INTRODUCTION

Although combatants and other persons taking a direct part in hostilities are military objectives and may be attacked, the moment such persons surrender or are rendered hors de combat, they become entitled to protection. That protection is provided for in Common Article 3 and the First and Third Geneva Conventions (GC) relating to the treatment of the „wounded, sick and shipwrecked” and „prisoners of war” (POW) respectively; supplemented (for international conflicts) by Additional Protocol I. These conventions are binding as treaty law, but the key provisions are in any event customary in nature.

Humanitarian treatment of prisoners of war was not emphasized until the second half of the nineteenth century. 1 The Hague Regulations did not prevent many of the hardships that prisoners suffered during World War I; they did provide an enlightened basis for regulation. Besides the failure to anticipate the problems that arose in World War I, the chief defect of the regulations were a lack of specificity and the absence of any enforcement procedures. After the
First World War, a conference at Geneva adopted new, more elaborate rules. Like the prior rules, the new rules did not anticipate the new modes of warfare adopted in the World War that followed their acceptance.

PRISONERS OF WAR DEFINED

The Third Geneva Convention of 1949 is concerned with prisoners of war, and consists of a comprehensive code centered upon the requirement of humane treatment in all circumstances. The definition of prisoners of war in GC III, Article 4(A) is of particular importance since it has been regarded as the elaboration of combatant status. It covers members of the armed forces of a party to the conflict, as well as irregulars such as members of militia or volunteer corps that fight alongside a party to the conflict, provided they satisfy four conditions: being "commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war."

This article reflected the experience of the Second World War, although the extent to which resistance personnel were covered was constrained by the need to comply with the four conditions. Since 1949, the use of guerrillas spread to the Third World and the decolonization experience. Accordingly, pressures grew to expand the definition of combatants entitled to prisoner of war status to such persons, who practice has shown rarely complied with the four conditions.

STATUS DETERMINATION

"RouQ and Company renders green services. Kindly consider not printing this e-mail unless absolutely necessary"
Under International Humanitarian Law (IHL), „combatant”’s privilege” entails three important consequences. First, the privileged combatant is allowed to conduct hostilities and as such cannot be prosecuted for bearing arms or attacking enemy targets, unless the conduct amounts to a war crime. Second, he or she is a legitimate target to the opposing forces. Third, in the event of capture, such combatants are afforded POW status.

The group of persons entitled to combatant’s privilege, and in the event of capture to prisoner of war status, is defined in GC III, Article 4(A). These include members of the armed forces of another party, as well as irregulars such as members of militia or volunteer corps that fight alongside a party to the conflict, provided they satisfy four conditions: being „commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war.”

POW status is therefore automatically due to persons who fought in the armed forces of a state. The fact that the government was not the recognized representative of the state is irrelevant. It should be noted that the criteria set forth by Article 4 of the Third Geneva Convention only apply to irregulars that fight alongside a party to the conflict and not to the armed forces of a party to the conflict itself. In the event that there is an element of doubt on the status of an irregular, the matter must then be determined by a competent tribunal. The prisoners must be presumed POWs pending such determination. Moreover, the onus is on a Detaining Power to demonstrate that detainees, purportedly captured for their role in the conduct of hostilities, do not deserve POW status only for serious crimes such as war crimes or crimes against humanity, whereas unprivileged or unlawful combatants can in addition, are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. 4

See Article 5 (2) GC III on the independent tribunal that must be established in case of doubt.

RouQ and Company renders green services. Kindly consider not printing this e-mail unless absolutely necessary.”
status. 5 This significant burden corresponds to the serious consequences for the combatants in question, including penal consequences 6 and loss of their entitlement to the enhanced rights protections due to POWs under GC III which in some respects go beyond those guaranteed by International Human Right Law.

However, on numerous occasions, states have, as a matter of practice, extended POW status to cover persons not strictly entitled to such status under the convention, as was for example the practice of the United States in Vietnam. This may reflect in part the core humanitarian principles reflected in IHL manifest in the specific provisions of GC III, but also the desire to ensure similar treatment of their own forces if captured.

RIGHTS OF A PRISONER OF WAR

The Third Geneva Convention is now the authoritative statement concerning prisoners of war. An outstanding innovation of the convention, in addition to its application to all other armed conflicts is that it makes reference to internal wars. The convention defined prisoners in a way calculated to include every person likely to be captured in hostilities. Full and primary responsibility for the treatment of prisoners of war fall upon the Detaining Power, not upon the individuals. The Detaining Power is under a general obligation to treat prisoners humanely and protect them from danger. They must be supplied with food, clothing and medical attention.

5 The presumption of POW status is reflected in Article 45(1) and (2) AP I, and can only be displaced by a tribunal.
6 They may be prosecuted for mere participation as opposed to only for crimes under international law.
7 International law cases and materials; Lori Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, Hans Smith (Eds); p.1621 (USA) 2001
8 Article 19 GC III 9
9 Article 20 GC III

*RouQ and Company renders green services. Kindly consider not printing this e-mail unless absolutely necessary*
They should be protected from public curiosity. They are also entitled to elaborate due process guarantees, including trial by the courts that respect the same standards of justice as those respected by the courts that would try the military of the detaining state. Medical and scientific experiments are prohibited. Prisoners are to be treated alike regardless of race, nationality, religious beliefs or political opinions.

At the time of detention, the prisoner is required to give a minimum of information. He is not to be subjected to torture and may retain his personal effects. Conditions at the detention camp must meet standards provided in the convention. The work that the prisoner is required to perform must not be inherently dangerous, humiliating or directly connected with the operations of war. The prisoner must be permitted contact with his family and correspondence privileges. Procedures must be established for registering complaints against the administration of the detention camp. Penal and disciplinary sanctions, including procedures for determining guilt, are prescribed by the convention. The convention also provides that the properties of prisoners shall not be disposed of them when arrested. When hostilities have ceased, POWs must be repatriated.

The convention elaborates the idea of a Protecting Power appointed by mutual agreement, which determines whether the provisions of the convention are being followed. When the belligerents

10 Article 13 GC III  
11 Article 84, 99-108 GC III  
12 Article 16 GC III  
13 Article 17 GC III  
14 Article 22 and 23 GC III  
15 Article 51,52 and 56 GC III  
16 Section V Article 70-73 GC III  
17 Article 78-90 GC III  
18 Article 82-88 GC III  
19 Article 18 GC III  
20 Article 118 GC III provides that ‘POWs shall be released and repatriated without delay after the cessation of active hostilities.’

RouQ and Company renders green services. Kindly consider not printing this e-mail unless absolutely necessary.