UNCONVENTIONAL WARFARE UNDER ADDITIONAL PROTOCOL I

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ABSTRACT[***]

Recent events have made it much more likely that the United States (U.S.) and its allies could wage an unconventional warfare campaign in a future international armed conflict. Should this occur, the conflict will—between many of the States involved—be governed by the most controversial portions of Additional Protocol I, including Article 44's rules limiting the need for partisans to wear uniforms. While the U.S. is not a Party to Additional Protocol I, U.S. practitioners cannot ignore the Protocol. By understanding how the Protocol applies to Parties, the U.S. will see many benefits, including increased protections for friendly partisans, and incur necessary costs, including limits on its ability to try enemy fighters. Failure to understand the protocol, however, will undermine the combatant immunity enjoyed by the U.S. Armed Forces and their allies.

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[***] The views presented are those of the authors and do not necessarily represent the views of the Department of Defense or its components. The authors would like to thank Professors Michael Meier and Todd Huntley for their invaluable feedback and helpful advice.

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I. INTRODUCTION

For much of the past twenty-five years, law of war practitioners have been focused on the challenges of terrorism and non-international armed conflict. But Russia's invasion of Ukraine[1] and increasing tensions in Southeast Asia[2] have brought the law governing international armed conflict back to the forefront. However, the body of law governing conflicts between States is split between the 174 States which have ratified Additional Protocol I ("AP

[1] *See* Marc Santora & Andrew E. Kramer, *For Ukraine, So Much Unexpected Success, and Yet So Far to Go*, N.Y. TIMES (Nov. 22, 2022), https://www.nytimes.com/2022/11/22/world/europe/ukraine-russia-state-of-war.html.

[2] *See* Raffaele Huang, *U.S., Chinese Defense Chiefs Meet*, WALL ST. J. (Nov. 22, 2022), https://www.wsj.com/articles/u-s-and-chinese-defense-chiefs-meet-in-reflection-of-easing-tensions-11669110111.

I"), the major law of war treaty since the 1949 Geneva Conventions, and States such as the United States (U.S.) and India which have declined to do so.[3]

Unconventional Warfare is at the very center of this division. When AP I was negotiated during the 1974-1977 *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*,[4] the major clashes were over Articles 1 and 44, both of which govern the rights and duties of partisan fighters. Article 1,[5] negotiated in a high-profile session at the beginning of the diplomatic conference, controversially expanded the law governing international armed conflicts to include "wars of national liberation," allowing rebel groups to qualify—in the right circumstances—for the combatant privilege traditionally extended only to members of State armed forces.[6] Article 44,[7]

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[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

[4] *See* CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987) [hereinafter AP I COMMENTARY]; *see also Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)* (1974-1977) [hereinafter citation to the Official Records will be to CDDH/(committee)/(summary record) (page)].

[5] Additional Protocol I, *supra* note 3, art. 1(3)-1(4).

> This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in . . . armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

[6] Waldemar A. Solf, *A Response to Douglas J. Feith's Law in the Service of Terror: The Strange Case of the Additional Protocol*, 20 AKRON L. REV. 261, 286 (1987).

[7] Additional Protocol I, *supra* note 3, art. 44:

> 1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
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> 2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
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> 3. 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

negotiated later in the conference, narrowed the circumstances when partisan fighters were required to wear uniforms.[8] These two articles led the U.S. to conclude that AP I was "fundamentally and irreconcilably flawed" and decline to ratify it.[9] At the time, the U.S. feared that Article 44 would be used by the Soviet Union and its allies to legitimize communist insurgencies at the expense of civilians and uniformed troops.[10] But the world has changed since 1977, and in 2024 it is the U.S. and its partners who would likely wage unconventional warfare campaigns in response to aggressive behavior by

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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.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

[8] *See* Solf, *supra* note 6, at 274.

[9] S. TREATY DOC. NO. 100-2 (1987), at iii, transmitted by Letter dated January 29, 1987, from Ronald Regan, President of the U.S. [hereinafter S. TREATY DOC. NO. 100-2]. *See also* Feith, *supra* note 6, at 38-39, 45; Solf, *supra* note 6, at 281; Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFFS. 901, 912-15 (1986); George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 9 (1991).

[10] *See* Feith, *supra* note 9, at 39; Solf, *supra* note 6, at 283; S. TREATY DOC. NO. 100-2, *supra* note 9, at iii.

their adversaries.[11] But since key U.S. allies and adversaries have ratified AP I, while the U.S. has not, these unconventional warfare campaigns would be uniquely complex, with AP I's most controversial articles—especially Article 44—applying between some States but not between others.[12]

Because it was designed to increase protection for armed resistance movements,[13] AP I, especially Article 44, will have a dramatic effect on unconventional warfare. Essentially all partisans, regardless of their role, will qualify as privileged combatants, and only a small portion will lose this status should they fall into AP I's narrow exceptions for spies or those who fail to distinguish themselves in certain situations.[14] And while the U.S. is not a party to AP I, the U.S. will not be able to disregard AP I's effects. In conflicts among parties to AP I, the U.S. will reap benefits, such as dramatically expanded protection for indigenous partisans, and will face costs, such as significant restrictions on its ability to try detainees.[15] The result will be a legally complex battlefield where U.S. commanders and legal advisors must deftly navigate AP I, taking advantage of its many benefits while remaining aware of its costs. The price of failure will be high. Improper attempts to try lawful combatants will undermine respect for the combatant immunity long enjoyed by the U.S. armed forces, and failure to object to enemy trials will sacrifice the legitimate protections owed to friendly partisan fighters.

To assist practitioners, this Article will first survey AP I's robust protection for partisan fighters, highlighting Article 43's broad definition of lawful combatants and discussing AP I's narrow exceptions for spies and mercenaries. The Article will then examine Article 44's difficult and

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[11] *See* STEPHEN J. FLANAGAN ET AL., DETERRING RUSSIAN AGGRESSION IN THE BALTIC STATES THROUGH RESILIENCE AND RESISTANCE 14-15 (RAND Corp. 2019); Isabelle Khurshudyan & Kamila Hrabchuk, *Stealthy Kherson Resistance Fighters Undermined Russian Occupying Forces*, WASH. POST (Nov. 18, 2022, 3:42 PM), https://www.washingtonpost.com/world/2022/11/18/kherson-resistance-partisans-russia-occupation/.

[12] *See* THEODORE RICHARD, UNOFFICIAL UNITED STATES GUIDE TO THE FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 3 (Donna Budjenska ed., Air Univ. Press 2019).

[13] *See* AP I COMMENTARY, *supra* note 4, at 522-23; Douglas J. Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 AKRON L. REV. 531, 531-32 (1986); François Bugnion, *Adoption of the Additional Protocols of 8 June 1977: A Milestone in the Development of International Humanitarian Law*, 99 INT'L REV. RED CROSS 785, 786-92 (2017) (noting that States representing former colonies "thought that the rules relating to the conduct of hostilities were unsuited to the wars of decolonization they had to wage in order to regain their independence. They also resented the fact that captured 'freedom fighters' were denied PoW status and protection under Geneva Convention III.").

[14] Additional Protocol I, *supra* note 3, at art. 48.

[15] *See* Anya Wahal, *On International Treaties, the United States Refuses to Play Ball*, COUNCIL ON FOREIGN RELS. (Jan. 17, 2022, 5:08 PM), https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball.

contested rules for partisans in combat, discussing the narrow situations in which partisans must distinguish themselves from the civilian population. After surveying AP I's rules, the Article will consider how States not a party to AP I (such as the U.S.) will be affected despite their decision not to ratify the Protocol. Finally, the Article will turn to the conflict in Ukraine to discover how AP I is being applied on the modern battlefield.

The goal is to equip future commanders and legal advisors with the tools they will need to properly protect friendly partisans while respecting international treaties, customary international law, and States' decisions to ratify (or not to ratify) AP I.

II. ADDITIONAL PROTOCOL I PROTECTION FOR PARTISANS

Article 44 was intended to expand law of war protections for partisans,[16] and the final text of AP I succeeded in that aim, dramatically expanding the definition of the armed forces and lawful combatants.[17] But while Article 44 is the rule which most famously governs partisan warfare, Article 44 falls within Part III, Section II of AP I, which includes Articles 43 through 47.[18] It is these articles, together with the first article of AP I, which govern

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[16] *See* AP I COMMENTARY, *supra* note 4, at 522; MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS, COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 278-80 (1982) [hereinafter BOTHE 1982]; Arthur John 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)*, 30 JAG J. 125, 128, 138-39 (1978). During the Diplomatic Conference, many post-colonial and communist states argued that AP I should protect fighters in certain "wars of national liberation" regardless of whether they wore uniforms. These protections would not extend to partisans in conflicts that did not qualify as a war of national liberation, nor would they generally extend to the opposing side in a war of national liberation. *See* Statement of the Representative of Egypt, *Official Records*, Vol. VI, CDDH/SR.41 at 145 (May 26, 1977) ("The right to disguise was confined to the combatants of liberation movements; regular combatants were not released by the obligation to wear uniform during military operations – failure to do so would be to commit an act of perfidy."). S*ee also* Statement of the Representative of Pakistan, *Official Records*, CDDH/IIII.SR.33 at 320 (Mar. 17, 1975) ("There was a clear distinction between freedom fighters struggling in the exercise of their right to self-determination against alien occupation and racist régimes, and minority movements rebelling against a lawful authority and threatening the territorial integrity of a State."); Statement of the Representative of the Democratic Republic of Viet-Nam, *Official Records*, CDDH/IIII.SR.33 at 324-25 (Mar. 17, 1975) (arguing that only fighters in wars of national liberation should be absolved from the requirement to distinguish themselves). This argument did not prevail, and the final text does not distinguish between partisans in wars of national liberation and partisans in other conflicts. For an overview of the negotiating history, *see* Solf, *supra* note 6, at 280, 282.

[17] *See* AP I COMMENTARY, *supra* note 4, at 522.

[18] Additional Protocol I, *supra* note 3, at arts. 43-47.

partisan warfare under the Additional Protocol.[19]

For a member of a resistance movement to receive protection under AP I, several things must be true. First, the individual must qualify as a combatant by being a member of the armed forces.[20] Second, the individual must not be a spy or mercenary.[21] Finally, the individual must distinguish themselves in certain situations as required by Article 44.[22]

While this framework may seem simple, AP I's exceptionally broad definition of the armed forces fundamentally changes the legal status of resistance movements. Instead of the Third Geneva Convention's ("GC III") narrow categories,[23] where resistance movements qualify almost by exception, AP I begins by granting combatant status to a broad group of people and then removes combatant status from narrowly defined groups. It is difficult to overstate this significant change from the 1949 conventions.[24]

A. Members of the Resistance as Lawful Combatants

In most cases, members of a resistance movement will be lawful combatants. AP I's requirements for lawful combatants are provided in Article 43.[25] Under Article 43, the essential question is whether the resistance movement answers to a party to the conflict. If it does, and if it has sufficient organization to hold its members accountable for their conduct, most members of the resistance will qualify as combatants and will have prisoner of war status if captured. This is true for all four of the primary resistance movement components (the guerrillas, the underground, the auxiliary, and the public component). While members of any component may operate in a way that causes loss of combatant immunity, membership in any of the four components is compatible with combatant status.[26] To see why, it is necessary review Article 43 in detail.

1. Article 43 Requirements

To receive protection under AP I, a person must first qualify as a member

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[19] BOTHE 1982, *supra* note 16, at 248-49 ("Article 44 can be understood only in the context of the group of Articles of which it is a key element (Arts. 37, 43, 45, 46, 47 and 75).").

[20] Additional Protocol I, *supra* note 3, at art. 43.

[21] *Id.* at arts. 46-47.

[22] *Id.* at art. 44.

[23] Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 4, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III].

[24] *See* Feith, *supra* note 13, at 532; Howard S. Levie, *Pros and Cons of the 1977 Protocol I*, 19 AKRON L. REV. 537, 539-40 (1986); Burrus M. Carnahan, *Additional Protocol I: A Military View*, 19 AKRON L. REV. 543, 545-46 (1986).

[25] Additional Protocol I, *supra* note 3, at art. 43.

[26] AP I COMMENTARY, *supra* note 4, at 515.

of the armed forces under Article 43.[27] Once a person is a member of the armed forces, they are (with the minor exception of chaplains and medical personnel) a combatant with a "right to participate directly in hostilities."[28]

Article 43 has two main requirements for membership in the armed forces. First, the organized armed force, group, or unit must be responsible to a party to the conflict.[29] Second, the group must have an internal disciplinary system capable of enforcing the law of war.[30]

These requirements are relaxed from the stricter requirements of GC III.[31] Under GC III, a resistance movement would have to carry arms openly and wear a fixed distinctive sign recognizable at a distance.[32] These requirements have been eliminated in Article 43 of AP I. Instead, AP I grants combatant status regardless of uniform wear and then removes combatant status only if uniforms are not worn in the narrow circumstances described in Article 44.[33]

2. The Requirement to be Responsible to a Party to the Conflict

To qualify as part of the armed forces, a resistance movement must be under a command responsible to a party to the conflict.[34] This raises two questions. First, what type of entity counts as a party to the conflict? Second, how strong must the connection be between the resistance movement and the party to the conflict?

Only certain entities may be a "party to the conflict" for AP I purposes. AP I applies to international armed conflicts, and in most cases, only States may be parties to an international armed conflict.[35] This generally means that the resistance movement must belong to a State which is engaged in an international armed conflict.[36] However, there are situations where the party to the conflict is either not a State or is a State not recognized by all parties to the conflict. First is where the conflict is a war of national liberation, and the resistance movement is linked to the authority representing the people

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[27] BOTHE 1982, *supra* note 16, at 248.

[28] Additional Protocol I, *supra* note 3, art. 43(2) ("Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.").

[29] *Id.* at art. 43(1).

[30] *Id.*

[31] *See* Levie, *supra* note 24, at 540-41.

[32] GC III, *supra* note 23, art. 4(A)(2).

[33] Additional Protocol I, *supra* note 3, at art. 44(2)-(4).

[34] *Id.* art. 43(1).

[35] *Id.* art. 1(3)-(4); GC III, *supra* note 23, at art. 2; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 26-28 (Cambridge Univ. Press 2d ed. 2010).

[36] GC III, *supra* note 23, at art. 2; AP I COMMENTARY, *supra* note 4, at 55.

engaged in such a war of national liberation.[37] While AP I's expansion to include wars of national liberation was extremely controversial,[38] and commentators have expressed doubt about whether wars of national liberation can truly exist,[39] should such a conflict arise the resistance movement involved will be included in Article 43's definition of the armed forces.[40] The second situation where a resistance movement may answer to something other than a State is where the resistance movement belongs to a government not recognized by the resistance movement's opponent. This situation is not unique to AP I, and results from Article 4 of the Third Geneva Convention. Under Article 4, prisoners of war include "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."[41] Commentators have interpreted this provision to include governments like the French government-in-exile during World War II, where the government was recognized by States, but not by the detaining power.[42] Thus, it seems clear that a resistance movement belonging to a government recognized by at least some States should qualify as the armed forces for Article 43 purposes.

The second question is what it means to be "responsible to" one of these parties to the conflict. Under GC III, a resistance movement could belong to a party, and therefore qualify for combatant immunity, in fairly broad circumstances.[43] These included situations where the party made an official declaration or even where there was "tacit agreement" between the resistance movement and the party to the conflict.[44] For AP I purposes, however, the

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[37] Additional Protocol I, *supra* note 3, art. 1(4) (wars of national liberation are defined by Article 1 as "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."); *see* Additional Protocol I, *supra* note 3, art. 96; AP I COMMENTARY, *supra* note 4, at 41, 47-48, 53.

[38] *See* Hans-Peter Glasser, *A Brief Analysis of the 1977 Geneva Protocols*, 19 AKRON L. REV. 525, 525-26 (1986). *See also* Feith, *supra* note 9, at 36-41.

[39] *See* Solf, *supra* note 6, at 283-85; *see also* Kubo Mačák, *Wars of National Liberation: The Story of One Unusual Rule II*, OUPBLOG (July 30, 2018), https://blog.oup.com/2018/07/wars-national-liberation-unusual-rule-part-2/ (noting that one conflict, in Western Sahara, has recently been recognized as meeting AP I's "war of national liberation" requirements).

[40] BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 277-80 (2d ed. 2013) [hereinafter BOTHE 2013].

[41] GC III, *supra* note 23, at art. 4(A)(3).

[42] JEAN DE PREUX ET AL., COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 61-64 [hereinafter GC III COMMENTARY].

[43] *Id.* at 57-58.

[44] *Id.*

party to the conflict must accept the ability to control the resistance movement and hold it to account.[45] Recent court decisions have provided important clarity in this area. On November 17, 2022, the District Court of the Hague convicted several individuals of shooting down Malaysia Airlines Flight MH17 in eastern Ukraine.[46] The court held that an international armed conflict existed because Russia exercised "de facto overall control" of the Donetsk People's Republic, a separatist group.[47] While the Court found that an international armed conflict existed, and that Russia was a party to that conflict, it found that the Donetsk People's Republic did not qualify as the armed forces under Article 43.[48] The court relied on the fact that Russia did not accept any responsibility for the group's actions. Without an acceptance of responsibility, the Court found that the Donetsk People's Republic was not responsible to a party to the conflict, and thus the Donetsk People's Republic could not qualify as armed forces under Article 43.[49]

Contrary to the District Court of the Hague's ruling, however, this acceptance of responsibility need not be public. The text of Article 43 merely requires that the group be responsible to the party, and that the chain of command can discipline members for violations of the law of war.[50] There is no requirement for a particular form of public announcement.[51] That said, a

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[45] *See* Additional Protocol I, *supra* note 3, at art. 43 (noting that the armed force, group, or unit must be "responsible to that Party for the conduct of its subordinates").

[46] Press Statement, Anthony J. Blinken, Sec'y of State, Verdict in Dutch Trial Against MH17 Suspects (Nov. 17, 2022), https://www.state.gov/verdict-in-dutch-trial-against-mh17-suspects/.

[47] *MH17 Judgment Hearing* (Dist. Ct. Hague 2022) (transcript on file with de Rechtspraak) [hereinafter *Transcript of the MH17 Judgment Hearing*] https://www.courtmh17.com/en/news/2022/transcript-of-the-mh17-judgment-hearing.html; *The Criminal Investigation by the Joint Investigation Team (JIT)*, NETHERLANDS PUBLIC PROSECUTION SERVICE, https://www.prosecutionservice.nl/topics/mh17-plane-crash/criminal-investigation-jit-mh17 (last visited Oct. 20, 2023).

[48] *Transcript of the MH17 Judgment Hearing*, *supra* note 47 ("The court is therefore of the opinion that from mid-May 2014 onwards, and also on 17 July 2014, an international armed conflict was taking place on the territory of Ukraine between Ukraine and the DPR, in which the DPR was controlled by the Russian Federation.").

[49] *Id.* ("The question is therefore whether the [Donetsk People's Republic] and its members may be regarded as elements of the Russian armed forces. That would require the Russian Federation to accept the DPR as pertaining to it and taking responsibility for the conduct and actions of combatants under the command of the DPR. The court notes that this is not the case.").

[50] Additional Protocol I, *supra* note 3, at art. 43(1).

[51] *See* Lachezar Yanev, *Jurisdiction and Combatant's Privilege in the MH17 Trial: Treading the Line Between Domestic and International Criminal Justice*, 68 NETH. INT'L L. REV. 163, 179-80 (2021) ("[A]s a matter of law, the condition that the armed group has to 'belong to'/ 'be under a command responsible to' a State involved in an IAC does not require

public pronouncement could provide important clarity without providing the kind of detail that could risk operations. Were a party to publicly commit to investigating and prosecuting allegations against partner forces, this could provide an important argument that (so long as the group is factually under the control of the party) the Article 43 standard is met and group members belong to the armed forces.

3. The Requirement for an Internal Disciplinary System that Enforces the Law of War

Even where a resistance movement is responsible to an appropriate party to the conflict, it still must have an organized chain-of-command that can enforce the law of war. This is a significant change from the 1949 Conventions. GC III required that a resistance movement "conduct their operations in accordance with the laws and customs of war."[52] In AP I, this has been reduced to a requirement to have an internal disciplinary system "which . . . shall enforce compliance with the rules of international law applicable in an armed conflict."[53]

There is some debate about whether this is a requirement for combatant status or merely a legal duty, the violation of which could perhaps be punished under a theory of command responsibility, but would not prevent the group from qualifying as the armed forces.[54] Proponents of the "legal duty" view are correct that the drafters intended to prevent denial of prisoner of war status to groups based on war crimes—real or imagined—committed by the group's members.[55] So much is clear from Article 43's explicit departure from the language of GC III. Unlike GC III, which required the group to "conduct their operations in accordance with the laws and customs of war," Article 43 merely requires a disciplinary system.[56] However, while the group's disciplinary system need not prevent all violations, nor must it function particularly well, it must exist.

Two factors show that Article 43 requires an internal disciplinary system for combatant status. First, the text and negotiating history of Article 43 show that the language "[s]uch armed forces shall be subject" is best read as a requirement. Throughout the diplomatic conference, discussion of Article 43 included many acknowledgments that an internal disciplinary system was

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a public announcement of this relationship.").

[52] GC III, *supra* note 23, art. 4(A)(2).

[53] Additional Protocol I, *supra* note 3, art. 43.

[54] Jennifer Maddocks, *Contracts Between the Wagner Group and Russia's Defense Ministry: International Law Implications*, ARTICLES OF WAR (June 16, 2023), https://lieber.westpoint.edu/contracts-wagner-group-russias-defense-ministry-international-law-implications/ (citing BOTHE 2013, *supra* note 40, at 272-73).

[55] BOTHE 2013, *supra* note 40, at 272-73.

[56] GC III, *supra* note 23, art. 4(A)(2).

required for a group to be considered part of the armed forces.[57] The final text of Article 43 includes this requirement, stating that "[*s*]*uch* armed forces shall be subject to an internal disciplinary system."[58]

Second, groups without any disciplinary system cannot be said to be "organized" or "under a command responsible to [a] Party," both of which are explicit requirements for qualification as armed forces.[59]

Resistance movements generally consist of four components, all of which can meet Article 43's requirement for an internal disciplinary system. While resistance movement organization will vary, there are certain common elements. A resistance movement will have senior resistance leadership and a resistance area command.[60] The area command is "the largest territorial resistance organization commanded by a senior resistance leader inside a defined resistance area of operations."[61] The area commander commands and

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[57] *See* Statement of the ICRC Representative, *Official Records*, CDDH/III/SR.30 at 294 (Noting "the organization which was indispensable for any armed force should be directed towards respect for the rules . . . as it was stated in The Hague Convention. That requirement was expressed in terms of an internal disciplinary system giving official recognition to the rules of the Protocol, the law laid down at The Hague, the Geneva Conventions, The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, and customary law. In other words, armed forces should provide themselves with the necessary machinery to ensure that their own members observed international law. That requirement had seemed so fundamental to those who drafted The Hague Regulations that they had made it the subject of the Convention itself, to which the rules of application were annexed."); Statement of the Representative of Switzerland, *Official Records*, CDDH/III/SR.30 at 296 (Stating "[the article] reaffirmed the notion that, to be recognized as belligerents, regular armed forces, militia organizations and volunteer corps had to be organized and must be subject to an appropriate internal disciplinary system."); Statement of the Representative of the Netherlands, *Official Records*, CDDH/III/SR.30 at 327 (Stating "[i]n his delegation's view, there were three such elements: . . . second, the fact that such an organization had an internal disciplinary system capable of enforcing respect for the rules and principles of international law applicable in armed conflicts - a requirement that was set out in [what became Article 43]"); Statement of the Representative of the United States of America, *Official Records*, CDDH/IIII.SR.47 at 91 (May 6, 1976) ("Mr. ALDRICH (United States of America), Rapporteur, pointed out that [what became Article 43], which included definitions of the armed forces of a Party to a conflict and of persons entitled to combatant status, was of some importance in that it was relevant to the structure of a series of articles and fixed the minimal rules for organization and internal discipline.").

[58] Additional Protocol I, *supra* note 3, at art. 43 (emphasis added).

[59] *Id*.

[60] HEADQUARTERS, DEP'T OF THE ARMY, ARMY TECHNIQUES PUB. No. 3-18.1, *Special Forces Unconventional Warfare* ¶¶ 2-93, 2-100 (2022) [hereinafter ATP 3-18.1] ("Although the U.S. Army basic model of resistance only expects one resistance area command per resistance movement, there is no limit to the number of sector commands that can be established under the resistance area command.").

[61] *Id.* ¶ 2-93.

controls all resistance activities within the area of operations and is directly linked to resistance senior leadership.[62] In some cases, a resistance movement may have a government-in-exile,[63] which is a government no longer operating within a State but recognized as legitimate by some States.[64]

A resistance movement has four components: the guerrillas, the auxiliary, the underground, and the public.[65] While each component may have members who act in a way that will cause loss of combatant immunity, as will be seen below there is no component of a resistance movement which is categorically excluded from membership in the armed forces by Article 43.

The first component, guerrillas, are small groups of fighters who employ offensive tactics and are organized into units.[66] As the part of a resistance movement that most resembles a traditional military force, the guerrillas can readily be organized in a way that supports discipline and law of war compliance. This means guerrilla forces will usually qualify as members of the armed forces and lawful combatants.

The second component, the underground, is "a cellular covert element within unconventional warfare that is compartmentalized and conducts covert or clandestine activities in areas normally denied to the auxiliary and the guerrilla force."[67] A cellular organization is characterized by intermediaries and compartmentalization to assure secrecy and resilience.[68] For example, cell members may not know other members of the cell, and cell members generally communicate with their leadership only through intermediaries.[69] However, this cellular structure still allows for control of the organization and even discipline of the organization's members.[70] This means that the underground's clandestine, cellular structure still allows for the type of organization, control, and responsibility required by Article 43.

The third component is the auxiliary.[71] Members of the auxiliary perform specific, clandestine tasks for underground or guerrilla networks.[72] The auxiliary is not a separate organization, it is "a different type of individual providing specific functions as a component within an urban underground

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[62] *Id.*

[63] *Id.* ¶ 2-113.

[64] *Id.* ¶ 2-120.

[65] *Id.* ¶ 2-43.

[66] *Id.* ¶¶ 2-58 - 2-64.

[67] *Id.* ¶ 2-44.

[68] SPECIAL OPERATIONS RSCH. OFFICE, UNDERGROUNDS IN INSURGENT, REVOLUTIONARY, AND RESISTANCE WARFARE 52-55 (AM. U. 1963) [hereinafter UNDERGROUNDS IN RESISTANCE WARFARE].

[69] *Id.* at 53.

[70] *Id*. at 52-54.

[71] ATP 3-18.1, *supra* note 60, at ¶ 2-68.

[72] *Id*. at ¶¶ 2-68, 2-69.

network or guerrilla force's network."[73] Because the auxiliary may or may not be integrated into the resistance movement, members of the auxiliary may or may not qualify as the armed forces under Article 43. The test would seem to be whether they are integrated into the group, subject to the group's control, and subject to the group's code of conduct and discipline. For example, a truck driver who is occasionally paid to transport supplies would likely not be part of the armed forces, but a counterfeiter who follows the group's rules and who can be assigned tasks likely would be part of the armed forces.

The fourth component is the public component. The public component "is an overt political manifestation of a resistance."[74] Members of the public component handle important tasks that must be done openly. These tasks can include negotiating with the enemy, organizing support, or providing strategic leadership.[75] So long as they are subject to the discipline of the resistance movement, members of the public component may also qualify as members of the armed forces.

B. Spies and Mercenaries

While most members of a resistance movement will qualify as members of the armed forces and thus as combatants, some may lose this status by virtue of being spies or mercenaries.

1. Spies

Under some circumstances, members of the armed forces who are spies will lose their prisoner of war status. The status of spies is dealt within Article 46, which initially sets out a broad rule, stating that "any member of the armed forces . . . who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war."[76]

While Article 46 initially lays out a broad rule, the actual effect of this rule is much narrower than it may initially seem. To see why this is so, consider that almost all members of the resistance movement—a clandestine organization—will initially receive protection as members of the armed forces. This is a dramatically different situation than what would occur under the more restrictive rules of the 1949 Geneva Conventions.[77] Under the 1949 Geneva Conventions, only a narrow category of resistance movement

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[73] *Id*. at ¶ 2-69.

[74] *Id*. at ¶ 2-82.

[75] *Id*. at ¶ 2-83.

[76] Additional Protocol I, *supra* note 3, at art. 46.

[77] GC III, *supra* note 23, at art. 4.

members could qualify, and only if they met very stringent rules.[78] Under AP I, most resistance movement members qualify, and only have their protection removed in narrowly-defined circumstances.[79] Nevertheless, since some members of the resistance movement may lose their protection because they are considered spies, it is important to consider the details of Article 46.

a. General Definition and Limitations

To lose protection, members of the armed forces must be engaging in espionage.[80] As defined in Article 29 of the Hague regulations, espionage requires that the person be:

Acting clandestinely or on false pretenses;

Obtaining or endeavoring to obtain information;

With the intention of communicating it to the hostile party.[81]

Given that the resistance movement generally operates in a clandestine manner and will always seek to learn about the enemy, the Hague regulations' broad definition of espionage might initially seem to encompass the entire resistance movement.[82] However, the definition is more limited than it may seem, and AP I Article 46 includes limiting provisions that will narrow the definition further.

b. Residents of Occupied Territory

The first limitation applies to residents of occupied territory. AP I significantly limits the enemy's ability to consider residents of occupied territory spies: a resident of occupied territory may only be treated as a spy if they collect information "through an act of false pretenses or deliberately in a clandestine manner"[83] and residents may only be treated as a spy if captured "while engaging in espionage."[84] This raises three issues for the resistance movement. First, which members will be considered "residents of occupied territory"? Second, what does it mean to collect information through false pretenses or in a clandestine manner? Finally, what does it mean to be captured "while engaging in" espionage?

The question of whether a resistance movement member is a resident of occupied territory is fairly straightforward: they are a resident if they are

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[78] *Id*.

[79] Additional Protocol I, *supra* note 3, at art. 46.

[80] *Id*.

[81] Hague Convention (IV) on War on Land and Its Annexed Regulations art. 29, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV].

[82] *Id*.

[83] Additional Protocol I, *supra* note 3, art. 46(3).

[84] *Id*.

"properly entitled to live in [the] territory either permanently or on a long-term and ordinary basis."[85] However, practitioners should note that Article 46 is relatively clear—enhanced protection is not available to residents of territory merely controlled by the enemy, the territory must be occupied territory as defined by international law.[86] This means that this enhanced protection is not available in enemy territory or in contested territory that is not yet occupied.[87]

If a resistance movement member is a resident of occupied territory, they will receive enhanced protection so long as they do not collect information "through an act of false pretenses or deliberately in a clandestine manner."[88] Unfortunately, this does not provide much clarity for members of the resistance movement. On one hand, the provision seems to require deception, such as a forged pass[89] or other espionage techniques, yet on the other hand, the term "clandestine" could be read to include all espionage due to its inherent secrecy. The commentaries—while perhaps not much clearer than the provision itself—provide some help for practitioners. Commentaries list examples of prohibited activity including "forged pass,"[90] "clandestine radio transmitter,"[91] "disguised courier,"[92] and a "resident who, if lawfully on [a military] base, illegally brings a camera with him."[93] The common theme appears to be techniques that go beyond civilian dress or techniques that allow people to exceed the access they have been granted. This means that the resistance movement should be able to question members of the auxiliary about what they see on the job, report information about enemy troop movements and the location of equipment, etcetera without loss of protection. Of course, the resistance movement remains free to engage in more sophisticated intelligence activities, but those would entail loss of protection in many cases.

But even more sophisticated intelligence activities may still leave

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[85] AP I COMMENTARY, *supra* note 4, at 567-68.

[86] *Compare* Additional Protocol I, *supra* note 3, at art. 46(2) (referencing "territory controlled by an adverse Party,") *with id.* at art. 46(3) (referencing "territory occupied by an adverse Party."). Territory is occupied when it is "actually placed under the authority of the hostile army." Hague IV, *supra* note 81, at art. 42.

[87] AP I COMMENTARY, *supra* note 4, at 568.

[88] Additional Protocol I, *supra* note 3, at art. 46(3). Arthur John 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)*, 30 JAG J. 125, 148 (1978).

[89] BOTHE 1982, *supra* note 16, at 248.

[90] *Id*.

[91] *Id*.

[92] *Id*.

[93] AP I COMMENTARY, *supra* note 4, at 569.

members with enhanced protection, because resistance movement members who are residents of occupied territory may only be considered spies if caught "while engaging in" espionage.[94] The precise scope of this language is unclear, but the commentary and statements during negotiations suggest that it would end "when the information obtained had been transmitted by the spy to his armed forces."[95] Because espionage is generally a reoccurring activity for those involved, and because there is often a delay between collection and transmitting the information, residents of occupied territory will still be liable much of the time. However, this is still a significant limitation on espionage liability, and it may well protect many members of the movement.

c. Non-Residents

Members of the resistance movement—or advisors—who are not residents of occupied territory are much more likely to be considered spies under Article 46. However, there are still significant limitations. First, like residents, in order to commit espionage non-residents must be acting clandestinely or on false pretenses.[96] Second, non-residents regain protection and receive immunity by reaching friendly lines.[97] This means that non-residents must leave occupied territory and rejoin the friendly force to regain protection.[98]

2. Mercenaries

AP I Article 47 deprives mercenaries of their combatant status and their right to be prisoners of war.[99] While partisans who are mercenaries would lose many law of war protections, AP I's definition of a mercenary is so narrowly drawn that it will be unlikely to affect a resistance movement.[100]

To be a mercenary, a person must meet a complex set of six criteria.[101] The person must:

Be "specially recruited . . . in order to fight in an armed conflict"[102]

"[T]ake a direct part in the hostilities"[103]

Be "motivated to take part in the hostilities essentially by the desire for private gain" and a party to the conflict must promise "material compensation

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[94] Additional Protocol I, *supra* note 3, at art. 46(3).

[95] *See* AP I COMMENTARY, *supra* note 4 at 569.

[96] Hague IV, *supra* note 81, at arts. 29, 42.

[97] Additional Protocol I, *supra* note 3, at art. 46(4).

[98] Carnahan, *supra* note 24 at 546 (noting that this rule significantly disadvantages members of the regular armed forces).

[99] Additional Protocol I, *supra* note 3, at art. 47.

[100] *Id*. art. 47(2).

[101] *Id*.

[102] *Id*.

[103] *Id*.

substantially in excess of that . . . paid to combatants of similar ranks and functions" in that party's armed forces.[104]

Not be a "national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict"[105]

Not be a "member of the armed forces of a Party to the conflict"[106]

Not have "been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces."[107]

Because of Article 43's exceptionally broad definition of "armed forces," it is extremely unlikely that a member of the resistance movement could be a mercenary.[108] As discussed above, since members of the underground, guerrillas, and even most members of the auxiliary will qualify as members of the armed forces under Article 43, almost all members of the resistance movement cannot be mercenaries regardless of their motivation, compensation, or nationality.[109]

While it could be argued that the definition of "armed forces" in Article 47 does not refer to the broad definition given by Article 43, and instead merely refers to the conventional uniformed armed forces of a State, such a narrow view is almost certainly incorrect. First, the language of Article 47 ("member of the armed forces of a Party to the conflict") precisely mirrors the language of Article 43 (the "armed forces of a Party to the conflict consist of").[110] Second, Article 47 does not refer to the armed forces of a State at all. Instead, it refers to the armed forces of a "Party to the conflict," thus including the armed forces of national liberation movements, which by definition are not established by the domestic law the movement is fighting to be liberated from.[111]

Because Article 47 excludes members of the armed forces from its definition of mercenaries, the only people at risk under this Article are those that the resistance movement recruits and compensates,[112] but does not integrate into the movement's chain of command. Since such personnel would not be protected anyway (since membership in the armed forces is the first requirement for protection), Article 47 will have little effect on the

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104 *Id*.

105 *Id*.

106 *Id*.

107 *Id*.

108 *Id*. at art. 43; *See* AP I COMMENTARY, *supra* note 4, at 581 ("Perhaps with some justification it has been said that this clause made the definition of mercenaries completely meaningless.").

109 *See* Additional Protocol I, *supra* note 3, at art. 47(2).

110 *Id*. at arts. 43(1), 47(2)

111 *See id*. at art. 47(2).

112 *See id*.

resistance movement.

C. Partisans in Combat: Article 44

Once members of a resistance movement qualify as combatants and are not spies or mercenaries, they must comply with the rules of Article 44 to avoid losing their protections. While much ink has been spilled in an effort to interpret Article 44, the end result for a partisan commander is relatively clear—guerrillas should distinguish themselves during attacks and during military operations preparatory to an attack, which means that while preparing for an attack, guerrillas must distinguish themselves whenever armed and ready to engage the enemy. In enemy-controlled territory, limited by some nations to occupied territory, guerrillas have slightly more flexibility, and may lawfully wait to distinguish themselves until within visible range of the objective.

1. General Provisions and Prisoner of War Protection

Article 44 begins by establishing the protections owed to combatants. These include the right to be a combatant and the right to be a prisoner of war.[113] After establishing the protections owed to combatants, Article 44 then takes its most significant step, establishing a new rule of international law[114] governing partisan warfare. It will be useful to cite the rule in full:

> 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. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).[115]

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[113] *See id*. at art. 44(2).

[114] BOTHE 1982, *supra* note 16, at 251; Aldrich, *supra* note 9, at 9; Christopher Greenwood, *Terrorism and Humanitarian Law - The Debate over Additional Protocol I*, 19 ISR. Y.B. HUM. RTS. 187, 201-202 (1989).

[115] Additional Protocol I, *supra* note 3, art. 44(3); Kubo Mačák & Michael N. Schmitt, *"Enemy-Controlled Battlespace": The Contemporary Meaning and Purpose of Additional*

The new rule is stated in the first sentence of Article 44(3), requiring combatants to distinguish themselves "while they are engaged in an attack or in a military operation preparatory to an attack."[116] The second sentence of Article 44(3) sets out an exception to this new rule for "situations in armed conflicts where . . . an armed combatant cannot so distinguish himself."[117] The scope of the rule and its exception will be critical, because it establishes the border between when a commander assumes risk and when a commander affirmatively violates the law of war.[118] Historically, a commander whose unit operated in less than full uniform only risked violating the law of war if unit members committed perfidy.[119] This left a gap where international law allowed commanders to assume risk. So long as members avoided perfidy (which generally occurs only where a combatant feigns a protected status under the law of war to kill or wound),[120] they could wear less than a proper uniform without violating international law.[121] While members of the force operating in this gap risked loss of combatant immunity and trial under the enemy's domestic law,[122] they were not violating international law and States were under no duty to suppress their operations.[123] Under Article 44, however, the risks are different. A commander who does not comply with Article 44's general rule affirmatively violates the law of war, and a violation could also lead to loss of combatant immunity.[124]

2. The General Rule: Distinguish During Attack and During Military Operations Preparatory to Attack

The text of the general rule states: "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

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Protocol I's Article 44(3) Exception, 51 VAND. J. TRANSNAT'L L. 1353, 1361-62 (2018).

[116] Additional Protocol I, *supra* note 3, at art. 44(3).

[117] *Id*.

[118] *See* BOTHE 1982, *supra* note 16, at 251.

[119] W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 512-13 (2003); BOTHE 1982, *supra* note 16, at 251; Jim Sleesman, *Conducting Unconventional Warfare in Compliance with the Law of Armed Conflict*, 224 MIL. L. REV. 1101, 1133-35, 1143-46 (2016). Of course, the unit could still violate the law of war through actions unrelated to their attire, such as attacking civilians.

[120] U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL 320 ¶ 5.22.2 (updated Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL].

[121] GC III, *supra* note 23, at art. 4; *see also* Sleesman, *supra* note 119, at 1134-35, 1143-46.

[122] *See* BOTHE 1982, *supra* note 16, at 251; Parks, *supra* note 119, at 512-13.

[123] *See, e.g.* GC III, *supra* note 23, at art. 129.

[124] Solf, *supra* note 6, at 274-75.

in an attack or in a military operation preparatory to an attack."[125]

a. What is a Military Operation Preparatory to Attack?

The first problem in interpreting Article 44's general rule is the meaning of the phrase "military operation preparatory to an attack."[126] While the phrase could be read too narrowly (including only movement from a final rally point to an ambush) or too broadly (including almost any military activity at all), the best view is that while preparing for an attack, guerrillas must distinguish themselves whenever armed and ready to engage the enemy. This view is supported by commentators and by the text of Article 44.

Ambassador George Aldrich, who led the U.S. delegation to the Geneva Diplomatic Conference,[127] explained the rule by noting "[w]hat is not required is that an irregular distinguish himself at all times,"[128] and that an irregular combatant could be a "baker[] by day and soldier[] by night"[129] without losing protection.

In their commentary, Waldemar Solf, Michael Bothe, and Karl Partsch took a similar view, arguing that the requirement was reduced "from all times while on active duty, or at least while engaged in military operations, to only those military operations which are preparatory to an attack."[130] Colonel Solf elaborated on this view in a later article, arguing that:

> The first sentence also puts to rest any residual claim that an irregular combatant must distinguish himself at all times while on active duty or even at all times when he is . . . participating in a military operation. The requirement is applicable when he is participating in a military operation preparatory to an attack. Thus, the farmer by day and guerrilla by night commits no offense and if apprehended, is entitled to be a prisoner of war.[131]

Turning to the text of Article 44, we find strong support for the interpretation that while preparing for an attack, guerrillas must distinguish themselves whenever armed and ready to engage the enemy. The first limitation, to situations where the guerrillas are preparing for an attack, reflects Article 44's express language limiting the general rule to when combatants "are engaged in an attack or in a military operation preparatory to an attack."[132] This means that members of the resistance movement need

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[125] Additional Protocol I, *supra* note 3, at art. 44(3).

[126] *See id*.

[127] ALDRICH, *supra* note 9, at 1-2.

[128] *Id*.

[129] *Id*.

[130] BOTHE 1982, *supra* note 16, at 251.

[131] Solf, *supra* note 6, at 275.

[132] Additional Protocol I, *supra* note 3, at art. 44(3).

not distinguish themselves when moving from camp to camp, transporting supplies, evacuating personnel, or in other situations where no attack is anticipated.[133] However, the requirement to distinguish would apply where these operations are essentially a movement to contact or where the enemy is detected and the decision is made to fight. At that point, the operation is "preparatory to an attack." The second limitation, interpreting the general rule to apply only when the guerrillas are armed and ready to engage the enemy, gives effect to the text's explicit expansion of those eligible for combatant and prisoner of war status.[134] In an armed conflict, partisans constantly plan and prepare for combat, and parties to AP I may not take advantage of this fact to return to the pre-AP I standard of the 1949 conventions.[135] On the other hand, the requirement to distinguish when armed and ready to engage the enemy protects civilians by ensuring that fighters are distinguishable when they are a threat, and that violent attacks will not come from what appear to be unarmed civilians.

b. Effect of Failure to Distinguish

Failure to follow the general rule will allow prosecution for violation of the new obligation to distinguish found in Article 44 but will not lead to loss of combatant immunity (and the much more severe sanctions for unprivileged warlike acts) unless guerrillas fail to follow the minimum requirement to carry arms openly during military engagements and military deployments preceding the launching of an attack.[136]

This conclusion is in some tension with the extremely ambiguous text of Article 44. To see why, it is best to start with a strict reading of Article 44(4). In this strict reading, failure to follow the general rule results in loss of combatant immunity unless all three requirements of Article 44(3)'s exception are met.[137] The precise meaning of the exception will be considered later; for the moment, it is sufficient to consider the text of the exception:

> Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot

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[133] BOTHE 1982, *supra* note 16, at 286 ("Moreover, a combatant commits no offense and is subject to no sanction if he does not distinguish himself when engaged in such military operations as recruiting, training, general administration, law enforcement, aid to underground political authorities, collection of contributions and dissemination of propaganda.").

[134] *See* AP I COMMENTARY, *supra* note 4, at 522-23.

[135] *But see* BOTHE 2013, *supra* note 40, at 286 ("In view of the purpose of the rule, the term "military operations preparatory to an attack" should be construed broadly enough to include administrative and logistic activities preparatory to an attack.").

[136] *See generally* Additional Protocol I, *supra* note 3, at art. 44.

[137] *Id*. at art. 44(3).

> 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.[138]

In the strict reading of the rule, there are three conditions for the exception to apply: first, there must be a situation in armed conflict "where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself."[139] Second, there are two enumerated requirements (carrying arms openly during each military engagement and during such time the combatant is visible to the enemy).[140] Since Article 44(4) removes combatant immunity for combatants captured "while failing to meet the requirements set forth in the second sentence of paragraph 3,"[141] it is quite possible to argue that combatant immunity is lost if the exception does not apply in full.[142]

However, this strict view does not align with the expansive interpretation of Article 44 put forward by many (if not most) states during the diplomatic conference. In fact, the report of the committee responsible for Article 44 takes the position that failure to follow the general rule results in liability for failure to distinguish oneself, but not loss of combatant immunity unless one fails to distinguish oneself during a military engagement or during the time visible to the enemy before a military engagement.[143] Textually, this is supported by the lack of any provision explicitly removing combatant immunity for those failing to follow the general rule found in the first sentence of Article 44(3). Article 44(4) only removes combatant immunity

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[138] *Id*.

[139] Additional Protocol I, *supra* note 3, at art. 44(3)

[140] *Id*.

[141] *Id*. at art. 44(4).

[142] Aldrich, *supra* note 9, at 9-10.

[143] AP I COMMENTARY, *supra* note 4, at 528-529 (citing *Official Records*, CDDH/407/Rev.l at 453 (Mar. 17-June 10, 1977)).

> With one exception, the sanction for a guerrilla fighter failing to comply with the obligation to distinguish himself from the civilian population in accordance with this provision, when required to do so, will be "merely trial and punishment for violation of the laws of war, not loss of combatant or prisoner of war status." The exception leading to loss of status relates to "the guerrilla fighter who relies on his civilian attire and lack of distinction to take advantage of his adversary in preparing and launching an attack." It will be examined in detail in the context of the second sentence of this paragraph and of paragraph 4. Suffice it to say here that the combatant can lose his status just as easily when he fails to carry his arms openly in the exceptional situations referred to in the second sentence, as when he abusively assumes the existence of an exceptional situation and fails to wear a distinctive sign in combat.

for those failing to follow the "requirements" of the second sentence of Article 44(3), which contains two enumerated requirements: the requirement to distinguish during each military engagement and the requirement to distinguish during the time visible to the enemy before a military engagement.[144] The second sentence of Article 44(3) does not include the general rule's requirement to distinguish oneself while engaged in an attack or in military operations preparatory to an attack.[145]

While it is difficult to predict the approach a court would take,[146] the expansive interpretation taken during the diplomatic conference is best, and only failure to distinguish during the time visible to the enemy before a military engagement should result in loss of combatant immunity.

While the effect of a failure to follow the general rule is difficult to predict, it is largely irrelevant to the commander. Unless the exception applies, AP I prohibits the commander from failing to distinguish during an attack or in a military operation preparatory to an attack, and the commander has a duty to follow the law—not a duty to speculate about the consequences.

3. The Exception: When a Combatant "Cannot So Distinguish Himself"

The AP I framework has now been established: All members of the armed forces are privileged combatants, so long as they are not spies or mercenaries. Guerrillas and partisans are also privileged combatants, so long as they distinguish themselves "while they are engaged in an attack or in a military operation preparatory to an attack."[147] But there is an additional layer of complexity, as AP I creates an exception to this general rule. The drafters of Article 44 wished to provide rules that would more realistically govern partisan warfare,[148] and many of the drafters believed the 1944 Geneva Conventions' strict requirement for partisans to distinguish themselves was not effective because it essentially outlawed partisan warfare in favor of traditional armed forces.[149] The drafters reached a compromise, establishing an exception for partisans who do not distinguish themselves while engaged in a military operation preparatory to an attack.[150]

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[144] Additional Protocol I, *supra* note 3, at arts. 44(3), 44(4).

[145] *Id.* at art. 44(3).

[146] BOTHE 2013, *supra* note 40, at 290 ("Article 44 is not clear as to the status of a combatant who can fulfill the conditions of the first sentence of para. 3, but meets only the minimum conditions set forth in the second sentence.").

[147] Additional Protocol I, *supra* note 3, at art. 44(3).

[148] BOTHE 1982, *supra* note 16, at 291.

[149] *Id. See also* Statement of the Representative of Norway, *Official Records*, Vol. XI, CDDH/III/SR.55 at 158 (Apr. 22, 1977).

[150] BOTHE 1982, *supra* note 16, at 245.

a. Situations Where Armed Combatants Cannot Distinguish Themselves

As a threshold matter, this exception will apply only in "situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself."[151] A large number of States, including many NATO members, made nearly identical reservations and declarations in an effort to clarify when the nature of hostilities might allow for the exception.[152] According to these States, the exception could only arise in occupied territory or in conflicts covered by Paragraph 4 of Article 1 (wars of national liberation).[153]

However, scholars Kubo Mačák and Michael N. Schmitt have persuasively argued that the proper test considers whether partisans are operating in "enemy-controlled battlespace" such that the partisans cannot follow Article 44's general rule with a "meaningful chance of tactical success."[154] According to Mačák and Schmitt, the object and purpose of Article 44 was to enhance civilian protection by providing an incentive for partisans to follow the law of war.[155] If Article 44's exception were unavailable in situations where partisans truly could not follow the general rule, Article 44's balance of incentives and sanctions would be upset, partisans might not follow the law of war, and more civilians would be harmed.[156] Mačák and Schmitt's analysis is persuasive, and it sticks closest to the text of Article 44, which asks only whether partisans are able to distinguish themselves, not whether they are operating in occupied territory.[157] While Mačák and Schmitt's "enemy-controlled battlespace" test is the best interpretation of the rule, many of the U.S.'s allies made reservations limiting the availability of the exception to occupied territory or wars of national liberation.[158]

Where such reservations apply, nationals of certain U.S. allies operating in contested territory that has not yet been occupied by the enemy or operating in the enemy's own territory must always follow the general rule. This means that while preparing for an attack they must distinguish themselves whenever armed and ready to engage the enemy. Partisans who are not nationals of a

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[151] Additional Protocol I, *supra* note 3, at art. 44(3).

[152] BOTHE 1982, *supra* note 16, at 253-55; Additional Protocol I, *supra* note 3.

[153] BOTHE 1982, *supra* note 16, at 253-55.

[154] Mačák & Schmitt, *supra* note 115 at 1374.

[155] *Id.* at 1366-68.

[156] *Id.* at 1368.

[157] Additional Protocol I, *supra* note 3, art. 44(3).

[158] The following States made reservations limiting the exception to occupied territory and wars of national liberation: Australia, Belgium, Canada, France, Germany, Ireland, Japan, New Zealand, Korea, and the United Kingdom. Italy and Spain made reservations limiting the exception only to occupied territory. Additional Protocol I, *supra* note 3. *See also* Mačák & Schmitt, *supra* note 115, at 1366-74.

State with a limiting reservation may utilize Article 44(3)'s exception when operating in enemy-controlled battlespace.[159]

b. The Meaning of the Exception: When Visible to the Adversary

Where the exception applies, Article 44(3) requires partisans to carry their 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."[160] During the diplomatic conference, States debated two difficult issues: the scope of the term "military deployment" and the definition of when partisans were "visible to the adversary." But changes in technology have made the "visible to the adversary" test nearly irrelevant, leaving the test for "military deployment" as the most important issue.[161]

Technology has rapidly changed since 1977, meaning that partisans will nearly always be "visible to the adversary." During the diplomatic conference, States debated whether a partisan was "visible to the adversary" only when visible with the naked eye[162] or whether a partisan was visible when in range of "optical and electronic scanning devices."[163] Only the Australian delegation seemed to think more broadly, arguing that partisans were "visible to the adversary" when visible by "any form of surveillance, electronic or otherwise."[164]

The comprehensive surveillance programs enabled by current technology are far different from what was available in 1977. Current systems range from artificial intelligence-enabled citywide camera and audio coverage in States like the United Kingdom[165] to even more comprehensive systems that include systematic DNA collection, block-by-block monitoring teams, and artificial intelligence-enabled comprehensive electronic surveillance.[166]

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[159] Mačák & Schmitt, *supra* note 115, at 1369-75.

[160] Additional Protocol I, *supra* note 3, at art. 44(3).

[161] *Id.*

[162] Statement of the Representative of Egypt, *Official Records*, Vol. XI,CDDH/III/SR.55 at 160 (Apr. 22, 1977); Statement of the Representative of the Palestine Liberation Organization, *Official Records*, Vol. XI, CDDH/III/SR.56, at 184 (Apr. 22, 1977).

[163] *Id.* at 176.

[164] *Id.* at 165.

[165] Philip Chertoff, *Facial Recognition Has Its Eye on the U.K.*, LAWFARE (7 Feb. 2020, 8:00 AM), https://www.lawfareblog.com/facial-recognition-has-its-eye-uk.

[166] *China's Algorithms of Repression*, HUM. RTS. WATCH (May 1, 2019), https://www.hrw.org/report/2019/05/01/chinas-algorithms-repression/reverse-engineering-xinjiang-police-mass; *China: New Evidence of Mass DNA Collection in Tibet*, HUM. RTS. WATCH (Sept. 5, 2022, 12:00 AM), https://www.hrw.org/news/2022/09/05/china-new-evidence-mass-dna-collection-tibet.

If partisans will nearly always be visible, it becomes much more important to properly define "military deployment preceding the launching of an attack,"[167] as this will become the dividing line for when arms must be carried.

c. The Meaning of the Exception: Military Deployment Preceding an Attack

The term "military deployment" means the uninterrupted tactical movement from an assembly area to the objective. This aligns with the views advanced during the diplomatic conference that led to AP I[168] and the text of AP I itself.

During the time set aside for States to explain their votes on Article 44, States fell into two broad categories. One group of States, including the U.S. and many NATO allies, argued for a restrictive view, where "deployment" included any movement towards a place from which an attack would be launched.[169] Other states took a very broad view, where "deployment" included only the final moments before the attack took place.[170]

While the broad view of "deployment" would be convenient for partisans, it is inconsistent with the test of Article 44. When explaining its vote, the Egyptian delegation took the view that "deployment" meant only "the last step in the immediate and direct preparation for an attack, when the combatants were taking up their firing positions."[171] Likewise, the Syrian delegation argued that a partisan need only carry arms openly "while he was engaged in a military deployment 'immediately' preceding the launching of an attack in which he was to participate."[172] While these interpretations would greatly benefit partisans, they are inconsistent with the text of Article 44. Notably, Article 44 does not qualify the term "deployment," and there is no justification for limiting it to taking up firing positions.[173] In this view, guerrillas could leave an objective rally point, walk past multiple observation posts, checkpoints, and patrols, then dip into the woods, draw weapons, and attack. This does not comply with Article 44(3)'s requirement to carry arms openly "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack."[174]

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[167] Additional Protocol I, *supra* note 3, at art. 44(3).

[168] AP I COMMENTARY, *supra* note 4, at 534-35.

[169] *Id.* at 520.

[170] *Official Records*, Vol. XI, CDDH/III/SR.55, at 156-87 (Apr. 22, 1977); AP I COMMENTARY, *supra* note 4, at 533-35.

[171] Statement of the Representative of Egypt, *Official Records*, Vol. XI, CDDH/III/SR.55, at 160 (Apr. 22, 1977).

[172] *Id.* at 161.

[173] Additional Protocol I, *supra* note 3, at art. 44.

[174] *Id.* at art. 44(3).

Of States taking the restrictive view, the United Kingdom and New Zealand interpreted "deployment" most narrowly. The United Kingdom delegation began by restating the restrictive view, that deployment meant "any movement towards a place from which an attack was to be launched."[175] The only clarification provided by the United Kingdom representative was that deployments would "not include movements of a strategic nature."[176] New Zealand took a similarly restrictive view, interpreting deployment to include "all planned and coordinated movements by groups of individuals to or during a military tactical operation."[177] Other delegations, while still in general agreement with the restrictive view, were more liberal. The Canadian delegation commented that military deployment began when fighters "moved out from an assembly point or rendezvous with the intention of advancing on their objective."[178] The U.S. advanced a similar view, stating that military deployment included "the phase of the military operation which involved moving to the position from which the attack would be launched."[179] However the language suggested by the German delegation (that deployment included "any uninterrupted tactical movement towards a place from which an attack was to be launched")[180] provides the most fairness and clarity, generally corresponding with the recognized military concept of a final rally point.[181]

This means that partisans who carry their arms openly during the uninterrupted tactical movement from an assembly area to the objective are protected in the interpretation of all but the two most restrictive States. Such partisans would be distinguishing themselves during "any movement towards a place from which an attack is to be launched," which is the phrase used

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[175] Statement of the Representative of the United Kingdom, *Official Records*, Vol. XI, CDDH/III/SR.55, at 157 (Apr. 22, 1977). Australia, Belgium, France, Germany, Ireland, Italy, Japan, The Netherlands, New Zealand, the Republic of Korea, Spain, and the United Kingdom all included nearly identical language in the reservations they filed noting their interpretation of the term "deployment." Additional Protocol I, *supra* note 3.

[176] Statement of the Representative of the United Kingdom, *Official Records*, Vol. XI, CDDH/III/SR.55, at 157 (Apr. 22, 1977).

[177] Statement of the Representative of New Zealand, *Official Records*, Vol. XI, CDDH/III/SR.55, at 186 (Apr. 22, 1977).

[178] Statement of the Representative of Canada, *Official Records*, Vol. XI, CDDH/III/SR.55 at 176 (Apr. 22, 1977).

[179] Statement of the Representative of the United States of America, *Official Records*, Vol. XI, CDDH/III/SR.55, at 179 (Apr. 22, 1977).

[180] Statement of the Representative of the Federal Republic of Germany, *Official Records*, Vol. XI, CDDH/III/SR.55, at 167 (Apr. 22, 1977); AP I COMMENTARY, *supra* note 4, at 534-35.

[181] *See, e.g.*, HEADQUARTERS, DEP'T OF THE ARMY, ARMY TECHNIQUES PUB. No. 3-21.8, *Infantry Platoon and Squad* ¶¶ 6-63 (2016).

(with minor variation) by States who took the restrictive view and made reservations to Article 44.[182] Notably, many of these States accepted that a deployment is a tactical movement[183] that does not include all phases of a tactical military operation, just the phase involving movement to the objective.[184] For States who took a broader view, partisans who carry their arms openly from the assembly area to the objective are actually doing more than the law requires.

Interpreting "deployment" to mean uninterrupted tactical movement from an assembly area to the objective is also consistent with the language and structure of Article 44. Recall that the general rule already limits the duty to distinguish to attacks and "military operation[s] preparatory to an attack."[185] Since the exception is intended to protect partisans who cannot comply with the general rule, the exception's reference to "the military deployment preceding the launching of an attack"[186] must refer to a narrower timeframe—something less than the military operations preparatory to an attack. Uninterrupted tactical movement from an assembly area to the objective fits nicely between the general rule (military operations preparatory to the attack) and the excessively narrow interpretations (final movement to firing positions) that would undermine the balance Article 44 strikes between civilian protection and inducing partisans to comply with the law of war.[187]

d. The Effect of the Exception: Does the Exception Provide Complete Immunity?

While there is commentary arguing otherwise, the language of Article 44 and its negotiating history strongly suggest the exception provides complete protection where the exception is available and partisans comply with the exception.

In an article arguing for U.S. ratification of AP I, Ambassador George Aldrich, the major drafter of Article 44,[188] claimed that partisans who failed to follow the general rule could be prosecuted for failure to distinguish themselves, even in cases where the exception was available and where the partisans complied with the exception's rules.[189] Ambassador Aldrich's view

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[182] Additional Protocol I, *supra* note 3.

[183] Statement of the Representative of the Federal Republic of Germany, *Official Records*, Vol. XI, CDDH/III/SR.55, at 186 (Apr. 22, 1977); Statement of the Representative of New Zealand, *Official Records*, Vol. XI, CDDH/III/SR.55, at 167 (Apr. 22, 1977)

[184] *Id*.

[185] Additional Protocol I, *supra* note 3, at art. 44(3).

[186] *Id.*

[187] *See* Mačák & Schmitt, *supra* note 115 at 1366-75.

[188] George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 10 (1991).

[189] *Id.* at 11-12.

has been reiterated by other scholars.[190] This would erode much of the protection provided by Article 44. While partisans could not be prosecuted for their warlike acts (they would retain prisoner of war status and combatant immunity), the enemy could try them for failure to distinguish themselves. While penalties would be lower, they would still exist.

However, there is a strong argument that the exception was meant to provide complete immunity.[191] At the outset, the text of Article 44 grants the exception in circumstances where it acknowledges partisans "cannot" distinguish themselves as required by the general rule.[192] While AP I has been criticized for this statement,[193] the States who chose to ratify AP I agreed to use the term, and it would be odd to prosecute a partisan for conduct States have admitted is required by the circumstances.

Additionally, Article 44 expressly exempts conduct falling within the exception from charges of perfidy.[194] At the diplomatic conference, representatives were concerned that one of the examples of perfidy given in Article 37, "the feigning of civilian, noncombatant status"[195] would be "misused to punish some combatants who would be entitled to prisoner of war status" under Article 44.[196] In response, representatives added language to the exception clarifying that conduct falling within the exception was not perfidious.[197] This negotiating history, when considered alongside the express language of Article 44, is strong evidence that Article 44 is intended to completely protect partisans who comply with Article 44(3)'s exception from prosecution.

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[190] BOTHE 1982, *supra* note 16, at 285; Solf, *supra* note 6, at 276-77.

[191] Christopher Greenwood, *Terrorism and Humanitarian Law: The Debate over Additional Protocol I*, 19 ISR. Y.B. HUM. RTS. 187, 204 (1989)

> A combatant who meets the requirements of the second sentence in a situation to which that sentence applies remains entitled to PoW and combatant status and is not guilty of perfidy under Article 37(1)(c). There is some doubt over whether he may nevertheless be tried for the separate war crime of violating the rule in Article 44(3), first sentence. Solf, and a number of other writers, consider that he may be so tried. The present writer doubts that this was the intention and considers few States will want to prosecute a lawful combatant in this way.

[192] Additional Protocol I, *supra* note 3, at art. 44(3).

[193] Feith, *supra* note 6, at 36, 47 (1985) (describing Article 44's use of "cannot" as "a masterstroke of amoral draftsmanship").

[194] Additional Protocol I, *supra* note 3, at art. 44(3).

[195] *Id.* at art. 37(1)(c).

[196] *Official Records*, CDDH/236/Rev.1 at 382 (Apr. 31-June 11, 1976); *see also* AP I COMMENTARY, *supra* note 4, at 438.

[197] *See* Major William H. Ferrell III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 123 (2003).

4. Putting the Rules Together: Combat Under Article 44

So far, this Article has argued for three key interpretations of Article 44. First is an interpretation of Article 44's general rule: that Article 44's requirement for partisans to distinguish themselves during "an attack or in a military operation preparatory to an attack" is limited to situations where partisans, while preparing for an attack, are armed and ready to engage the enemy. Second is an interpretation of Article 44's exception: that in enemy-controlled territory guerrillas may lawfully wait to distinguish themselves until visible to the enemy and conducting uninterrupted tactical movement from an assembly area to the objective. Third is that where the exception applies partisans may not be tried for perfidy or for violating Article 44's general rule.

A strength of these interpretations is that when brought together they can coherently regulate unconventional warfare, providing a framework in harmony with the difficult text of Article 44 while fulfilling the goals of the Diplomatic Conference—to increase protection for partisans while imposing increasing penalties as partisans' actions pose greater risk to civilians.

Two simplified hypothetical situations illustrate how Article 44, when properly interpreted, provides a coherent regulatory framework for unconventional warfare. The first occurs in a contested area inside "enemy-controlled battlespace," as described by Mačák and Schmitt.[198] In this area, assume two teams of partisans, Gold and Purple, are operating in a dispersed manner. Both are instructed to attack an enemy munitions plant. For a while, both teams focus on logistics, rehearsals, and training. Operating clandestinely, they move between safe houses, gather supplies, plan the operation, and rehearse the attack. So far, neither team is required to distinguish themselves, and, although they are preparing for an attack, neither team is armed and ready to engage the enemy. This means that Article 44's general rule does not yet require either team to distinguish themselves.[199] Eventually, it becomes time to begin movement from the dispersed safe houses to the enemy plant. Both teams arm themselves and start moving. The general rule, requiring partisans to distinguish themselves during attack and during military operations preparatory to attack, would apply as the partisans move out, armed for combat, from these dispersed safe houses.[200] However, since this is enemy-controlled battlespace, Article 44's exception applies and thus, the partisans may wait to distinguish themselves.[201]

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[198] *See supra* Part II.C.3.a.

[199] *See supra* Part II.C.2 (discussing the general rule requiring partisans to distinguish themselves during an attack and during military operations preparatory to an attack).

[200] *See supra* Part II.C.2.

[201] The teams' actions at this point demonstrate the importance of interpreting Article 44's exception to supply complete immunity. If it did not do so, Article 44's complex rules would have no relevance to the forward-looking commander who seeks to comply with the

The plan, which will take place over several days, will require both teams to move to various safe houses and farms without weapons visible. The night of the attack, each team will link up at a final hide site near the plant, cache unneeded equipment, and move out to the objective. When the teams move out from these final hide sites on the night of the attack, they are now conducting uninterrupted tactical movement from an assembly area to the objective. Article 44 requires them to carry their arms openly when visible to the enemy from this point onward.

Assume that the enemy factory has a fence and guards. If they wish to maintain combatant immunity and avoid violating Article 44's new rule of international law, both teams must carry arms openly while they work their way past these final obstacles.

Assume team Gold distinguishes themselves, but team Purple does not, waiting until they are inside the perimeter to draw weapons. Team Gold would maintain full combatant immunity, but Team Purple has two problems. First, they are subject to trial for their warlike acts, as they failed to carry their arms openly as required by Article 44's exception. Second, they may have violated the law of war, by committing perfidy, if their use of civilian dress proximately caused death or injury to the enemy.[202]

Once both teams leave the area, all members will regain their combatant immunity pursuant to Article 44(5), though members of team Purple could be tried for perfidy or be tried for violations of Article 44's rules. Members of team Purple could not be tried for the underlying violent acts, provided the attack complied with the law of war, due to the protections of Article 44(5).[203]

To fully understand Article 44, consider a second, similar, situation. In this case, teams Blue and Green are operating in contested areas. Unlike the enemy-controlled battlespace of the first example, in these areas enemy forces are advancing but remain in contact with friendly military units throughout the area. Teams Blue and Green are dispersed in the area and are instructed to attack enemy armored vehicles.

Like teams Gold and Purple in the earlier scenario, teams Blue and Green begin by focusing on logistics and rehearsals, clandestinely moving between safe houses to gather supplies and prepare for the operation. While the teams

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law, and would cease to guide operations at this point. Instead, Article 44's rules would largely be an academic discussion about maximum punishments and consequence for those who operate without complying with the general rule. *See supra* Part II.C.3.

[202] Sleesman, *supra* note 119, 1143-4.

[203] Additional Protocol I, *supra* note 3, at art. 44(5). ("Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.").

are not operating in enemy-controlled battlespace in this scenario, the situation remains the same because Article 44's general rule does not require either team to distinguish themselves.

Assume that teams Blue and Green have a similar plan to our earlier example—over several days they will move to various safe houses and farms, armed and ready for combat. Team Green will carry its arms openly, but team Blue will not. At this point, teams Blue and Green select targets, arm themselves, and begin moving through dispersed safe houses towards their specific target areas.

At this point, the fact that the teams are operating in a contested area becomes relevant. As this is not enemy-controlled battlespace, the partisans are in the same situation as nearby regular units and have the same obligation to distinguish themselves. The exception, available only in enemy-controlled battlespace, does not apply, so because both teams are preparing for an attack, both teams must distinguish themselves once they are armed and ready to engage the enemy.

However, assume that, like the partisans in the earlier example, each team links up on the night of the attack at a final hide site near the target area to cache equipment and move out to the objective, also assuming both teams carry arms openly from that point forward.

In this scenario, both teams complied with the minimum standard by carrying arms openly while visible to the enemy during uninterrupted tactical movement to the objective. Since they did this, neither team will have lost combatant immunity, though team Blue would be liable for violating the general rule (since the team operated outside enemy-controlled battlespace, making the exception unavailable).

While these are simplified scenarios, they help illustrate how the rules of Article 44 apply in ways that increase the potential consequences for partisans as partisans create more risks for civilians.

D. Partisans Who Are Nationals of an Enemy State

Partisans recognized as privileged combatants under AP I face one final obstacle: the risk they may lose protection because they are nationals of the enemy State. In the view of many States,[204] including the U.S., a State's own nationals may not assert prisoner of war status against their own State.[205] Even those who disagree acknowledge that a State may try its own nationals for loyalty-based offenses such as treason despite prisoner of war status.[206]

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[204] INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, ¶¶ 964-74 (Knut Dörmann et al. eds., 1st ed. 2020) [hereinafter ICRC].

[205] *See* HOWARD S. LEVIE, DOCUMENTS ON PRISONERS OF WAR VOL. 60, at 741 (Naval War Coll. Press 1979).

[206] ICRC *supra*, note 204, at ¶¶ 964-65, 968-974.

Resistance leaders must consider this increased risk when recruiting or utilizing sympathetic nationals of the enemy state. Regardless of their position in the resistance movement, and regardless of the extent to which they would ordinarily be treated as combatants by AP I, they will not be protected from prosecution by their own State.

E. Procedural Protection for Captured Partisans

As a final but important step, Article 45 of AP I provides protection for partisans even if they do not qualify as members of the armed forces. While it is tempting to overlook the procedural rules of Article 45, in practice Article 45 grants some of the most important practical protections for partisans.

Article 45 begins by establishing a presumption that prisoner of war protections apply to those detained in connection with the conflict.[207] This presumption is critical because it prevents those detained as suspected partisans from simply disappearing into the enemy State's criminal justice system. Instead, Article 45 applies a presumption of prisoner of war status anytime the detainee claims it, it is claimed by the detainee's State (or other suitable party to the conflict), or if the facts raise the issue.[208] This presumption may only end once a "competent tribunal" determines that the detainee is not entitled to prisoner of war status.[209]

Article 45's presumption is critical in unconventional warfare. Under the Third Geneva Convention, familiar to U.S. practitioners, the requirement for a competent tribunal only arises in cases of "doubt."[210] Under Article 45, however, an individual determination is needed essentially every time a State seeks to try a partisan as a criminal rather than as a prisoner of war.[211] This determination could receive great scrutiny because Article 45 imposes yet another requirement—if the competent tribunal determines that the partisan is not entitled to prisoner of war status, and the enemy State seeks to try the partisan, the trial court is required to determine again whether the partisan is entitled to prisoner of war status.[212] In almost every case, the protecting

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[207] *See* Additional Protocol I *supra*, note 3, at art. (45)(1). *See also id.*, at art. 75(3) ("Any person arrested, detained, or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken").

[208] Additional Protocol I *supra* note 3, at art. 45(1); AP I COMMENTARY, *supra* note 4, at 546-50.

[209] Additional Protocol I *supra* note 3, at art. 45(1).

[210] GC III, *supra* note 23, at art. 5.

[211] AP I COMMENTARY, *supra* note 4, at 544-46.

[212] Additional Protocol I, *supra* note 3, at art. 45(2); AP I COMMENTARY, *supra* note 4, at 552-57.

power will be entitled to be present for this judicial determination.[213] While they do not guarantee combatant immunity, these procedural safeguards (by requiring individual analysis that can be scrutinized by outsiders) make it much more likely that partisans will receive the protection to which they are entitled under AP I.[214]

III. EFFECT OF NON-PARTY STATES

AP I has a dramatic impact on States who have chosen to become parties. As seen so far, AP I dramatically expands the protection owed to members of resistance movements. Most members now qualify as lawful combatants, few members may be punished by the enemy for being spies or mercenaries, and members may operate out of uniform much more freely.

Although the U.S. is not bound by AP I, it will not be able to ignore the additional protocol and carry on with business as usual. This is because AP I has been ratified by so many States that it is likely that the State where the campaign is fought, as well as many of the allies and adversaries involved in the conflict, will be bound by AP I's provisions.[215] The result will be a complex battlefield in which the U.S. will be constrained by many of the provisions discussed above. To determine which rules will apply to a given situation, it is important to start with the basic rules governing treaties.

The general rule is that a "treaty does not create either obligations or rights for a third State without its consent."[216] This rule has been described as "one of the most certain and universally accepted principles of international law."[217] While some early law of war treaties, such as the 1907 Hague Convention Respecting the Laws and Customs of War on Land, contained general participation clauses limiting applicability to situations where all of the belligerents were parties,[218] this is not the case with AP I. Instead, under the terms of Article 96, parties to AP I will be bound in their mutual relations.[219] However, the parties are not bound in their relations with nonparty States unless nonparty States agree to accept the protocol.[220]

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[213] Additional Protocol I, *supra* note 3, at art. 45(2).

[214] AP I COMMENTARY, *supra* note 4, at 544-59.

[215] *See* Additional Protocol I, *supra* note 3.

[216] *See* Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 256 (2d ed. 2007); ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES 310 (1961).

[217] *Treaties and Third States*, 29 AM. J. INT'L L. Sup. 653, 918 (1935) (citing Arrigo Cavaglieri, *Règles Générales du Droit de la Paix*, 26 RECUEIL DES COURS 527 (1929)).

[218] E.W. Vierdag, *The Law Governing Treaty Relations between Parties to the Vienna Convention on the Law of Treaties and States not Party to the Convention*, 76 AM. J. INT'L. L. 779, 784 (1982).

[219] Additional Protocol I, *supra* note 3, at art. 96(1)-(2).

[220] *Id.*

This means that U.S. forces may not claim the benefits of AP I, nor can they be subjected to AP I's limitations. Enemy forces tried before U.S. courts could not take advantage of enhanced immunities offered by AP I, nor could U.S. forces claim enhanced immunities before enemy courts. Instead, in their dealings with each other, both sides would be operating under the framework created by treaties to which both States are party and current customary international law.

However, this would not be the case once U.S. allies become involved. Since many of the U.S.'s allies and partners are parties to AP I,[221] they will be bound in their dealings with enemy states who are parties to AP I. This raises two fundamental issues. First, while partisans from States party to AP I will not lose their enhanced protections by working with U.S. forces, they will still be subject to AP I's limitations even when they work with U.S. forces. Second, while the U.S. will still be able to try enemy advisors and partisans under non-AP I rules, such prosecutions will be exceptionally limited.

A. Rules for Friendly Partisans

Friendly partisans from States party to AP I will retain the duties and protections granted by AP I. Because the U.S. is not a party to AP I, it might appear that friendly partisans could lose AP I protections if they are advised by U.S. personnel. For example, both North and South Korea are parties to AP I.[222] In a conflict, would Korean partisans lose their AP I protections merely because they work with U.S., and not South Korean, advisors? The clear answer is no—Korean partisans would retain the protections and duties granted by AP I.

The general rule is that a State, by treaty, may alter the rights of its nationals.[223] This means that nationals of a State that is a party to AP I gain AP I's protections and liabilities when engaged in an armed conflict against another State that is also a party to AP I.[224] This link between the individual and their State was reinforced during the Nuremburg trials, where courts drew a clear link between the obligations the defendant's State had undertaken and the responsibility of each defendant as an individual.[225] This

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[221] Among others, this list includes Australia, Austria, Canada, Colombia, Denmark, Estonia, Finland, France, Germany, Iraq, Italy, Japan, South Korea, the Netherlands, Norway, Poland, the United Kingdom, and Ukraine. Additional Protocol I, *supra* note 3, *at* "State Parties."

[222] *Id.*

[223] MCNAIR, *supra* note 216, at 324.

[224] U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS VOL. XV 11-12 (1949) [hereinafter LAW REPORTS].

[225] *Id*.

means that both the duties and the benefits of South Koreans are determined by South Korea's obligations with respect to North Korea, and are not affected by the treaty law governing the relationship between the U.S. and North Korea. Therefore, South Korean partisans would retain the enhanced protections of AP I, as would all partisans who are nationals of a State party to AP I.

While friendly partisans will retain their enhanced protection even while working with U.S. forces, they will also retain AP I's limitations. Although a full comparison of AP I with the international law applicable to the U.S. is outside the scope of this Article,[226] there are two significant practical effects for friendly partisans. First, partisans will be restricted by the general rule of Article 44—there will be situations where friendly partisans will be legally required to distinguish themselves while their accompanying U.S. forces will not. Second, friendly partisans will have restrictions on the wear of enemy uniforms and the use of certain symbols.

1. Additional Requirement to Distinguish for Friendly Partisans

Recall that Article 44 of AP I created a new international law requirement under which partisans must distinguish themselves from civilians.[227] In a combined unconventional warfare campaign, friendly partisans would be bound, as a matter of international law, to distinguish themselves during attacks and during military operations preparatory to attack.[228] In cases where Article 44(3)'s exception applied, international law would require friendly partisans to carry their arms openly during each military engagement and while visible to the enemy during a military deployment prior to the launching of an attack.[229] U.S. advisors would remain free to operate under the rules of customary international law, avoiding perfidy but risking their entitlement to combatant immunity.[230]

2. Additional Restrictions on Enemy Uniforms and Symbols

Under customary international law, it is prohibited to use the enemy's uniform to conduct an attack.[231] In U.S. practice, this means that troops may infiltrate and exfiltrate in enemy uniforms so long as they do not conduct attacks in them.[232] However, friendly partisans are subject to AP I's more

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[226] For a summary of the many ways Additional Protocol I differs from the Law of War applicable to the United States, *see* DOD LAW OF WAR MANUAL, *supra* note 120, at 1192 § 19.20.1.5.

[227] Additional Protocol I, *supra* note 3, at art. 44(3).

[228] *Id.; see also supra* Part II.C.2.

[229] Additional Protocol I, *supra* note 3, at art. 44(3); *see also supra* Part II.C.3.

[230] *See supra* Part II.C.1.

[231] DOD LAW OF WAR MANUAL, *supra* note 120, at 330-31 § 5.23.1.

[232] *Id.*

restrictive rule, which prevents any use of enemy "emblems, insignia or uniforms . . . to shield, favour, protect, or impede military operations."[233] This rule prohibits almost any use of enemy uniforms, though an exception for espionage is provided.[234]

B. Trials of Enemy Partisans

Because it is not a party to AP I, the U.S. is theoretically able to try enemy partisans for conduct that would otherwise be protected by AP I. This ability is very important to the U.S., as its objections to AP I's enhanced immunity were key reasons for its decision not to ratify the protocol.[235] However, there are multiple obstacles that will limit such trials. First, where an enemy prisoner of war would be entitled to combatant immunity under AP I, U.S. allies party to AP I may not transfer the prisoner of war to the U.S. for trial and must request return of prisoners of war where such trials are pending. Second, U.S. forces could likely only try prisoners for harms to nonparty State forces or for actions carried out in territory occupied by the U.S.

1. Prisoner of War Transfers

U.S. allies who are parties to AP I will likely be unable to transfer prisoners of war to the U.S. for trial where the prisoner of war's conduct would be protected by AP I. To see why, it is important to begin with Article 43 of AP I. As discussed above, Article 43 defines combatants and explicitly states that such combatants have the right to participate directly in hostilities.[236] Article 44 then states that any "combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war."[237] This means that, for the capturing U.S. partner who is party to AP I, the law is clear—the detained partisan had the right to participate directly in hostilities (so long as the partisan complied with the rules detailed above) and is a prisoner of war.[238] While AP I increases the scope of those eligible for prisoner of war status, prisoners of war are still governed by the Third Geneva Convention

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[233] Additional Protocol I, *supra* note 3, at art. 39(2).

[234] *Id.* at art. 39(3).

[235] S. TREATY DOC. NO. 100-2, *supra* note 9, at 4.

Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations.

[236] Additional Protocol I, *supra* note 3, at art.43(2).

[237] *Id.* at art. 44(1).

[238] *Id.* at arts. 43(2), 44(1).

of 1949.[239] Article 45 of AP I makes this clear, stating that a person "who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention."[240] Under the Third Geneva Convention, prisoners of war "may only be transferred by the Detaining Power to a Power which is a party to the Convention."[241] and while the receiving party then becomes responsible for application of the Geneva Convention, the transferring party must request return of the prisoner of war if it learns that the detaining party is failing to carry out the provisions of the Third Convention.[242] This would certainly be the case if the prisoner of war were tried for their warlike acts, as opposed to war crimes.

It is important to note that the U.S. would be receiving a combatant and a prisoner of war from the detaining AP I partner. The enemy partisan would be presumed to be a prisoner of war immediately upon capture under Article 45, and the AP I partner would have no basis to conclude otherwise, even if it convened a competent tribunal.[243] This means that regardless of any jurisdiction that the U.S. might be able to exercise over prisoners of war in its custody, the AP I partner would continue to have a treaty obligation to ensure the prisoner of war was repatriated upon the cessation of hostilities.[244] In fact, unjustifiable delay in the repatriation of prisoners of war, when committed "willfully and in violation of the Conventions *or the Protocol*" is a grave breach of AP I. [245] Transfers of prisoners of war to a non-party State, when done to avoid the substantive rules of AP I, would likely be a grave breach because they would likely lead to (for a partner bound by AP I) an unjustifiable delay in repatriation of a prisoner of war. At a minimum, the AP I partner would have a duty to suppress such a breach of AP I—likely by prohibiting future transfers.[246] This means that U.S. allies who are party to AP I would be unable to transfer prisoners of war to the U.S. for trial if the prisoners were to be tried for acts otherwise protected by AP I.

2. Substantive Limits on Trials

For detainees directly captured by the U.S., restrictions on prisoner of war transfers will not be an issue. Because the U.S. objects to AP I's expansion of combatant immunity to those who do not distinguish themselves, as required by the 1949 Conventions, the U.S. may wish to try such detainees

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[239] *Id.* at art. 45(1).

[240] *Id.*

[241] GC III, *supra* note 23, at art. 12.

[242] *Id.*

[243] Additional Protocol I, *supra* note 3, at art. 45(1).

[244] GC III, *supra* note 23, at art. 118.

[245] Additional Protocol I, *supra* note 3, at art. 85(3) (emphasis added).

[246] *Id.* at art. 86(1).

for warlike acts covered by AP I's expanded combatant immunity. However, even where U.S. forces directly capture a detainee, the U.S. could likely only disregard AP I's expanded combatant immunity to try prisoners for harms to U.S. nationals or for actions carried out in territory occupied by the U.S.

To understand these limitations, it is important to clarify the types of charges that may be brought against a captured enemy partisan who committed an attack without a U.S. victim or outside of territory occupied by the U.S. In such cases prosecutors would have two options. First, they could attempt to try the enemy partisan using the U.S. ability to try war crimes or other offenses triable under the law of war. Second, prosecutors could charge the underlying warlike act—murder, for example—in ordinary criminal courts and then argue the enemy fighter lacked combatant immunity for their warlike act.

a. Jurisdiction Over War Crimes and Jurisdiction Over Offenses Triable Under the Law of War

States have broad jurisdiction to try war crimes,[247] and States may also prosecute certain offenses triable under the law of war.[248] However, the U.S. could not pierce AP I's expanded combatant immunity in this manner because unprivileged belligerency is not a war crime,[249] and thus partisans who attack States party to AP I in an AP I-compliant manner do not commit an offense subject to trial under the law of war.[250] As a threshold matter, unprivileged belligerency is not a war crime.[251] Instead, unprivileged belligerency is conduct that in certain cases may be tried and punished under the law of war.[252]

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[247] DOD LAW OF WAR MANUAL, *supra* note 120, 1144-43 § 18.21.1. *See also* CHRISTOPHER STAKER, *Jurisdiction*, *in* INTERNATIONAL LAW 301-303 (Malcolm Evans ed., 5th ed., 2018).

[248] In *Hamdan v. Rumsfeld* the United States Supreme Court looked to the law of war to determine whether the charges against Hamdan could be tried in a military commission. For the purposes of this article, it is the Supreme Court's discussion of offenses triable under the law of war that is relevant, not whether those charges could be tried in a military commission as opposed to another type of tribunal. 548 U.S. 557, 752-55 (2006).

[249] Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 344 (1951); DOD LAW OF WAR MANUAL, *supra* note 120, at 154 § 4.17.4 ("Under the law of war, belligerents may employ spies and saboteurs.").

[250] *See Hamdan*, 548 U.S. at 752-55.

[251] Baxter, *supra* note 249, at 495-96, 504-505; DOD LAW OF WAR MANUAL, *supra* note 120, at 154 § 4.17.4 ("Under the law of war, belligerents may employ spies and saboteurs.").

[252] Baxter, *supra* note 249, at 495-96, 504-505; DOD LAW OF WAR MANUAL, *supra* note 120, at 154 § 4.17.4 ("Spying, sabotage, and similar acts behind enemy lines have a dual character under the law of war; States are permitted to employ persons who engage in these activities, but these activities are punishable by the enemy State.").

The limits of the U.S.'s law of war authority to try unprivileged belligerency are staked out in *Ex parte Quirin*, where the Supreme Court held that the U.S. could try certain "offenses against the law of war" in military commissions.[253] In *Quirin*, the court held that a group of Nazi saboteurs' unprivileged belligerency was an offense against the law of war such that it could be tried by a military commission.[254] The court argued that Congress had referenced substantive international law when it authorized trials by military commission for "offenders or offenses that . . . by the law of war may be triable by . . . military commissions."[255] The *Quirin* Court's logic would not allow the U.S. to pierce AP I's expanded combatant immunity in trials outside of occupied territory and without a U.S. victim. In 1942, the law of war clearly allowed States to punish fighters who did not wear uniforms.[256] The *Quirin* Court could thus find Congress to have referenced that law when it allowed for military commission jurisdiction.[257] The situation would be entirely different, however, for a partisan who was a national of a State party to AP I who had attacked a national of another State party to AP I in circumstances where AP I's expanded combatant immunity applied. Under the treaty law applicable to both States, the partisan would not have committed an act subject to trial and punishment. Therefore, unlike in the *Quirin* case, the law of war would not provide a basis for U.S. jurisdiction over an AP I-compliant partisan. The situation could be different for a partisan who attacked a U.S. national while complying with AP I. In that case, the jurisdictional logic of *Quirin* might apply, as the treaty law governing the conflict between the U.S. and the enemy State would not include AP I's enhanced immunity, thus maintaining the required law of war basis for jurisdiction.

b. Other Options for Jurisdiction

The U.S. could also attempt to pierce AP I's enhanced immunity by charging the underlying warlike act—murder, for example—and arguing the enemy fighter lacked combatant immunity for this act. Under this theory, prosecutors would argue that a homicide had occurred and that the partisan, once before U.S. courts, could not invoke AP I's enhanced combatant immunity due to the United States' decision not to ratify AP I. However, when applied on a foreign battlefield without a U.S. victim, this approach suffers from a simple problem—lack of jurisdiction over the underlying offense.

International law has several principles of jurisdiction: the territorial

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253 *See Ex parte Quirin*, 317 U.S. 1, 28-30 (1942); *Hamdan*, 548 U.S. at 557-60.

254 *See Quirin*, 317 U.S. at 29-30.

255 *See id.*

256 Baxter, *supra* note 249, at 495-96, 504-05.

257 *See Quirin*, 317 U.S. at 29-30.

principle, or the right to make law within a State; the national principle, or the right to make law for the State's nationals; the protective principle, or the right to address threats to vital State issues; and the universal principle, or the right to punish certain especially severe crimes.[258] The protective principle and the universal principle are the two principles most likely to support jurisdiction, but both are unlikely to allow trials without a U.S. victim outside U.S. occupied territory.

The protective principle sometimes allows States to exercise jurisdiction over foreign citizens acting outside their territory, so long as certain vital interests are threatened.[259] The U.S. has invoked this principle to try drug traffickers on the high seas and States have invoked the principle to try counterfeiters.[260] However, the protective principle would unlikely apply to attacks against foreign military forces abroad, especially where the foreign states involved have entered into a treaty extending combatant immunity to the attackers.[261]

Likewise, the universal principle would not support an exercise of jurisdiction. The universal principle allows States to try certain especially severe crimes, such as piracy.[262] While the universal principle arguably[263] allows for jurisdiction over war crimes, as discussed above unprivileged belligerency is not a war crime, let alone a type of war crime subject to universal jurisdiction.[264]

This leaves the U.S. able to try some enemy partisans for conduct falling within AP I's expanded combatant immunity, but only where there is a U.S. victim or the act occurs within territory occupied by the U.S. As discussed above, the U.S. likely could exercise jurisdiction where the victim is a national of the U.S. In appropriate situations, the U.S. could also use its legal authority as an occupying power to punish attacks within territory it occupies. Under international law, an occupying power has robust ability to define and

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[258] STAKER, *supra* note 247 at 289-303; GIDEON BOAS, PUBLIC INTERNATIONAL LAW 250-259 (2012) (including the passive personality principle and, noting its controversial status).

[259] STAKER, *supra* note 247, at 301.

[260] *Id.* (citing United States v. Gonzalez, 776 F.2d 931 (11th Cir. 1985)).

[261] *See* LAW REPORTS, *supra* note 224, at 30-31 (describing how Norway tried war criminals in its own courts for crimes committed in Norway, against Norwegian citizens, or against Norwegian interests).

[262] STAKER, *supra* note 247, at 302-303.

[263] *See* DOD LAW OF WAR MANUAL, *supra* note 120, at 1146-47 § 18.21.1.

[264] *See* Baxter, *supra* note 249, at 495-96, 504-505; DOD LAW OF WAR MANUAL, *supra* note 120, at 150 § 4.17 ("Spying, sabotage, and similar acts behind enemy lines have a dual character under the law of war; States are permitted to employ persons who engage in these activities, but these activities are punishable by the enemy State."); STAKER, *supra* note 247, at 302-303 (noting that universal jurisdiction is likely only available for "serious war crimes.").

punish crimes, especially crimes such as violent attacks.[265] In exercising this authority, the U.S. would not be bound to apply AP I's enhanced combatant immunity as the U.S. has not ratified AP I.

IV. ADDITIONAL PROTOCOL I AT WORK: THE CONFLICT IN UKRAINE

As a large-scale international armed conflict between two States party to AP I, the war in Ukraine is one of the first opportunities to observe how States will apply AP I on a complex modern battlefield. The war in Ukraine includes an extensive unconventional warfare campaign in addition to more traditional large-scale combat operations.[266] However, rather than engage in a detailed description of unconventional warfare in Ukraine, this paper will draw from the conflict as a whole and identify the legal issues most relevant for future unconventional warfare activities.

The conflict between Ukraine and Russia began in 2014, and during its early stages Russia annexed Crimea and became heavily involved with separatist groups in the Donbas region of eastern Ukraine.[267] On February 24, 2022, Russian forces began a massive invasion of Ukraine, initially attacking multiple Ukrainian cities, including Kiev.[268] On March 25, 2022, after the failure of its attack towards Kiev, Russia announced that it would focus further operations in eastern Ukraine.[269] Large-scale combat operations have continued ever since.[270] During September 2022, Russia held referendums in four eastern regions of Ukraine: Donetsk, Luhansk, Kherson,

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[265] DOD LAW OF WAR MANUAL, *supra* note 120, at 774, 788, 791, 799 §§ 11.2, 11.7, 11.8, 11.11.

[266] Aleksandra Klitina, *In-Depth: Ukrainian Partisans Become Gamechangers in Russia's War*, KYIV POST (Nov. 4, 2022, 12:03 PM), https://www.kyivpost.com/russias-war/in-depth-ukrainian-partisans-become-gamechangers-in-russias-war.html; Matthew Luxmoore, *Ukraine's Secret Weapon is Ordinary People Spying on Russian Forces*, WALL ST. J. (Dec. 14, 2022, 5:30 AM), https://www.wsj.com/articles/ukraines-secret-weapon-is-ordinary-people-spying-on-russian-forces-11671012147.

[267] Jonathan Masters, *Ukraine: Conflict at the Crossroads of Europe and Russia*, COUNCIL ON FOREIGN RELS. (updated Feb. 14, 2023, 7:00 AM), https://www.cfr.org/backgrounder/ukraine-conflict-crossroads-europe-and-russia; CORY WELT, CONG. RSCH. SERV., R45008, UKRAINE: BACKGROUND, CONFLICT WITH RUSSIA, AND U.S. POLICY 14-16 (2022).

[268] ANDREW S. BOWEN, CONG. RSCH. SERV., R47068, RUSSIA'S WAR IN UKRAINE: MILITARY AND INTELLIGENCE ASPECTS 3-6 (2022), https://crsreports.congress.gov/product/pdf/R/R47068/5.

[269] *Id.* at 5-12.

[270] Ann M. Simmons & Alistair MacDonald, *Zelensky Says Ukraine Makes Gains Outside Bakhmut but Fighting Rages Nearby*, WALL ST. J. (Jan. 5, 2023, 5:21 PM), https://www.wsj.com/articles/zelensky-says-ukraine-makes-gains-outside-bakhmut-but-fighting-rages-nearby-11672916535.

and Zaporizhzhia.[271] Russia then claimed that each region had voted to join Russia, and the Russian government began a process that—it claimed—would incorporate these territories into Russia.[272] As this process has continued, pro-Russian administrations in the regions of Donetsk and Luhansk have claimed to adopt constitutions that would make them part of Russia.[273] During the conflict, both sides have deployed a complex set of forces including foreign fighters, partisan groups, and separatist militias.[274]

The conflict in Ukraine reveals three key insights for unconventional warfare under AP I. First, the question of which groups belong to a party to the conflict will be of central importance. Both sides have argued that certain groups are unprivileged in their entirety, so States wishing to protect partisans must be willing to show a framework for how they enforce the law of war among partner forces. This framework will be essential to show that the partisan group qualifies as the armed forces under Article 43. Second, as Article 47 categorically exempts members of the armed forces from its definition of "mercenary,"[275] States should remain focused on Article 43 whenever allegations of mercenarism arise. Finally, States supporting partisans must insist on the procedural protections of Article 45 and the substantive protections of Article 75. The procedural protections of Article 45 are critical because resistance movements operate in secrecy and thus ensure that members of the armed forces are practically able to claim their protections.[276] Article 75 ensures that unprivileged auxiliary members

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[271] Ian Lovett & Isabel Coles, *Russia Prepares to Annex Parts of Ukraine as Staged Votes End*, WALL ST. J. (Sept. 27, 2022, 9:22 AM), https://www.wsj.com/articles/russia-prepares-to-annex-ukrainian-regions-as-staged-votes-draw-to-an-end-11664281068.

[272] Ann M. Simmons, *Putin Describes Situation in Occupied Ukrainian Territories as 'Extremely Difficult,'* WALL ST. J. (Dec. 20, 2022, 10:58 AM), https://www.wsj.com/articles/putin-describes-situation-in-occupied-ukrainian-territories-as-extremely-difficult-11671551921; Ann M. Simmons, *Russian Leaders Welcome Referendum Results as Ukraine Conflict Deepens*, WALL ST. J. (Sept. 28, 2022, 2:34 PM), https://www.wsj.com/articles/russian-leaders-welcome-referendum-result-as-ukraine-conflict-deepens-11664390063; Fatma Khaled, *Russia Says Integration of Annexed Land in 'Full Swing' Amid Massive Losses*, NEWSWEEK (Dec. 30, 2022, 12:50 PM), https://www.newsweek.com/russia-says-integration-annexed-land-full-swing-amid-massive-losses-1770451.

[273] Daniel Stewart, *Ukraine – Pro-Russian authorities in Donetsk and Lugansk regions adopt constitutions*, NEWS 360 (Dec. 30, 2022), https://www.news360.es/usa/2022/12/30/ukraine-pro-russian-authorities-in-donetsk-and-lugansk-regions-adopt-constitutions/.

[274] THE SOUFAN CENTER, FOREIGN FIGHTERS, VOLUNTEERS, AND MERCENARIES: NON-STATE ACTORS AND NARRATIVES IN UKRAINE 6, 20 (2022).

[275] Additional Protocol I, *supra* note 3, at arts. 43, 47.

[276] *Id*.

remain accounted for and protected from abuse.[277]

A. Command Responsible to a Party: Article 43 and Armed Groups

Perhaps the central legal issue facing a resistance movement will be demonstrating that the resistance movement is sufficiently linked to a party to the conflict (usually a State) such that Article 43 is satisfied. As discussed above, for a resistance movement to be considered part of the armed forces, a party to the conflict must accept responsibility to hold the resistance movement accountable to the law of war, though the party need not acknowledge this publicly.[278] While simple in theory, non-traditional armed groups in Ukraine have struggled to be recognized as part of the armed forces for law of war purposes. A look at two types of armed groups, Ukraine's Azov Regiment and the pro-Russian separatist militias in Donetsk and Luhansk, shows that a framework for force accountability is essential for the force's recognition as armed forces under Article 43.

1. Ukraine's Azov Regiment

Ukraine's Azov Regiment started as a paramilitary formation founded by the Azov Movement, a Ukrainian right-wing organization.[279] While the unit originally contained many extremist members, Ukraine integrated the Azov Regiment into its National Guard and made efforts to remove radicals from the unit, including assigning the unit to rear areas for three years while it was retrained.[280] In addition to the National Guard unit, Azov members ended up in several other formal units, including the 98th Azov Battalion, assigned to Ukraine's Territorial Defense Forces,[281] which are formally part of Ukraine's military.[282]

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[277] *Id.*

[278] *See supra* Part II.A.2.

[279] David Axe, *Ukraine Deradicalized Its Extremist Troops. Now They Might Be Preparing A Counteroffensive.*, FORBES (Dec. 16, 2022, 7:54 PM), https://www.forbes.com/sites/davidaxe/2022/12/16/ukraine-deradicalized-its-extremist-troops-now-they-might-be-preparing-a-counteroffensive/; STANFORD CENTER FOR INTERNATIONAL SECURITY AND COOPERATION, MAPPING MILITANTS: AZOV MOVEMENT 1 (2022); OFF. FOR DEMOCRATIC INSTS. & HUM. RTS., SECOND INTERIM REPORT ON REPORTED VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW IN UKRAINE 66-67 (Org. for Sec. & Coop. in Eur. 2022) [hereinafter ODIHR SECOND INTERIM REPORT].

[280] Axe, *supra* note 279; ODIHR SECOND INTERIM REPORT, *supra* note 279, at 66-67; Illia Ponomarenko, *After More Than 3 Years in Bases, Azov Regiment Returns to Front*, KYIV POST (Feb. 1, 2019, 2:52 PM), https://www.kyivpost.com/post/7537.

[281] Axe, *supra* note 279.

[282] Magdalena Kowalska-Sendek & Robert Sendek, *Lesson Right from the Front*, POLSKA ZBROJNA (July 15, 2022, 4:54 AM), https://polska-zbrojna.pl/home/articleshow/37680?t=Lesson-Right-from-the-Front.

Ukraine's integration efforts have been put to the test by Russia. Russia has declared the Azov Regiment to be a terrorist organization[283] and is currently trying twenty two members of the Azov Regiment.[284] While Russia has continued to exchange Azov-affiliated troops in prisoner exchanges, including two of the twenty four defendants in the current case, they have proceeded to trial against the remaining defendants.[285] Russia has charged the fighters with participation in a terrorist organization and attempting to overthrow the separatist authorities in Donetsk.[286] These charges appear to relate to the defense of Mariupol, where the fighters were captured and where eight of the fighters appear to have served as cooks for the unit.[287] Importantly, Russia has not made any allegation that the individual fighters being tried committed war crimes. Instead, the Russian Supreme Court's ruling, which allowed the group to be designated a terrorist organization, appears to have relied on alleged atrocities by the group as a whole.[288]

The Azov Regiment remains controversial, with commentators

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[283] *Russia High Court Labels Ukraine's Azov Regiment 'Terrorist' Group*, VOICE OF AM. (Aug. 2, 2022, 10:29 AM), https://www.voanews.com/a/russia-high-court-labels-ukraine-s-azov-regiment-terrorist-group/6683665.html; ODIHR SECOND INTERIM REPORT, *supra* note 279; *Trial Of 22 Members of Ukraine's Azov Regiment Begins in Russia,* RADIOFREELIBERTY RADIOLIBERTY (June 16, 2023), https://www.rferl.org/a/ukraine-azov-regiment-trial-rostov/32461839.html.

[284] Lauren Ban, *Russia Court Begins Criminal Trial Against Ukraine's Azov Battalion*, JURIST (June 15, 2023, 6:59 PM), https://www.jurist.org/news/2023/06/russia-court-begins-criminal-trial-against-ukraines-azov-battalion/; Shaun Walker, *Russia trades Azov fighters for Putin ally in biggest prisoner swap of Ukraine war*, THE GUARDIAN (Sept. 22 2022), https://www.theguardian.com/world/2022/sep/22/ukrainian-putin-ally-viktor-medvedchuk-exchanged-for-200-azov-battalion-fighters-zelenskiy-says ("Russia's embassy in Britain tweeted in July that the fighters should be hanged. 'They deserve a humiliating death,' it said.").

[285] *Captured Ukrainian Soldiers Face Trial in Russia*, ASSOCIATED PRESS (June 14, 2023), https://apnews.com/article/russia-ukraine-war-prisoners-trial-mariupol-azov-1aecb8fa05a60372c88199e0fe00311d; Michael Schwirtz, *Russia Releases 215 Fighters, Including Mariupol Commanders, in Prisoner Exchange*, N.Y. TIMES (updated Sept. 22, 2022), https://www.nytimes.com/2022/09/21/world/europe/russia-ukraine-mariupol-azov-prisoners.html.

[286] *Captured Ukrainian Soldiers Face Trial in Russia*, *supra* note 285; *Russians Began Rostov Trial of Captured Azov Soldiers. Why is it Illegal?*, SPRAVDI (June 20 2023), https://spravdi.gov.ua/en/russians-began-rostov-trial-of-captured-azov-soldiers-why-is-it-illegal/.

[287] *Mariupol Defenders Go on Trial in Russia*, KYIV POST (June 15, 2023, 1:38 PM) https://www.kyivpost.com/post/18296.

[288] *Russian Supreme Court Designates Azov Nationalist Battalion as Terrorist Organization*, TASS (Aug. 2, 2022), https://tass.com/politics/1488031.

challenging whether it has truly reformed from its far-right past,[289] and with Russia arguing that the group has committed war crimes on the battlefield.[290] But these allegations do not affect the group's treatment under international humanitarian law. By formally integrating the unit into its military under domestic law, Ukraine has ensured that members of the Azov Regiment qualify as members of the armed forces under Article 43. This is because, after integration, members of the Azov Regiment have been placed very definitively under a command responsible to Ukraine, and Ukrainian law provides a system to enforce the law of war among Ukrainian military personnel.[291] This means that the Azov Regiment is part of the armed forces, and its members receive combatant immunity and prisoner of war protection.[292] Of course, members of the Azov Regiment and Azov Regiment commanders can be held liable for war crimes, but this must be done in specific cases and based on specific violations.

2. Pro-Russia Separatist Forces

In contrast to the Azov Regiment, the status of Russian-backed militias has been much less clear. In 2014, shortly after the collapse of Victor Yanukovych's pro-Russian administration, Russia invaded Ukraine, annexing Crimea and supporting pro-Russian separatist forces in the Ukrainian provinces of Donetsk and Luhansk.[293] The separatist forces in Donetsk and Luhansk declared independence in 2014.[294] Russia recognized Donetsk and Luhansk as independent States in 2022,[295] and invaded shortly thereafter.[296]

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[289] Lev Golinkin, *The Western Media is Whitewashing the Azov Battalion*, THE NATION (June 13, 2023), https://www.thenation.com/article/world/azov-battalion-neo-nazi/.

[290] *Russian Supreme Court Designates Azov Nationalist Battalion as Terrorist Organization*, *supra* note 288.

[291] Gaiane Nuridzhanian, *Prosecuting War Crimes: Are Ukrainian Courts Fit to Do it?*, EJIL: TALK! (Aug. 11, 2022), https://www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/ (discussing Article 438 of the Ukrainian criminal code); Niebytov Andrii et al., *Military Justice of Ukraine: Problems of Determining the Bodies That Govern the Construction of Its System*, 3(15) ACCESS TO JUST. E. EUR. 203, 206-208 (2022).

[292] Maksym Vishchyk, *Trials of Ukrainian Prisoners of War in Russia: Decay of the Combatant's Immunity*, JUST SEC. (Aug. 21, 2023), https://www.justsecurity.org/87702/trials-of-ukrainian-prisoners-of-war-in-russia-decay-of-the-combatants-immunity/.

[293] WELT, *supra* note 267, at 14-15, 17.

[294] *Ukraine Separatists Declare Independence*, AL JAZEERA (May 12, 2014), https://www.aljazeera.com/news/2014/5/12/ukraine-separatists-declare-independence.

[295] *Russia Recognizes Independence of Ukraine Separatist Regions*, DEUTSCHE WELLE (Feb. 21, 2022), https://www.dw.com/en/russia-recognizes-independence-of-ukraine-separatist-regions/a-60861963.

[296] INST. FOR THE STUDY OF WAR, RUSS. TEAM, UKRAINE CONFLICT UPDATE 1 (2022) [hereinafter ISW UKR. CONFLICT UPDATE] .

Since 2014, Russia has supported a militia in each province, organizing Donetsk's militia into the 1st Army Corps and Luhansk's militia into the 2nd Army Corps.[297] On December 31, 2022, Russia formally incorporated the militias from Donetsk and Luhansk into the Russian military.[298] Since December 31, 2022, Russia has continued to take steps to integrate both Donetsk and Luhansk's militias into the Russian armed forces.[299]

As discussed earlier in this paper, Russia did not acknowledge its control over the Donetsk and Luhansk militias in the early stages of the conflict.[300] This left militia members vulnerable, as discussed above with regard to the District Court of the Hague judgment in the MH-17 case.[301] However, Russia's recent incorporation of these units has dramatically reduced this risk, bringing them much more clearly within the scope of Article 43.[302]

3. The Future — Balancing Operational Security and Legal Protections

Each of these three groups was operating, with varying degrees of formality, at the behest of the States party to the Ukrainian conflict. Nevertheless, members of each force found it difficult to establish that they were protected members of the armed forces.

In the future, States conducting unconventional warfare should make a deliberate choice about how much to acknowledge a resistance movement and should make this decision with Article 43 in mind. On one hand, the State may be able to acknowledge the resistance movement's existence with little harm to operational security. In World War II, for example, the German government recognized that members of the Free French Army were under the control of the British.[303] If the State can acknowledge the group with little operational cost, it should publicly clarify the legal procedures it uses to enforce the law of war among the resistance movement. With this public framework in place, the State can—and should—zealously argue for prisoner of war protection for captured partisans.

On the other hand, the situation is more complex where the State cannot acknowledge its link to the group for reasons of operational security. Failure to acknowledge the group lowers the likelihood the group will receive law of

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297 Carla Babb, *UK: Luhansk and Donetsk Formally Integrated into Russian Armed Forces*, VOICE OF AM. (Jan. 6, 2023), https://www.voazimbabwe.com/a/6906934.html.

298 *Id.*

299 ISW UKR. CONFLICT UPDATE, *supra* note 296, at 1.

300 *See supra* Part II.A.2.

301 *See id.*

302 Note that Article 43 is concerned only with whether the armed group is part of a State's armed forces, and that the Article 43 question has no bearing on Russia's territorial claims. Additional Protocol I, *supra* note 3, at art. 43.

303 GC III COMMENTARY, *supra* note 42, at 63.

war protection, as it is much easier for the enemy to deny the required link between the resistance movement and a party to AP I. However, States should not simply give up in these cases. The best approach is to set up the internal disciplinary system required by Article 43 even without public recognition. Since good order and discipline is a basic military requirement regardless of Article 43 concerns, this should come at little additional cost or risk. Since the status of resistance movement members is determined by the reality on the ground—whether Article 43 was satisfied at the time the partisan took part in the hostilities—the partisan will be protected even if the facts are acknowledged later or come to light during trial.[304]

The critical point is to avoid preoccupation with public acknowledgment or immediate impact. By ensuring the movement actually qualifies as armed forces under Article 43, the stage is set for ultimate legal success and protection for the most partisans possible.

B. Mercenaries: Article 47 and Irregular Volunteers

One significant feature that has distinguished the Russia-Ukraine conflict is the presence of foreign or privately paid fighters alongside both Russian and Ukrainian forces. This section analyzes two groups: pro-Ukraine foreign fighters and fighters affiliated with a pro-Russian corporation, the Wagner Group. Unlike the Azov Battalion or the pro-Russian separatist forces discussed earlier, the groups discussed in this section have been accused of mercenarism due to their foreign origin and corporate control.[305]

1. Pro-Ukraine Foreign Fighters

The International Legion of Territorial Defense of Ukraine, a recently established wing of the Ukrainian military, received applications from approximately 20,000 people from fifty-two countries.[306] Despite being organized and trained as part of the official wing of the Ukrainian military, foreign fighters have been called mercenaries and tried for fighting by Russian and separatist forces.

In August 2022, five Europeans, including three Britons, one Swede, and

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[304] *See supra* Part II.A.2.

[305] Petra Ditrichová & Veronika Bílková, *Status of Foreign Fighters in the Ukrainian Legion*, ARTICLES OF WAR (Mar. 15, 2022), https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/; Ilya Nuzov, *Mercenary or Combatant? Ukraine's International Legion of Territorial Defense under International Humanitarian Law*, EJIL:TALK! (Mar. 8, 2022), https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/.

[306] Prakash Nanda, *Russia-Ukraine War Ignites the 'Dirty Battle' of Foreign Mercenaries, Private Army & Crazy Volunteers*, EURASIAN TIMES (Nov. 13, 2022), https://eurasiantimes.com/russia-ukraine-war-ignites-the-dirty-battle-of-foreign-mercenaries/.

one Croatian were accused of being mercenaries and put on trial in a court run by pro-Russian separatists.[307] On June 9, 2022, two Britons and a Moroccan, captured by pro-Russian forces, were sentenced to death for being mercenaries by the Supreme Court of the Donetsk People's Republic.[308] Further, two former American servicemen were held from June through September of 2022.[309]

Importantly, the foreign fighters of the International Legion are members of the Ukrainian armed forces, deployed to eastern Ukraine with their respective units, and therefore qualify as combatants under Article 43. In fact, the International Legion of Territorial Defense of Ukraine appears to have been established with Article 43 in mind.[310] In 2015 and 2016, Ukraine changed its law to ensure that foreigners could join its armed forces, and several presidential decrees ensured that the International Legion was formally part of the Ukrainian military.[311] As formal members of a State's military, the International Legion is part of the armed forces under Article 43.

AP I Article 47 does not deprive members of the International Legion of the protections they gain under Article 43. Article 47 deprives mercenaries of their combatant status and their right to be prisoners of war but, in order to be considered a mercenary, all six criteria must be met.[312] Based on the

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[307] *Five Europeans Face Trial on Mercenary Charges in Separatist-Controlled Ukraine*, THE GUARDIAN (Aug. 15, 2022, 5:03 PM), https://www.theguardian.com/world/2022/aug/15/five-face-trial-on-mercenary-charges-in-separatist-controlled-ukraine.

[308] *Id.*

[309] Ben Makuch, *Foreign Fighters are Becoming Battle-Hardened, and Dying, in Ukraine*, VICE (Aug. 11, 2022, 8:30 AM), https://www.vice.com/en/article/jgp5pb/ukraine-foreign-fighters-us-volunteers; Ramon Antonio Vargas, *Two US Veterans Back in Alabama After Russian Captivity in Ukraine*, THE GUARDIAN (Sep. 25, 2022, 8:51 PM), https://www.theguardian.com/us-news/2022/sep/25/us-veterans-drueke-huynh-alabama-russian-captivity-ukraine.

[310] Nuzov, *supra* note 305.

[311] *Id.*

[312] *See supra* Part II.B.2. Recall that under Article 47:

> A mercenary is any person who:
>
> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
>
> (b) does, in fact, take a direct part in the hostilities;
>
> (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
>
> (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

available public reports about these foreign nationals, members of the International Legion would likely not constitute mercenaries. First, as outlined above, members of the International Legion are members of the armed forces under Article 43 and thus fail one of the six criteria.[313] Second, mercenaries are motivated to take part in the hostilities essentially by the desire for private gain and for material compensation substantially in excess of that paid to combatants.[314] According to reporting by the Eurasian Times, each foreign volunteer is paid approximately $3,000 per month, the same as a Ukrainian soldier.[315] As the foreign volunteers fail these two criteria, they do not meet the definition of a mercenary under AP I Article 47 and therefore retain their status as combatants under Article 43.

Ukraine's efforts with the International Legion are instructive for future unconventional warfare practitioners. By carefully considering Articles 43 and 47, Ukraine created and acknowledged the International Legion with little operational cost, clarifying the legal procedures that should be applied to enforce the law of war among these nonconventional actors.

2. Russia's Wagner Group

The renowned Wagner Group has been a key component of the Ukraine campaign for Russian President Vladimir Putin, and the Wagner Group has sent approximately 50,000 fighters to fight alongside Russian military forces.[316] At its core the Wagner Group is a private military company.[317] However, the actual organization is quite complex, consisting of many different companies and individuals.[318] To add to the complexity, the

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(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Additional Protocol I, *supra* note 3, at art. 47.

313 Ditrichová & Bílková, *supra* note 305.

314 Additional Protocol I, *supra* note 3, at art. 47(c).

315 Nanda, *supra* note 306.

316 *Id.*; Nathan Luna, Leah Vredenbregt & Ivan Pereira, *What Is the Wagner Group? The 'Brutal' Russian Military Unit in Ukraine*, ABCNEWS (Aug. 23, 2023, 2:07 PM), https://abcnews.go.com/International/International/wagner-group-brutal-russian-military-group-fighting-ukraine/story?id=96665326#:~:text=There%20are%20an%20estimated%2050%2C000,John%20Kirby%20said%20in%20January.

317 Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Russian Proxy Wagner Group as a Transnational Criminal Organization (Jan. 26, 2023), https://home.treasury.gov/news/press-releases/jy1220.

318 *Id.*; Off. of the Spokesperson, *Actions to Counter Wagner and Degrade Russia's War Efforts in Ukraine* U.S. DEP'T OF STATE (Jan. 26, 2023), https://www.state.gov/actions-to-counter-wagner-and-degrade-russias-war-efforts-in-ukraine/ (identifying individuals and companies who are part of or provide support to the Wagner Group); *See also* Catrina Doxsee, *Putin's Proxies: Examining Russia's Use of Private Military Companies*, CTR. FOR STRATEGIC

Wagner Group has engaged in serious disputes with Russian leadership, culminating (for now) in a brief but high-profile march on Moscow on June 24, 2023 and the dramatic death of its founder and leader in August 2023.[319]

a. The Wagner Group Prior to June 24, 2023

Even prior to the events of June 24, 2023, the Wagner Group likely did not qualify as members of the armed forces under Article 43. While at that time the Wagner Group appeared to be responsible to a Party to the conflict, it did not appear to have an internal disciplinary system capable of enforcing the law of war.[320]

Prior to June 24, 2023, the Wagner Group was closely connected to Russia, a State Party to the Ukraine conflict. While there was continuous tension between the Wagner Group and senior leaders in the Russian government,[321] the Wagner group operated alongside Russian forces in pursuit of common goals.[322] The Wagner Group also appears to have received significant support from Russia on the battlefield.[323]

However, this is not enough to satisfy Article 43. In addition to operating under the control of a Party, the group must have an internal disciplinary system that can enforce the law of war.[324] While Yevgeniy Prigozhin, the leader of the Wagner Group, claimed that his forces complied with the law of war,[325] the Wagner Group did not appear to have any kind of disciplinary

& INT'L STUD. (Sep. 15, 2022), https://www.csis.org/analysis/putins-proxies-examining-russias-use-private-military-companies.

[319] Yaroslav Trofimov, *Prigozhin in Belarus as Wagner Prepares to Hand Over Weapons in Russia*, WALL ST. J. (Jun 27, 2023, 3:58 PM), https://www.wsj.com/articles/wagner-is-preparing-to-hand-over-heavy-weapons-russian-military-says-723e7a53. Matthew Luxmoore & Benoit Faucon, *Russian Private Military Companies Move to Take Over Wagner Fighters*, WALL ST. J. (Sep. 5, 2023), https://www.wsj.com/world/russia/russian-private-military-companies-move-to-take-over-wagner-fighters-a568f938.

[320] *See supra* Part II.A.

[321] Kateryna Stepanko & Frederick W. Kagan, *Russian Offensive Campaign Assessment,* INST. FOR THE STUDY OF WAR (Jan. 22, 2023, 8:30 PM), https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-january-22-2023.

[322] Winston Williams & Jennifer Maddocks, *Ukraine Symposium: The Wagner Group: Status and Accountability*, ARTICLES OF WAR (Feb. 23, 2023), https://lieber.westpoint.edu/wagner-group-status-accountability/.

[323] Isabel Coles & Georgi Kantchev, *Wagner Chief Draws Back From Feud With Russian Military Over Ukraine*, WALL ST. J. (Feb. 23, 2022), https://www.wsj.com/articles/wagner-head-draws-back-from-feud-with-russian-military-over-groups-losses-in-ukraine-d3ea4925; Jennifer Maddocks, *Putin Admits to Funding the Wagner Group: Implications for Russia's State Responsibility*, ARTICLES OF WAR (June 30, 2023), https://lieber.westpoint.edu/putin-admits-funding-wagner-group-implications-russias-state-responsibility/.

[324] *See supra* Part II.A.

[325] Muhammad Darwish, Katharina Krebs & Tara John, *Former Wagner Commander*

framework beyond summary executions on the battlefield for some offenses and contract extensions for minor disagreements.[326] Also, the Wagner Group (including Mr. Prigozhin himself) very publicly disparaged the law of war and Wagner forces were implicated in many law of war violations.[327] These failings aside, it is the apparent total lack of a disciplinary system that most likely prevents the Wagner Group from qualifying as members of the armed forces.

The second question is whether Wagner Group could be considered mercenaries. Considering the definition of mercenaries under Article 47, the Wagner Group clearly satisfies some elements. For example, Wagner Group forces took direct part in the hostilities, and some members appear to have been offered pay that exceeded the amount offered for similar roles in the Russian military.[328] Additionally, some members of the Wagner Group appeared to have been specially recruited to fight in the armed conflict in Ukraine.[329] However, many Wagner Group fighters were nationals of Russia, a Party to the conflict, which would exclude them from the definition of mercenaries.[330]

While individual members of the Wagner Group may or may not be considered mercenaries, ultimately the mercenary question is irrelevant—Wagner Group fighters were not lawful combatants because the Wagner Group lacked a disciplinary system that allowed it to satisfy the definition of

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Describes Brutality and Incompetence on the Frontline, CNN (Jan. 31, 2023, 9:37 AM) ("In a statement emailed to CNN on Tuesday, Prigozhin . . . described Wagner as an 'exemplary military organization that complies with all the necessary laws and rules of modern wars.'").

[326] Steve Hendrix & Serhii Korolchuk, *Bloodied Wagner fighters Captured in Ukraine Recount Path From Prison to War*, WASH. POST (Feb. 23, 2023, 6:00 AM), https://www.washingtonpost.com/world/2023/02/23/wagner-mercenaries-captives-war-ukraine/; Stefan Korshak, *New Accounts Emerge of Wagner Soldiers Shot for Retreating*, KYIV POST (Jan. 13, 2023, 9:56 AM), https://www.kyivpost.com/post/11077.

[327] Two videos have been released claiming to show Wagner Group deserters being executed with sledgehammers. *Russia's Wagner Militia Suggests Deserter Was—and Wasn't—Executed*, REUTERS (Feb. 13, 2023, 12:21 PM), https://www.reuters.com/world/europe/sledgehammer-execution-russian-mercenary-who-fled-shown-video-2023-02-13/; Karolina Hird et al., *Russian Offensive Campaign Assessment, February 13, 2012*, INST. FOR THE STUDY OF WAR (Feb. 13, 2023, 10:30 PM), https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-february-13-2023.

[328] Levent Kemal, *Wagner Group Lures Foreign Mercenaries with Bumped-up Salaries as Russia Suffers Losses*, MIDDLE E. EYE (Oct. 6, 2022), https://www.middleeasteye.net/news/wagner-group-russia-foreign-mercenaries-salaries-suffers-losses.

[329] Nick Paton Walsh et al., *Russia Dangles Freedom to Prisoners if They Fight in Ukraine. Many are Taking the Deadly Gamble.*, CNN (Aug. 9, 2022), https://edition.cnn.com/2022/08/09/europe/russia-recruits-prisoners-ukraine-war-cmd-intl/index.html.

[330] *See What is Russia's Wagner Group, and What Has Happened to its Leader*, BBC (Sept. 6, 2023), https://www.bbc.com/news/world-60947877; Additional Protocol I, *supra* note 3, at art. 43.

armed forces under Article 43. Were Wagner to adopt such a system, its fighters could likely qualify as the armed forces under Article 43 and thus even non-Russian national members of the Wagner Group would be excluded from the definition of "mercenary" given by Article 47.

b. The Wagner Group After June 24, 2023

The events of June 24, 2023, had a significant effect on the status of the Wagner Group, providing important lessons for unconventional warfare practitioners. On June 10, after months of tension between Wagner Group leadership and Russian military leadership, Russia announced that Wagner Group forces would be required to sign contracts with the Russian government.[331] The situation escalated rapidly and, on June 24, the Wagner Group captured the city of Rostov and began a march toward Moscow, with Yevgeniy Prigozhin claiming that Wagner Group would remove the leadership of Russia's military forces.[332] Eventually, the march was halted when the President of Belarus negotiated a deal between the Wagner Group and the Russian government.[333] On August 23, however, Prigozhin was killed in a plane crash, with both U.S. intelligence and many in Russia claiming that the crash was ordered by president Putin.[334]

While Prigozhin's death was dramatic, from a legal perspective the critical events occurred earlier, during the Wagner Group's June 24 march on Moscow. The issue is whether the June 24 events severed the link between the Wagner Group and the Russian government such that the Wagner Group was no longer under a "command responsible to" the Russian Federation.[335] While the answer may seem obvious, the true situation between Wagner Group leadership and the Russian government remains extremely dynamic, with reports of Prigozhin's whereabouts and status varying widely before his

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[331] Benoit Faucon, Joe Parkinson & Thomas Grove, *Why Wagner Chief Prigozhin Turned Against Putin*, WALL ST. J. (June 27, 2023), https://www.wsj.com/articles/wagner-prigozhin-putin-mutiny-moscow-march-7072d6ea.

[332] Ann M. Simmons & Kate Vtorygina, *From Armed Rebellion to Rapid Retreat Over 24 Hours*, WALL ST. J. (updated June 26, 2023, 1:09 AM), https://www.wsj.com/livecoverage/russia-wagner-prigozhin-putin/card/from-armed-rebellion-to-rapid-retreat-over-24-hours-vaqWt8QrOjAP8UVFchcQ.

[333] *Id.*

[334] Robyn Dixon & Francesca Ebel, *Prigozhin Confidant Says Fatal Plane Crash Shows No One is Safe*, WASH. POST. (Sept. 7, 2023), https://www.washingtonpost.com/world/2023/09/07/prigozhin-crash-death-maksim-shugalei/; Matthew Luxmoore & Benoit Faucon, *Russian Private Military Companies Move to Take Over Wagner Fighters*, WALL ST. J. (Sept. 5, 2023), https://www.wsj.com/world/russia/russian-private-military-companies-move-to-take-over-wagner-fighters-a568f938.

[335] Additional Protocol I, *supra* note 3, at art. 43.

death.[336] Additionally, members of an armed group may commit loyalty-based offenses against their State, and be tried for them, without so undermining the State's control over the armed group that prisoner of war status and combatant immunity is lost.[337] The question for the Wagner Group, the groups emerging in its aftermath, and for similar forces in future campaigns, is whether all or part of the armed group remains engaged in the international armed conflict on behalf of the controlling State and remains responsible to the controlling State for its conduct. If the Article 43 test continues to be met, the group will remain part of the armed forces, though the State will remain free to try members of the group for breaches of discipline.

C. Partisans or Criminals? Article 45 and Allegations of Espionage and Terrorism

While the situation is difficult for fighters in overt organized armed groups such as the Azov Regiment, it is even more difficult for individual partisans operating out of uniform. Pro-Ukrainian partisans operating clandestinely and with tight operational security will always have difficulty showing membership in a group that might be protected under international law. Many such Ukrainian partisans have faced this problem, disappearing into a Russian "filtration" system or simply facing criminal charges.[338]

These problems show the importance of Article 45 and its procedural protections for captured fighters. States waging unconventional warfare should insist on Article 45's procedural protections, which ensure that captured partisans can benefit from the protections of Articles 43, 44, and 46.

1. The Situation of Non-Uniformed Ukrainian Partisans

Even where there is a recognition that a particular armed group is part of a party's armed forces under Article 43,[339] captured members of a resistance movement will often be hard-pressed to demonstrate that they are in fact members of the protected group. They may have been recruited and controlled in a clandestine manner,[340] and groups with good operational security practice strict compartmentalization to limit the damage an arrest or

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[336] Thomas Grove, *Two Weeks After Wagner Revolt, Prigozhin Remains Crucial to Putin*, WALL ST. J. (July 7, 2023, 11:16 AM), https://www.wsj.com/articles/two-weeks-after-wagner-revolt-prigozhin-remains-crucial-to-putin-7d9bf721.

[337] *See* W. Casey Biggerstaff & Michael N. Schmitt, *Prisoner of War Status and Nationals of a Detaining Power,* 100 INT'L. L. STUD. 513, 524 (2023).

[338] David Kortava, *Inside Russia's 'Filtration Camps' in Eastern Ukraine*, NEW YORKER (Oct. 3, 2022), https://www.newyorker.com/magazine/2022/10/10/inside-russias-filtration-camps-in-eastern-ukraine; Luxmoore, *supra* note 266.

[339] *See supra* Part IV.A.

[340] Luxmoore, *supra* note 266.

an interrogation can cause.[341] This problem was well understood during the drafting of Article 44,[342] and has proven true in Ukraine, with little clarity available about whether captured partisans are members of a group at all, let alone whether they might be protected by AP I.[343]

Ukrainian partisans are active in both contested and Russian-controlled parts of Ukraine.[344] While operational details are scarce, Ukrainian special operations and intelligence personnel appear to coordinate networks of fighters and intelligence assets who collect intelligence and attack Russian personnel.[345] Communication is usually through encrypted messaging services, with varying levels of operational security.[346] In general, these networks appear to be organized in accordance with unconventional warfare doctrine—including an underground, guerrillas, and the auxiliary all cooperating with special operations or intelligence advisors.[347]

In response, Russia runs what it calls a "filtration" system designed, among other goals, to separate possible partisans from civilians in occupied areas.[348] In this system, individuals in occupied territory are searched, interrogated, have their biometric information collected, and have their digital media examined.[349] Individuals are then released or sent to detention facilities.[350] Abuses abound as many detainees simply disappear.[351] Notably, despite extensive analysis of this filtration process, there appears to be no reference to decisions by any type of tribunal on whether an individual is entitled to prisoner of war treatment.[352]

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[341] UNDERGROUNDS IN RESISTANCE WARFARE, *supra* note 68, at 79-82.

[342] AP I COMMENTARY, *supra* note 4, at 546-47.

[343] Luxmoore, *supra* note 266 ("But the . . . members soon became a target. Russia's Federal Security Service raided their homes and those of their relatives. Several remain imprisoned on espionage charges inside Russian-held territory.").

[344] Jeffrey Gettleman, *How Citizen Spies Foiled Putin's Grand Plan for One Ukrainian City*, N.Y. TIMES (Dec. 25, 2022), https://www.nytimes.com/2022/12/25/world/europe/ukraine-kherson-defiance-russia.html.

[345] Andrew E. Kramer, *Behind Enemy Lines, Ukrainians Tell Russians 'You Are Never Safe*,' N.Y. TIMES (Aug. 18, 2022), https://www.nytimes.com/2022/08/17/world/europe/ukraine-partisans-insurgency-russia.html; Gettleman, *supra* note 344; Luxmoore, *supra* note 266.

[346] Luxmoore, *supra* note 266.

[347] Kramer, *supra* note 345.

[348] Kortava, *supra* note 338.

[349] YALE SCH. OF PUB. HEALTH, HUMANITARIAN RSCH. LAB, SYSTEM OF FILTRATION: MAPPING RUSSIA'S DETENTION OPERATIONS IN DONETSK OBLAST 17-18 (2022) [hereinafter YALE SCH. OF PUB. HEALTH].

[350] *Id.* at 20–25.

[351] *Id.*

[352] *Id.*

2. The Procedural Protections of Article 45: A Neglected Advantage for Partisans

Media coverage of Ukrainian partisans seems to have a common assumption: that members of a resistance movement operating out of uniform cannot be prisoners of war. Media coverage correctly notes that poor detainee treatment violates the law of war but does not generally question the ability of Russian occupying forces to criminally try captured partisans as spies or saboteurs.[353] Notably, two extensive reports on Russian filtration and detention practices do not mention any of AP I's protections in their discussions of the law applicable to detainees.[354]

States conducting unconventional warfare abandon a critical advantage when they fail to insist on Article 45's procedural protections. As discussed above, these protections require the enemy to treat captured partisans as prisoners of war unless they can show that they are not entitled to this status—a difficult undertaking under AP I's rules.[355] While some partisans will be subject to trial, Article 45 protects against the types of tactics currently being employed by Russia—mass arrests followed by disappearances into an opaque domestic criminal justice system. Recall that AP I shifted the legal landscape in favor of the partisan. The 1949 Geneva Conventions required partisans to fit into narrow categories to receive protection. Reversing this system, AP I protects partisans and requires their captors to find an exception before a trial may be held. States who wage unconventional warfare should not abandon this advantage by failing to insist on Article 45's procedural protections.

When Russia detains the individual partisans described above, for example, Article 45 requires a presumption of prisoner of war status when claimed by the detainee.[356] To exclude the detainee from prisoner of war protections, Russia is obligated to determine the detainee's status using a competent tribunal.[357] Even more importantly, if Russia were to try such a detainee for espionage or the detainee's warlike acts, the trial court would be required to reevaluate the detainee's claim of prisoner of war status under AP I.[358] Importantly, this includes notification to the Protecting Power,[359] which prevents the detainee from disappearing into the criminal justice system, even if the competent tribunal determines the detainee is not a member of the armed forces or is otherwise not entitled to combatant immunity or prisoner

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[353] *See id*.; Luxmoore*, supra* note 266*;* Kramer, *supra* note 345*;* Gettleman, *supra* note 344.

[354] YALE SCH. OF PUB. HEALTH, supra note 349, at 20-25.

[355] *See supra* Part II.E.

[356] Additional Protocol I, *supra* note 3, at art. 45(1).

[357] *Id.*

[358] *Id.*

[359] *Id.*

of war status.

V. CONCLUSION

The drafters of AP I sought to fundamentally change the law of war rules governing resistance movements and unconventional warfare. In the years since the diplomatic conference, AP I has been accepted by 174 States. Due to its wide acceptance, the Protocol's rules will regulate the unconventional warfare campaigns of the future. This Article has undertaken a detailed study of AP I's rules to gain insight on AP I's dramatic effect on unconventional warfare. The Article's conclusions fall into two broad areas: the substance of AP I's rules and the scope of AP I's impact.

The scope of AP I will extend beyond merely the States who have ratified the Protocol, affecting non-party States like the U.S. in surprising ways. In particular, States party to AP I will be unable to transfer prisoners of war to non-party States who seek to try them for conduct protected under AP I. Also, even detainees directly captured by non-party States may only be tried (if their conduct would be protected by AP I's rules) for harm to non-party States or actions taken in territory occupied by a non-party State.

In addition to its sweeping scope, the substance of AP I will dramatically affect unconventional warfare. This Article has revealed several key substantive points. Most important is AP I's reversal of the 1949 Geneva Convention framework for prisoner of war protection and combatant status. Unlike the 1949 Convention, under which resistance groups had to meet strict conditions to qualify as privileged combatants, under AP I all armed groups under a command responsible to a party are now protected and only lose that protection in narrow circumstances.

Article 43's expansive definition of the armed forces sweeps in most partisan fighters, even many clandestine members of resistance movements previously denied protection as prisoners of war.

A careful analysis of Articles 44, 46, and 47, which govern how combatant protections may be lost, reveals several key insights. Article 44, which governs partisans in combat, only strips partisans of combatant status when they fail to meet its minimum standard by carrying arms openly when visible to the enemy during a military deployment preceding an attack. Other violations of Article 44 are punishable, but do not result in loss of combatant immunity. Article 46, while acknowledging that spies are not protected from prosecution, considerably narrows who may be considered a spy, especially for residents of occupied territory. Finally, Article 47, while purporting to strip mercenaries of combatant immunity, has no effect at all as it excludes members of the armed forces—as defined by Article 43—from its definition of mercenaries.

The easy-to-overlook procedural protections of Article 45 are critical, as it

is Article 45's presumption of prisoner of war status which makes it possible for captured partisans to practically benefit from AP I's protections.

Finally, analysis of the war in Ukraine shows that States conducting unconventional warfare are not fully advocating for the protections guaranteed by AP I. The result is a gap between treaty law and State practice that risks undermining the combatant immunity due to all members of the armed forces. Regardless of whether AP I's rules were well-drafted or wise, they are the law between States who chose to ratify AP I. Since States always retain the right to try even lawful combatants for war crimes, there is no excuse for failing to provide all detainees with the rights guaranteed by international law.