was wrong and went against the spirit of the Geneva Conventions and the principle of non-discrimination.¹⁴⁷ Those voting for the amendment reiterated their strong belief that wars against colonial domination and alien occupation must be encompassed by international humanitarian law and that it was a necessary step in legitimizing the right to self-determination.¹⁴⁸

The proposed Article 1 was put to a final vote in a plenary session of the Diplomatic Conference. The Article was adopted by 87 votes in favour, one against (Israel), and 11 abstentions (mainly Western countries).¹⁴⁹

The Diplomatic Conference also revised the definition of combatant, acknowledging the new character of modern-day conflicts. The four conditions laid down in the HReg are still present, in Article 43.1 AP1, which states that, “[t]he 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 for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of

¹⁴² Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VI, p. 46.

¹⁴³ Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VIII, p. 13.

¹⁴⁴ *Ibid.*, p. 14.

¹⁴⁵ Amendment (CDDH/I/71). Official Records of the Geneva Diplomatic Conference (1974-1977), vol. III, pp. 8-9.

¹⁴⁶ 70 votes for, 21 against, 13 abstentions. Most of the states voting against the amendment or abstaining were Western states. Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VIII, p. 102.

¹⁴⁷ Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VIII, p. 106.

¹⁴⁸ *Ibid.*, p. 108.

¹⁴⁹ Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VI, p. 41.

international law applicable in armed conflict". Thus, the requirements of internal disciplinary system, commandment by a person responsible, and adherence to the rules of war are mentioned.

The third and fourth criteria, those of carrying arms openly and wearing fixed distinctive signs, caused extensive debate at the Diplomatic Conference, as they go hand in hand with the principle of distinction, laid down in Article 48 AP1. This principle exists in the Geneva Conventions, but the delegates at the Conference wished to develop it further. Suggestions¹⁵⁰ were made regarding the rule of distinction as to encompass only the time the combatant spent in military operations, whilst other delegations wished to retain the condition of permanent distinction.¹⁵¹ The discussions were long and arduous, until the article was remanded to a Working Group, which presented its suggestion to the plenary Conference.

According to this suggestion, combatants do not have to be clearly distinguished from the civilian population at all times; it is enough that they distinguish themselves while they are engaged in an attack or preparation for an attack. The article goes on, stating that if it is not possible for the combatant to distinguish himself this way, he must, at the very least, carry his arms openly during the operation and at any time that he is visible to the enemy whilst in preparation for the attack.¹⁵²

This was a manner of clarifying the existing, vague regulations, satisfying the demands of the principle of distinction, whilst at the same time relaxing the pressures on resistance movements of fulfilling the conditions.¹⁵³ Experience showed that very strict directives for fulfilling combatant status did not deter individuals who were fighting for freedom.¹⁵⁴ They would pick up arms and engage enemy soldiers, whether they fulfilled the demands or not. It should rather be a policy to accommodate for this reality, to encourage these individuals and these groups to fulfil the criteria.¹⁵⁵

¹⁵⁰ Amendments submitted by Poland, Finland, the Netherlands, and the UK and the US. Official Records of the Geneva Diplomatic Conference (1974-1977), vol. III, pp. 181-184.

¹⁵¹ Ex. Spain.. Official Records of the Geneva Diplomatic Conference (1974-1977), vol. XIV, p. 323.

¹⁵² Article 44.3 AP1. The exact text reads: "In order to promote the protection of the civilian population from the effects of hostilities, 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. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) During each military engagement, and

(b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."

¹⁵³ K. Suter, *An International Law of Guerrilla Warfare*, p. 164.

¹⁵⁴ G.I.A.D. Draper, 'The Status of Combatants and the Question of Guerrilla Warfare', in *BYIL 1971*, p. 214.

¹⁵⁵ It has been put forth that guerrilla groups strive to become a unit, both factually and morally; they endeavor to find a common identity, and often use uniforms, etc., to achieve this unity. M. Walzer, *Just and Unjust Wars*, p. 182.

Although the article was adopted, as Article 44,¹⁵⁶ it was still controversial, leading several States to abstain from voting, and Israel to vote against it. Israel's interpretation of the article was literal, indicating that such a liberal view of the principle of distinction would lead to an increase of terrorist acts. The delegate exemplified the problem by suggesting that a terrorist in civilian clothes who was about to set off a bomb was not in fact bearing arms, and was not obliged to distinguish himself from the civilian population because in his case there was no organized "deployment" preceding his attack.¹⁵⁷

Other delegates were not as gloomy in their predictions on the impact of the article, and instead welcomed the more humane regulations, which would give resistance movements a chance and an incitement to fulfil the criteria and be acknowledged as combatants. It was imperative that the principle of distinction should remain intact in order to protect civilians, but the protection of and adherence to the rules of war by all combatants, regular and irregular, was also of the utmost importance.¹⁵⁸

One final regulation with direct relevance to resistance movements was introduced in the Additional Protocol: Article 96.3. This article gives resistance movements and movements fighting colonial domination and alien occupation the opportunity to make a unilateral declaration stating that they will adhere to the Geneva Conventions and the Additional Protocol. Although these groups are not States, and can therefore not be Parties to the Protocol, the possibility of making such a declaration raises the credibility of the movement and increases the safety of the civilian population. Both parties to the conflict are then officially operating by the same rules, and the risk for discrepancies diminishes.

3.3 The Additional Protocol today

Despite the overwhelming success of the Additional Protocol in modernizing the laws of war, there were a number of States that still felt that the Protocol did not sufficiently fulfil its promises. Today, 163 states are Parties to the first Additional Protocol, leaving 29 states who find enough fault with the Protocol not to ratify it.¹⁵⁹

As stated in the preceding chapter, Israel refused to sign the Additional Protocol, and has still not changed its position. Its arguments against signature and ratification are mainly due to the main subject of this thesis:

¹⁵⁶ The draft Article passed by 73 votes to one, with 21 abstentions. Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VI, p. 121.

¹⁵⁷ Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VI, p. 122.

¹⁵⁸ Ibid, pp. 124-126.

¹⁵⁹ Afghanistan, Andorra, Azerbadjan, Bhutan, East Timor, Eritrea Fiji, Haiti, India, Indonesia, Iran, Iraq, Israel, Kiribati, Malaysia, Marshall Islands, Morocco, Myanmar, Nepal, Pakistan, the Philippines (only party to APII), Singapore, Somalia, Sri Lanka, Sudan, Thailand, Turkey, Tuvalu, USA. ICRC homepage

the definition of combatant and the acceptance of resistance movements as such.¹⁶⁰ Israel felt the language in Article 1 was too political, which had no place in a document such as this. Further, Israel felt that the wording of Article 44 was fundamentally flawed, and could not accept the statement that there were situations in armed conflicts where combatants could not distinguish themselves from civilians, however qualified and limited. In the end, Israel did not even sign the Final Act of the Conference.¹⁶¹

The United States signed the Final Act and the Additional Protocol¹⁶² in 1977. In 1987, however, President Reagan notified the US Senate that he would not submit API for the Senate's advice and consent to ratification, because he felt the Protocol was "fundamentally and irreconcilably flawed"¹⁶³. As expressed already in 1977 at the Diplomatic Conference, the United States felt it was wrong to automatically treat wars of national liberation as international conflicts, as a result of the moral qualities of each conflict. Further, the United States was still not content with the revised principle of distinction, saying it would endanger civilians among whom terrorists and other irregulars would try to conceal themselves.¹⁶⁴

Several authorities, particularly the ICRC, have criticized this decision, saying that the Additional Protocol codifies what has become customary international law.¹⁶⁵ The inclusion of wars of national liberation is something that had been in the works for some time (see for example the Friendly Relations Declaration¹⁶⁶), and the Additional Protocol does not anywhere provide support for terrorism. On the contrary, the Protocol is adamant in its position that terrorist acts should be punished.¹⁶⁷

The United States' position regarding the Additional Protocol serves as an example of the confusion surrounding the treaty and international humanitarian law. Arguments that are readily accepted by some states are just as readily rejected by others, and the motives behind different states' ratification vary greatly. Although we may believe that the status and rights of resistance movements in international humanitarian law has been regulated satisfactorily, difficulties will certainly arise when these rules are to be applied in practice.

¹⁶⁰ Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VI, pp. 216-7.

¹⁶¹ This was mainly due to the fact that movements of national liberation, which had been invited to participate in the Diplomatic Conference, also had been invited to sign the Final Act. Israel's main objection was that the PLO was invited to sign. Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VI, p. 216.

¹⁶² Adding an understanding that "the phrase 'military deployment preceding the launching of an attack' in Article 44.3 means any movement towards a place from which an attack is to be launched". 'Contemporary Practice of the United States', in *AJIL Vol. 72, 1978*, p. 407.

¹⁶³ M. Sàssoli & A. Bouvier (eds.), *How Does Law Protect in War?*, p. 604.

¹⁶⁴ *Ibid.*

¹⁶⁵ H.P. Gasser, 'An Appeal for Ratification by the United States', in *AJIL Vol 81, 1987*, p. 916.

¹⁶⁶ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.

¹⁶⁷ G.H. Aldrich, 'Prospects for US Ratification of Protocol I', in *AJIL Vol 85, 1991*, p. 10.

The next two chapters will look at the theoretical and practical application of the rules on resistance and guerrilla fighters, and the problems facing governments and armed forces in applying these rules.

4 Theoretical and practical application of the rules of occupation and resistance

4.1 The example of Sweden

Sweden ratified the Additional Protocol in 1979, accepting all regulations within it without reservations. In 1984, the Swedish International Humanitarian Law Committee (Folkrättskommittén) published an Official Report on the Swedish interpretation of humanitarian law as it stood at the time, and how it should be applied by Swedish authorities.¹⁶⁸

The official Swedish attitude towards resistance to occupation is that resistance should be made at all times. If the country becomes occupied, it means that the defensive forces failed to keep the enemy off Swedish territory, but the conflict is in no way to be deemed resolved. Resistance to occupation is officially sanctioned by the Swedish Government.

The Official Report of 1984 also studied the time criterion in Article 44.3 API, the open carrying of arms “during deployment preceding military action”, and took up possible problems of interpretation that may arise. The International Humanitarian Law Committee illustrated two extremes that would accentuate these problems. On the one hand is the interpretation that “preceding” should encompass the entire process of preparation, including transportation to the planned place of engagement and even the gathering before transportation. This interpretation would make it extremely difficult for both resistance movements and regular units to deploy in secret, a tactic sometimes necessary in order to carry through an attack successfully.¹⁶⁹

The other extreme would define “preceding” as “immediately preceding”, which would most certainly endanger civilians, and would probably also go against Article 37 API, which forbids perfidy.¹⁷⁰ The Swedish interpretation is an amalgamate of these two extremes, allowing for movement with concealed weapons if the risk of contact with the enemy is small.¹⁷¹ The Committee also advises a potential Swedish resistance movement to wear an armband as soon as it makes contact with enemy forces.¹⁷²

In general the Report was accepted, but it contained one new concept which caused some concern and which ultimately was discarded.

¹⁶⁸ SOU 1984:56 Folkrätten i krig. Rättsregler under väpnade konflikter – tolkning, tillämpning och undervisning.

¹⁶⁹ SOU 1984:56, p. 150.

¹⁷⁰ SOU 1984:56, p. 151.

¹⁷¹ SOU 1984:56, p. 151.

¹⁷² SOU 1984:56, p. 152.

The general international opinion during the 1970s was that soldiers and members of resistance movements were permanently in action even when they were not specifically engaged in military operations.¹⁷³ The British Manual of Military Law stated in 1971 that, “both these classes have distinct privileges, duties, and disabilities... an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both; in particular... an individual [shall] not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured or in danger of life, pretend to be a peaceful citizen”.¹⁷⁴

The Swedish International Humanitarian Law Committee found that this was a solution that only favors the occupier. Alongside the regular armed forces, the national defense system incorporated a Home Guard, certain police forces, and certain types of security forces.¹⁷⁵ The very character of the Home Guard and these other categories as temporary soldiers, fulfilling all the criteria of a combatant when they are on duty, but qualifying as civilians at all other times, would go against AP1 if interpreted in this way. This was felt to be unacceptable to the Committee, and the Official Report of 1984 suggested another solution. As long as the members of the Home Guard fulfil the four criteria whilst on duty, and as long as these individuals do not violate their rights whilst civilians, there should be no objection to them being classified as temporary combatants. It was suggested that this term might apply to police and members of organized resistance movements, too.¹⁷⁶ The Committee stated that although the term “temporary combatant” does not exist explicitly in international humanitarian law, the concept is not illegal.¹⁷⁷ It interpreted Article 51.3 AP1 as allowing individuals to change over between different statuses, as long as all criteria are fulfilled for each status.¹⁷⁸ Further, the Committee felt it was possible to make an analogy toward the differentiation between temporary and permanent medical personnel made in Article 8.k AP1.¹⁷⁹

The use of the term “temporary combatant” was heavily criticized from many sides, and was not used in the Ordinance on international humanitarian law adopted in 1990, Totalförsvarets folkkrätsförordning (1990:12), or in any other Swedish legal text.¹⁸⁰ In 1998 another Official Report was compiled, with the task of determining the legal status and tasks of the Home Guard, police forces, and other security forces in case of war, but also with the aim of determining whether the term “temporary

¹⁷³ Official Records of the Geneva Diplomatic Conference (1974-1977), vol. XIV, p. 323

¹⁷⁴ M. Walzer, *Just and Unjust Wars*, p. 179.

¹⁷⁵ SOU 1998:123, p. 12.

¹⁷⁶ SOU 1998:123, p. 37.

¹⁷⁷ SOU 1984:56, p. 75.

¹⁷⁸ Article 51.3 states: “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”. SOU 1984:56, p. 75.

¹⁷⁹ SOU 1998:123, p. 38.

¹⁸⁰ SOU 1998:123, p. 12.

combatant” was an acceptable expression when dealing with international humanitarian law.¹⁸¹

In general, the Official Report of 1998 found that the use of the expression and concept of “temporary combatant” would give rise to many uncertainties and credibility issues in the event of an armed conflict on Swedish soil. Sweden is a country with a small armed defense. In the event of an attack, it would be of great importance to use not only these forces, but also other groups, like police, the Home Guard, and certain other security personnel, which otherwise would conduct their civilian duties, in the defense of the country. Thus it is necessary for these groups to be labelled as combatants whilst performing these duties. However, if these groups were permanently seen as combatants, i.e. even when they are fulfilling their civilian duties, they would be a legitimate target for the enemy, even though they were not participating in armed defense of the country.¹⁸² If it were possible for these groups to change status between combatant and civilian, they would be appropriately protected.

However, the advantages these groups gain by this concept are dwarfed by the confusion that would arise both on the enemy side and amongst other civilians. Since the term “temporary combatant” and the concept of changing back and forth between statuses is not expressly accepted by international humanitarian law, the enemy forces could easily consider a policeman doing his duties as a member of the armed forces as a civilian participating in hostile activities contrary to humanitarian law.¹⁸³ Further, confusion as to which policeman is acting as a combatant and which is fulfilling his civilian duties could lead to the enemy treating all police as legitimate military targets.¹⁸⁴

The conclusion in the Official Report was that the use of the concept and term “temporary combatant” would risk Sweden’s credibility in following the rules of international humanitarian law and the international community’s trust in Sweden’s dedication to following the spirit of the rules. Therefore it was suggested that the concept be abandoned completely.¹⁸⁵

4.2 The example of the United Kingdom

The British attitude toward occupation of British soil is simple. The British Manual speaks of a right of armed forces and resistance groups to continue their struggle even after an occupation has entered into force, as long as they distinguish themselves from the civilian population or carry their arms

¹⁸¹ SOU 1998:123, p. 13.

¹⁸² SOU 1998:123, p. 39.

¹⁸³ SOU 1998:123, p. 43.

¹⁸⁴ SOU 1998:123, p. 64.

¹⁸⁵ SOU 1998:123, pp. 43-44.

openly during deployment.¹⁸⁶ In discussing the principle of distinction, the Manual is clear: “[a]n individual who belongs to one class is not permitted at the same time to enjoy the privileges of the other class”.¹⁸⁷ However, it clearly states that, “an organized guerrilla group or resistance movement that meets the requirements [of combatant] is as much a part of the armed forces as a regular unit”.¹⁸⁸ There is a clear acceptance of resistance movements in British military law.

The United Kingdom signed the Additional Protocol in 1977 and ratified it in 1998. A number of reservations and declarations were made, some regarding occupation and resistance. Firstly, there is a declaration on Article 44.3 regarding the United Kingdom’s interpretation of the term deployment. This declaration, defining deployment as “any movement towards a place from which an attack is to be launched”¹⁸⁹ has been made by many States parties to the Additional Protocol, and should merely be seen as a clarification of the term.¹⁹⁰ The 2004 British Manual of the Law of Armed Conflict brings up the question of the time criterion in the Article as well, discussing, as was done in the 1984 Swedish Official Report, the difficulties of a wide interpretation of the rule, and clarifies it to mean “situations where a combatant is truly *unable* to operate effectively whilst distinguishing himself...”.¹⁹¹ The Manual also clarifies how the UK interprets the term “visible to the adversary”. A combatant must carry arms openly whilst visible through regular or infra-red binoculars. The Manual states: “the test is whether the adversary is able, using such devices, to distinguish a civilian from a combatant carrying a weapon [...] The wide availability of these devices means that combatants should [...] carry their arms openly well before they are actually in contact with the enemy”.¹⁹²

Having ratified the Additional Protocol, the UK is bound to follow it. However, a reservation to the Protocol makes it clear that the UK considers itself bound by the document only where reciprocity exists, i.e. where the opponent also has ratified the Additional Protocol, or where the opponent has made a declaration according to Article 96.3 stating it considers itself bound by the Additional Protocol.¹⁹³ The United Kingdom also reserved its right to consider itself bound to any declaration according to Article 96.3 AP1 unless it has expressly recognized that the body making the declaration is genuinely an authority representing a people engaged in an armed conflict.¹⁹⁴

¹⁸⁶ Article 11.13 *Manual of the Law of Armed Conflict*, UK Ministry of Defence, p. 279.

¹⁸⁷ Article 4.1.1, *Ibid*, p. 37.

¹⁸⁸ Article 4.3.2, *Ibid*, p. 39.

¹⁸⁹ Reservations/Declarations made by the United Kingdom 2 July 2002. ICRC homepage.

¹⁹⁰ Reservations/Declarations made by States parties to the Additional Protocol. ICRC homepage. A total of 13 States have made such declarations – Australia, Belgium, Canada, France, Germany, Ireland, Italy, South Korea, Holland, New Zealand, Spain, and the United States (upon signature).

¹⁹¹ Article 4.5.1 *Manual of the Law of Armed Conflict*, UK Ministry of Defence, p. 42.

¹⁹² Article 4.5.3, *Ibid*, p. 43.

¹⁹³ Reservations/Declarations made by the United Kingdom 2 July 2002. ICRC homepage.

¹⁹⁴ Reservations/Declarations made by the United Kingdom 2 July 2002. ICRC homepage.

4.3 Iraq

During the last few decades, there have been many wars around the world, mostly civil wars with insurgents battling against government forces. However, there have not been very many instances of occupation, in the sense that I am treating it. Of course, there is the occupation of the West Bank and Gaza, but as I noted in the introduction to this thesis, the Israeli/Palestinian issue is so large, and encompasses so many other questions, that it is not viable to study it in this context.

The Coalition occupation of Iraq following the war in March 2003 is, on the other hand, a “classic” occupation, in that foreign troops have invaded Iraq and taken control of the administration of the country. The invasion of Iraq by the US-led Coalition was a swift operation, over in a few weeks. The invasion was followed by an occupation, led by the Coalition Provisional Authority (CPA), headed by Paul Bremer. On 1 May, 2003, President Bush announced that major combat operations in Iraq had ended, and the Coalition’s task now was to secure and reconstruct the country.¹⁹⁵

However, the work of the CPA was slow, which frustrated many Iraqis and prompted public protests on several occasions.¹⁹⁶ What began as tolerance of Coalition forces and hope that Iraq would become truly independent soon after the invasion, soon turned into malcontent and distrust of the Coalition as it became clear that it could not protect civilians from the violent elements attacking them. Sympathies began to weigh over toward the side of the religious leaders advocating an Iraq free from Western influence.

Because of the escalation of violence during the occupation, it is doubtful whether the CPA actually had effective control over the country. Cities like Basra, Mosul, and Fallujah were hotly contested in many clashes between Coalition forces and pockets of resistance, and the capital itself had never been completely secured. There are estimates that there were about a dozen major resistance organizations, both former regime loyalists and emerging Sunni and Shi’ite organizations.

Ambassador Bremer has been consistent in labelling the instigators of violence as terrorists and common criminals who must be brought down.¹⁹⁷ Certainly there were many groups and individuals in Iraq using violence against the Occupying Power that did not fulfil the criteria of lawful combatant and resistance movement. Although 163 countries have ratified the Additional Protocol, including members of the Coalition, neither Iraq

¹⁹⁵ “President Bush Announces Major Combat Operations in Iraq Have Ended”, White House Press Release, 1 May, 2003.

¹⁹⁶ “Angry Iraqis Demand Right to Rule Themselves”, Andrew Marshall, Iraq Occupation Watch, 3 June, 2003.

¹⁹⁷ L. Paul Bremer, Coalition Provisional Authority Administrator, Address to the Iraqi People, broadcast 17 October, 2003.

nor the leader of the Coalition in Iraq, the United States, have done so. Further, the British Article 96.3 declaration, means it does not consider itself bound to the Additional Protocol in relation to Iraq. Since most clashes between Coalition forces and resistance have involved American or British troops, the Additional Protocol would not be applicable in this situation.

5 Analysis and conclusion

The thesis has described the development of international humanitarian law toward greater recognition and protection of the right to defend one's life and home, even though the individual is not part of a regular army. Up until the end of the 19th century, civilians who took part in hostilities, without being part of the armed forces, were considered illegal combatants and punished thereafter. The past century has shown a rapid and definitive legal development in line with the change in attitude toward resistance movements and guerrilla-type fighting, due, in part, to the extensive resistance activities during WWII which was supported by the Allies.

However, not all States accept this development. The United States and Israel, for example, have declared themselves unprepared to go as far as to ratify the Additional Protocol, largely because of the more nuanced definition of combatants in it. They argue the risk to civilians would become too great. The counter-argument from different sides is that the Additional Protocol merely codified what has already become customary international law.

5.1 Are the rules regarding resistance in occupied territory adequate for today's world?

My opinion is that the practical development of warfare and the now-accepted principle of self-determination and human rights in general, has led, correctly, to the rules of the Additional Protocol. It is clear that resistance movements and guerrilla groups have emerged despite regulations to deter them. The only logical step in this situation is to accommodate in the law for the factual reality, not force reality to comply with the law.

In my view, the changes that were made to the definition of combatant in the Additional Protocol were correct. The main cause for concern during war should be the protection of civilians and that the basic rule of distinction remains intact. What the Additional Protocol does, in my view, is to widen the categories to be included in the definition of combatant so as not to leave any individual unprotected by any of the Geneva Conventions. Giving resistance groups recognition as combatants serves to give these groups the confidence and incentive to follow the rules of war, because it is then clear that the rules of war apply to them, too. Earlier, when it was not clear whether these groups were encompassed by the Geneva Conventions, there was really nothing that would encourage them to follow the rules. This increased the risk of groups committing war crimes, either because of ignorance of the rules, or because of exasperation at not being recognized for their struggle. The rules of war are not only designed to protect civilians, they exist to protect combatants, too.

One criterion in Article 4 GCIII is that of the resistance movement belonging to a Party to the conflict. This implied a connection with the official authority of the State for which the resistance was fighting, thus also meaning recognition by the adverse Party. The Additional Protocol changed this, acknowledging that not all resistance movements were recognized by the enemy, nor must they be. The important requirement was that there was a apparent chain of command, not that this command be recognized by everyone. A chain of command implies a certain level of organization, discipline, and a willingness to follow the rules of war.

The concept of requiring distinction during deployment preceding an attack is a welcome innovation. However, it appears perhaps a bit unclear, which is why certain States made clarifying declarations on the subject at ratification. As seen above, Sweden did not make such a declaration, and instead found itself rationalizing back and forth in the Official Report from 1984 on the difficulties of determining the temporal scope of the term. By first saying that a very generous time scope (from the earliest stages of preparation) is unrealistic, and then that a tight time scope puts civilians at risk, there is never a clear line to follow. Although the report appears to decide on one line, the discussions back and forth to reach this compromise is confusing enough to render the definition useless. This must be confusing to the Swedish armed forces, as well as to the rest of the world, potential adversaries in a potential future conflict with Sweden. The most logical solution, and the solution with least potential difficulties, should be making a declaration in line with the British, whereby it is clearly stated at which stage of the military deployment combatants must carry their weapons openly.

5.2 Can these rules be improved to encourage resistance movements and Occupying Powers to follow them?

In my opinion, there are two problems with today's regulations. One problem regards recognition of resistance movements. It has already been established that resistance groups need not be recognized by the adverse Party, but what about recognition by their own sovereign authority or government? Gerhard von Glahn sees a guerrilla supported by its government (in exile or otherwise) as entitled to combatant status. But should other groups, operating independently from the government, also be accorded combatant status? My opinion is that they should, and this is supported by the Additional Protocol, which states in Article 43 that, as long as the guerrilla forces are commanded by a person responsible for them, then they should fulfil the requirements, even though no official, recognized entity supports or recognizes them. I believe perhaps there should be a requirement of popular support rather than official support from an authority. In a democracy, the authorities receive legitimacy from the people, from popular support. The mere existence of a resistance movement

during an occupation should signal general malcontent with the occupation (see for example Iraq). A resistance movement can only survive with the aid of the civilian population around them. They depend on the civilian population for sustenance and protection, factors that show a correlation between civilians and resistance fighters. The resistance group should perhaps be seen as the military arm of the civilian population, in places where the official armed forces do not exist or cannot operate. Would it be possible to attach a criterion of popular support to the rules on resistance movements? It is not my place here to bring forth suggestions on how such a criterion would be formulated, or even how to present such a criterion to the international community, but it is a spontaneous idea that might prove useful in the future. Encouraging a resistance movement to acquire “official” popular support would, in my view, serve to legitimize the organization’s actions unto themselves and to the enemy, the Occupying Power. The likelihood of an organized resistance movement emerging in occupied territory increases with the deteriorating quality of administration by the Occupying Power. Unless a system of sanctions is created to influence an Occupying Power to take its obligations in the occupied territory extremely seriously, there is always the risk of maladministration leading to the suffering of the civilian population. Out of this suffering and discontent emerge more resistance movements, and so forth.

The second problem with today’s regulations is the vagueness of the term “arms” in Article 44.3 AP1. How would you categorize a suicide bomber who approaches a military convoy? Does an individual who carries no firearm, but who carries 20 hand grenades, or 20 land mines, have to have these munitions visible when approaching the enemy? These questions may seem elementary at first glance, of course they should be shown openly, but the rules are not that explicit. This can prove to be a very complex issue. There should be a clear description of what is meant by the term “arms”, and how different weapons should be handled, so as to avoid any and all confusion.

5.3 Conclusion

Although resistance movements have become more widely accepted as legitimate groups of combatants during the 20th century, there is still a discrepancy between the law and reality. As seen above, there are many questions to be resolved to attain better protection of both civilians and combatants during a belligerent occupation. However, there are more issues related to occupation which are equally confusing, although they do not have such a direct tie with the subject for this thesis. The temporal scope of the rules of occupation could potentially give rise to problems, such as when the one-year rule in Article 6 GCIV begins to apply. Taking the example of the occupation of Iraq, President Bush announced on May 1, 2003 that the end of major combat operations had been reached. However, hostilities did not cease at that point; if anything, they escalated. What weight should be given to a declaration such as that made by President Bush?

Further, what is the legal position of Coalition troops still stationed in Iraq today? The occupation is officially over, but the troops remain, prime targets for attacks by groups set against their presence. What is the legal status of such groups? Obviously, there are many more perplexing questions to be resolved.

The international community has come a long way in protecting civilians from wars, and in defining the parameters of war. However, the main problem is the willingness of individual States to conform with these regulations. There seems no point in having a book of rules if no one is going to follow the rules, no matter how detailed and fair the rules are. The 1949 Geneva Conventions are universally accepted and have taken on the character of customary law, but still there are countries that do not accept the Additional Protocol, a continuation of the Geneva Conventions. Even among countries that have ratified the Protocol, there are those who state that they will only apply it in relation to certain countries and not to others.¹⁹⁸ The Protocol was drafted in 1977. Today, almost 30 years later, the nature and scope of armed conflict has changed dramatically. The occurrence of terrorist acts, suicide bombs, etc. has, in my opinion, perhaps made it necessary for another overhaul of the rules, to accommodate for these new developments. The emergence of the term “terrorism” as an all-encompassing epithet to all individuals and groups conducting operations against a State or government instigates mistrust and hate against such groups. It is true that many of the actions for example in Iraq were not in conformity with the rules of law, but we should perhaps not be so fast to use the term terrorism, especially since there is as of today no universally accepted definition of the term.

¹⁹⁸ For example, Oman declared in 1984 that, "While depositing these instruments, the Government of the Sultanate of Oman declares that these accessions shall in no way amount to recognition of nor the establishment of any relations with Israel with respect to the application of the provisions of the said protocols". Reservations/Declarations made by Oman 29 March, 1984. ICRC homepage.

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