Commentary

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Professor Hingorani has dealt most comprehensively in his paper with the subject of prisoners of war, and has not sought to avoid any of the more difficult problem areas. His paper could be described as a tour de force, and I agree with most of his conclusions.

Implicit in the formal requirements for the grant of prisoner of war status, set out in Article 4 of the Third Convention are, as Draper has noted, two further elements — dependence, in some degree, on the Government of a State belligerent, and a degree of organisation.[1] This extends from the close connection between a State and its regular armed forces, at one end of the spectrum, to the rather indeterminate status, of an organised resistance movement which, under Article 4A.(2), "belongs to" a Party to the armed conflict. It is a relationship which need not be formal, but must be real, in the sense that the State concerned accepts international responsibility for the acts of the movement.[2]

From the language of Article 4 of the Convention, one could assume that members of regular armed forces automatically gain prisoner of war status, but such cases as *Mohammed Ali* v *Public Prosecutor,*[3] show that domestic courts are reluctant to grant prisoner of war status to persons caught engaging in sabotage operations, wearing civilian clothes. Following the US case of *Ex parte Quirin,*[4] such persons are held to have forfeited their combatant and, hence, prisoner of war status.

Such cases derive their legal justification from an extension of the customary law relating to espionage, to cover sabotage. But, as *Quirin's* case itself demonstrated, the principle is used in order to allow States to reach preparatory conduct, before it has matured into a substantive offence under the Hague Regulations, the Geneva Conventions, the Protocols, or the Nuremberg Principles.[5]

By denying combatant status, the States concerned are able to avoid their clear responsibility under Article 4 of the Third Convention to afford prisoner of war status. It is suggested that the correct course would be initially to confer prisoner of war status, with all the attendant judicial guarantees of the Convention, and

1. Draper, "The Status of Combatants and the Question of Guerilla Warfare" (1971) 45 BYBIL 173, 188.
2. On the nature of this link see Meyrowitz, "La Guerilla et le droit de la guerre — problèmes principaux", (1971) 7 Rev Belge Dr Int 56, 49.
3. [1968] 3 All ER 488.
4. 317 US 1 (1942).
5. See Armstrong, "Mercenaries and Freedom Fighters: The Legal Regime of the Combatant under Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)" (1978) JAGJo 125, 166–7.

then bring the individual concerned to trial for the substantive offence committed by him under the law of armed conflict, for example, of failing to distinguish himself from the civilian population. It would appear from paragraph 2 of Article 44 that the drafters of Protocol I intended such an approach in future.

One must also be concerned by decisions of domestic courts which put the onus of proving that a person is entitled to be treated as a prisoner of war on the captured person. In *Public Prosecutor* v *Koi*,[6] the accused had been dropped into Malaysia as a member of a group of paratroopers under the command of Indonesian Air Force officers, bearing arms openly, and wearing camoflaged uniforms. One might have assumed that, prima facie, Koi should have been regarded as a combatant member of the armed forces of Indonesia. But the Privy Council stated of him and his associates:[7]

> ". . . There was nothing to show that the accused were protected prisoners of war or to raise a doubt or not (under Article 5 of the Convention). The mere fact that they landed as part of the Indonesian armed forces did not raise a doubt".

Surely, the better view must be that a man who outwardly seems to meet the requirements of Article 4, but whose nationality or allegiance is in question, should be put before a competent tribunal under Article 5, and, until that time, must be treated as a prisoner of war.[8]

Koi's case confirms Professor Hingorani's remarks on traitors, the Privy Council having held that the Convention does not apply to a State's own nationals.

Similar arguments apply in relation to so-called "status offenders". By calling them spies, terrorists, saboteurs or mercenaries, the State can determine that an individual is unprivileged, which is itself a sanction, as this gives the Detaining Power international legal authority to prosecute its prisoners.

That these arguments are alive and well, at least in Western Eurpe, is clear from the interpretation of Article 44 of Protocol I given in the Rapport General to the IXth Congress of the International Society for Military Law and the Law of War held in Lausanne, Switzerland, particularly at 20–21. It adopts an interpretation which does not conform to the plain meaning of the second paragraph of the Article, and, as this Society reflects the views of senior military lawyers in their respective countries, it is clear that Western Europe does not accept that any change in the law relating to the duty of a combatant to distinguish himself has taken place. This is regrettable, if the effect will be to leave guerillas outside the law. It is clear from practice in World War II and often more recent conflicts, that those who stand to gain nothing from the law have no incentive to observe it.

Time does not permit analysis of these European arguments, which appear to be based on the views of Professor Ruth Lapidoth of the Hebrew University in Jerusalem.[9] Suffice it to say that I consider them contrary to the text, and to the clear intentions of the drafters of Article 44, as set forth in the *travaux préparatoires*.

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6. [1968] 1 All ER 419.
7. At 427.
8. See Baxter's comment in this case in (1969) 63 AJIL 290, esp at 293.
9. "Qui a droit au statut de prisonnier de guerre?" (1978) 82 Rev Gen Dr Int Pub 170 at 198–9.

I mention the above to show how the Conventions can be interpreted broadly or narrowly, or even ignored, in the case of the status offenders mentioned above. I now turn to two matters on which I have somewhat different views to those of Professor Hingorani.

Armed forces after surrender

The instrument of surrender signed at Berlin on 9 May 1945, paragraph 2, provided that the German High Command ". . . will at once issue orders to all German military, naval, and air authorities and to all forces at sea, or in the air who are at this date under German control to cease active operations at 23.01 hours, Central European Time on May 8 . . ." (This act of military surrender was without prejudice to, and was to be superseded by, any general instrument of surrender imposed by the United Nations.) Paragraph 5 went on to provide that:

> "In the event of the German High Command or any of the forces under their control failing to act in accordance with this act of surrender, the Supreme Commander, Allied Expeditionary Force, and the Supreme High Command of the Red Army, will take action as they deem appropriate."

See also the Declaration of the Allied Powers dated 5 June 1945, assuming supreme authority, including all the powers possessed by the German Government.

Churchill's broadcast to the British people, at 3pm on 8 May 1945 said:

> "The Germans are still in places resisting the Russian troops, but should they continue to do so after midnight they will, of course, deprive themselves of the protection of the laws of war, and will be attacked from all quarters by the Allied troops".

This did not mean that no quarter would be given to them, but that any captured by the Allies would not be lawful belligerents, and, hence, would not be entitled to be prisoners of war. They could be tried either for their war crime of participating in hostilities or for violating the armistice.

Armed force of unrecognized states

I have some difficulty with Professor Hingorani's argument that members of the PLO are entitled, as a matter of law, to be treated as prisoners of war.

My understanding of the 1949 Geneva Conference is that Article 4A.(3) of the third Convention was intended to confer prisoner of war status on members of the *regular armed forces of a State* who were in a position similar to that of the French regular forces who fought on behalf of the Allies in World War II. In effect, they rejected the armistice, and had decided to fight on against the Axis Powers. Although they owed allegiance to an authority not recognized by the Detaining Power, they were clearly part of the Allied forces, and the Allied States could accept responsibility for their acts.[10]

The PLO may owe allegiance to an authority not recognized by the Detaining Power, but they are not regular armed forces in the sense of Article 4A.(3) (that is, of a State or a belligerent entity). And, so far as I am aware, no State is prepared to accept international responsibility for the acts of the PLO.

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10. Nurick and Barrett, "Legality of Guerilla Forces under the Laws of War" (1946) 40 AJIL 563.

I do consider that Articles 1.4 and 43 are opposable to States that are not parties to the Protocol. This is not simply because a State is not bound by a treaty without its consent (reflected in Articles 93 and 94 of the Protocol, which require ratification or accession, in order to become binding). Article 96, paragraph 3, has the effect of imposing the same rights and obligations as those assumed by a High Contracting Party, on an authority representing a people engaged in an Article 1.4 conflict. But, paragraph 2 makes it clear that when a State party to the armed conflict is not a party to the Protocol, it can only become bound by it if it "accepts and applies the provisions thereof".

In view of the small number of ratifications to date, I do not believe that it can be argued that these Protocol norms are reflective of recently-emerged norms of customary law.

I see some resemblance between Tito's partisans in World War II and the PLO. The former had control over a constantly-changing but, nevertheless, real population and territory, and eventually managed to become the lawful government of Yugoslavia. The PLO aspires to become the lawful government of a State of Palestine whose borders are at present unclear and whose population is undefined. Recognition as a State or state-type entity by some other States seems a necessary first step.

So too, during World War II, the Free French Movement sought to replace the Vichy government, as the lawful government of the French Republic. Until that replacement occurred, its armed forces had no right to the status of prisoners of war, under the 1929 Convention, or customary law. But, by defeating Germany, all these defects could be cured.

It may be noted that the PLO has not sought to use the Article 96 procedure. This may indicate an acceptance of the legal arguments set out above, or recognition that the Protocol imposes heavy responsibilities on an organisation, as well as benefits.