

**“Enemy Controlled Battlespace”:
The Contemporary Meaning and Purpose of
Additional Protocol I’s Article 44(3) Exception**

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(forthcoming in VANDERBILT JOURNAL OF TRANSNATIONAL LAW)

Exeter Centre for International Law

Working Paper Series

2018/6

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Cite as Kubo Mačák & Michael N. Schmitt, “‘Enemy Controlled Battlespace’: The Contemporary Meaning and Purpose of Additional Protocol I’s Article 44(3) Exception”, ECIL Working Paper 2018/6 (forthcoming in *Vanderbilt Journal of Transnational Law*).

“Enemy Controlled Battlespace”: The Contemporary Meaning and Purpose of Additional Protocol I’s Article 44(3) Exception

Kubo Mačák¹ and Michael N. Schmitt²

I. INTRODUCTION

The notion of combatancy lies at the heart of international humanitarian law (IHL). Parties to a conflict are obligated by customary and treaty law to distinguish between combatants and civilians and direct their operations only against the former, except when civilians have lost their protection from attack through membership in an organized armed group or by directly participating in hostilities.³ Combatancy also accords rights and entitlements. During an international armed conflict, combatants enjoy immunity from prosecution in both domestic and international tribunals for activities related to the hostilities that are lawful under IHL,⁴ most notably intentionally killing the enemy and, in some situations, launching an attack that is certain to incidentally harm civilians. Additionally, combatants are

¹ Senior Lecturer in Law, University of Exeter. Previous versions of this article were presented at the “War in Cities and the Law of Armed Conflict” Conference at Brigham Young University Law School in February 2018 and at the “Responding to Hybrid Threats by Force: International and National Law Aspects” Conference in May 2018 at Palacký University in the Czech Republic. In addition to participants in those conferences, we would like to acknowledge with gratitude the insightful comments on drafts by Dr Ana Beduschi, Dr Russell Buchan, Prof Geoffrey Corn, Gp Capt Ian Henderson, Dr Aurel Sari, and Dr Noam Zamir. Any errors or omissions are our sole responsibility.

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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 arts. 48, 51 (2) & (3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art. 13(3), June 8, 1977, 1125 U.N.T.S. 609; INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 27–36, 46 (2009);, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts and Louise Doswald-Beck eds. 2005), rr. 1 & 6 [hereinafter ICRC CIHL STUDY]; Michael N. Schmitt, Charles H. B. Garraway, and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict* (International Institute of Humanitarian Law 2006) r. 1.1.2.

⁴ Additional Protocol I, *supra* note 3, art. 43(2).

entitled to prisoner of war (POW) status, and the many protections that attach thereto, upon capture.⁵

While these basic obligations and rights are universally accepted, the precise criteria for qualification as a combatant lack clarity. This Article zeroes in on the meaning of a single criterion resident in Article 44(3) of Additional Protocol I (AP I) to the 1949 Geneva Conventions. The text of the provision is as follows:

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).⁶

The second sentence of Article 44(3) is noteworthy because it offers combatants exceptional relief from the general obligation to distinguish themselves. Whether the exception is militarily sensible is the subject of heated and long-standing disagreement, with certain nonparty states, most notably the United States and Israel, citing the provision as, in part, their basis for refusal to ratify the treaty.⁷ Although we address the underlying logic of the competing positions in passing, it is not our purpose here to take on this controversy. Rather, the objective is more focused: to

⁵ Convention (III) Relative to the Treatment of Prisoners of War art. 4A, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Additional Protocol I, *supra* note 3, art. 44(1).

⁶ Additional Protocol I, *supra* note 3, art. 44(3).

⁷ See OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974–1977) (Fed. Pol. Dept. Bern, 1978), vol. VI, at 121 ¶ 17 (Israel) (explaining its vote against the draft rule on grounds that it “was contrary to the spirit and to a fundamental principle of humanitarian law”) [hereinafter OFFICIAL RECORDS]; Ronald Reagan, Letter of Transmittal, Jan. 29, 1987, Message from the President Transmitting Additional Protocol II to the Senate (“Another provision [of AP I] 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.”). See also US DoD, LAW OF WAR MANUAL (December 2016), at 119 ¶ 4.6.1.2.

elucidate the meaning of the determinative phrase “cannot so distinguish” in the context of contemporary conflict.

Our exploration of the functioning of Article 44(3) is apposite for a number of reasons. Firstly, the number of states parties to AP I is slowly but steadily increasing.⁸ As such, the application of its provisions is statistically likely to be more frequent in the future. This is of particular importance with respect to those that, like the rule in question, arguably do not already amount to customary international law that is binding on all states.⁹

Secondly, the relevance of Article 44(3)’s exception to the requirement of distinction is on the rise due to the evolving nature of warfare. Since the 1970s, decolonization and proxy wars, which were the staple of Cold War-era armed conflict, have been replaced in great part, albeit not entirely, by asymmetrical conflicts pitting military superpowers like the United States and its partners against significantly weaker forces and localized armed groups with limited resources and military strength, as was the case in both Afghanistan and Iraq.¹⁰ During such insurgencies or other modes of asymmetrical warfare, the forces of the weaker party are often based in, and conduct hostilities among, the civilian population. The exception ameliorates the difficulty of effectively fighting an asymmetrically advantaged opponent in such circumstances by countenancing the suspension of the obligation to distinguish oneself when the conditions of the provision are met.

Urbanization will exacerbate the phenomenon of war among the civilian population. While in 1974 only 1.5 billion people lived in cities, the corresponding figure for 2018 is estimated at 4.2 billion—nearly a threefold increase.¹¹ To place the trend in context, by the middle of this century, almost 70 percent of the global population will live in cities.¹² In that war usually follows people, the flight to cities has brought with it a growing incidence of urban warfare.¹³ Crucially, asymmetrically weaker opponents will often find it strategically and operationally advantageous to exploit the urban environment in order to maintain a realistic prospect of

⁸ See ICRC, States Party to the Following International Humanitarian Law and Other Related Treaties, 4 June 2018, <<https://ihl-databases.icrc.org/ihl>>.

⁹ On the customary status of Article 44 of Additional Protocol I, see text accompanying notes 23–26 *infra*.

¹⁰ See generally MARY KALDOR, *NEW AND OLD WARS* (2d ed. 2007).

¹¹ UN, ‘World Urbanization Prospects: The 2014 Revision’ (2014) <<https://esa.un.org/unpd/wup/>>.

¹² UN, ‘World Urbanization Prospects: The 2014 Revision – Highlights’ (2014) <<https://esa.un.org/unpd/wup/publications/files/wup2014-highlights.pdf>> 7.

¹³ *Cf.* David Campbell, Steve Graham and Daniel Bertrand Monk, *Introduction to Urbicide: The Killing of Cities?*, (2007) 10(2) *THEORY & EVENT* 1, 1 (“As traditional wars between nation states conducted in open terrain have become objects of relative curiosity, so the informal, ‘asymmetric’ or ‘new’ wars that centre on localized struggles over strategic urban sites have become the norm.”).

victory over their militarily more powerful enemies.¹⁴ In light of these and other realities of modern combat, situations falling within the purview of the “cannot so distinguish” exception will become ever more common.

Thirdly, in light of remarkable advances in intelligence, surveillance, and reconnaissance (ISR) capabilities, and the means to communicate the information attained thereby, concealment and deception have become pervasive features of modern-day combat operations.¹⁵ Appearing to be a civilian, or otherwise frustrating the enemy’s ability to distinguish civilians from combatants, offers meaningful tactical advantages, both in terms of avoiding identification by the enemy and mounting one’s own offensive operations. Indeed, the tactical advantages of muddying enemy targeting by operating from within the civilian population have been tragically illustrated during recent conflicts in which insurgents have prevented the civilian population from fleeing cities where combat is expected.¹⁶ It is thus necessary to understand where the legal limits of such tactics lie beyond the basic prohibition of perfidy, which bans the feigning of civilian or other protected status in order to kill, wound, or capture the enemy.¹⁷ The scope of Article 44(3) is central to such limits.

To lay the foundation for assessing application of the phrase “cannot so distinguish” in modern warfare, Part II of the Article introduces IHL’s extant standards for combatancy. The piece then turns to the *travaux préparatoires* of Article 44(3) in Part III. This analysis exposes the limitations of relying solely on the provision’s drafting history to understand the notion. Therefore, and consistent with the interpretive approach set forth in the Vienna Convention on the Law of Treaties,¹⁸ we look to the object and purpose of Article 44(3) to inform our examination in Part IV. Armed with an understanding of this *telos* of the provision, in Part V of the Article we proffer “enemy control of battlespace” as the appropriate standard for determining when the requirement to distinguish oneself may exceptionally be attenuated. Finally, Part VI highlights a number of legal safeguards that mitigate the risk associated with use of enemy control of the battlespace vis-à-vis Article 44(3)’s reference to situations in which combatants “cannot so distinguish” themselves.

¹⁴ Ivan Arreguín-Toft, *HOW THE WEAK WIN WARS: A THEORY OF ASYMMETRIC CONFLICT* 12–13 (2005).

¹⁵ See Scott Gerwehr and Russell W. Glenn, *THE ART OF DARKNESS: DECEPTION AND URBAN OPERATIONS* 37–55 (2000).

¹⁶ ICRC and InterAction, *Outcome Report: When War Moves to Cities: Protection of Civilians in Urban Areas 1* (May 2017), <https://reliefweb.int/report/world/when-war-moves-cities-protection-civilians-urban-areas-outcome-report-may-2017>.

¹⁷ Additional Protocol I, *supra* note 3, art. 37(1).

¹⁸ Vienna Convention on the Law of Treaties arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331

Two cautionary notes are in order, lest the analysis that follows be understood in an overbroad manner. First, the discussion applies only to international armed conflict. This is because the concept of combatancy is limited to armed conflicts that are international in character; there is no equivalent to combatant status in non-international armed conflicts.¹⁹ Second, the analysis is confined to conflicts between states parties to AP I (and, possibly, those involving parties to the conflict that accept and apply the Protocol on an *ad hoc* basis²⁰). Although a number of the Protocol's provisions either reflect or have acquired the force of customary law,²¹ that is not the case with all of the instrument's rules.²²

In this regard, the customary status of Article 44 is nuanced. Most of its components are considered reflective of customary international law. This includes the first sentence of paragraph 3, which prescribes that combatants must distinguish themselves from the civilian population in order to enjoy the benefits of combatancy.²³ In particular, that sentence has been recognized by the International Committee of the Red Cross (ICRC) as an expression of customary international law.²⁴ However, this is not the case with the second sentence of the same paragraph, which

¹⁹ See, e.g., Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck ed. 3d ed. 2013) 79, 85; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 41 (3d ed. 2016); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 201 (2d ed. 2016).

²⁰ See Additional Protocol I, *supra* note 3, art. 96(2).

²¹ For an early observation to this effect, see Yoram Dinstein, *The Application of Customary International Law Concerning Armed Conflicts in the National Legal Order*, in NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW (Michael Bothe ed. 1990) ("in my assessment, the great majority of the norms of the Protocol—perhaps as many as 85%—qualify as declaratory or non-controversial").

²² See, e.g., John Bellinger and William James Haynes, *A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law* 89 INT'L R. RED CROSS 443, 446 (2007) ("Additional Protocols I and II to the Geneva Conventions contain far-reaching provisions, but States did not at the time of their adoption believe that all of those instruments' provisions reflected rules that already had crystallized into customary international law; indeed, many provisions were considered ground-breaking and gap-filling at the time.").

²³ See, e.g., Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy* Program on Humanitarian Policy and Conflict Research at Harvard University, Occasional Paper Series 1, 64–65 (2005) ("The first sentence of Article 44(3) of Additional Protocol I is essentially a statement of customary international law"); *but see* Anthony P. V. Rogers, *Combatant Status*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 116 (Elizabeth Wilmshurst and Susan Breau eds. 2007) ("Under customary law, ... if a person qualifies as a prisoner of war, he must be accorded prisoner-of-war status even if he has not distinguished himself from the civilian population.").

²⁴ ICRC CIHL STUDY, *supra* note 3, r. 106.

relaxes the requirement.²⁵ On the contrary, a number of nonparty states have publicly objected to the exception.²⁶ Nonetheless, it remains valid law for states parties to the Protocol and will be examined here as such.

II. COMBATANT STATUS: THE *LEX SCRIPTA*

The legal status of fighters engaged in hostilities is determined by the regulation of combatant status under IHL. As with many other IHL issues, the relevant rules constitute an attempt to craft a balance between military and humanitarian considerations.²⁷ On the one hand, the legal designation of combatants serves to allow armed forces involved in an international armed conflict to take those actions that are necessary to bring about their opponent's defeat (principle of military necessity). This is accomplished by affording members of the armed forces combatant immunity for certain acts that would be unlawful but for the fact that they were undertaken during an armed conflict. On the other hand, by carving out a category of persons who alone are liable to be targeted lawfully, IHL also serves the countervailing goal of protecting the lives and health of those who do not directly participate in hostilities (principle of humanity).²⁸ Affording combatants the benefits of POW status once they are *hors de combat* due to surrender or capture, and thus no longer able to fight, also reflects the humanitarian underpinning of IHL.²⁹

The interaction of these two foundational principles finds its most fundamental expression in the rule of distinction, today enshrined in Article 48 of AP I and generally considered as reflecting customary international law.³⁰ The rule requires parties to the conflict to “at all times distinguish between the civilian

²⁵ Cf. *id.* at 387–89.

²⁶ OFFICIAL RECORDS, *supra* note 7, vol. VI, at 121 ¶ 17 (Israel) (explaining its vote against the draft rule on grounds that it “was contrary to the spirit and to a fundamental principle of humanitarian law”); US DoD, LAW OF WAR MANUAL (December 2016), at 119 ¶ 4.6.1.2 (“The United States has objected to the way these changes relaxed the requirements for obtaining the privileges of combatant status, and did not ratify AP I, in large part, because of them.”).

²⁷ See generally Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance* 50 VA. J. INT'L L. 795 (2010).

²⁸ JEAN S. PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 61–62 (1985).

²⁹ See also ICRC CIHL STUDY, *supra* note 3, at 166–67 (“Respect for and protection of persons who are in the power of an adverse party is a cornerstone of international humanitarian law”).

³⁰ *Legality of the Threat or Use of Nuclear Weapons Case* (Advisory Opinion) [1996] ICJ Rep 226, ¶¶ 78–79; *Western Front: Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26* (Partial Award of 19 December 2005) (Eritrea-Ethiopia Claims Commission) (2005) 26 RIAA 291, ¶¶ 93–95; ICRC CIHL STUDY, *supra* note 3, rr. 1 and 7.

population and combatants.”³¹ Since the definition of civilians is in the negative, that is, civilians are those who are not combatants,³² the meaning of the term “combatant” is the key to application of the rule, as well as its progeny, such as the prohibition on attacking civilians or intentionally terrorizing them.³³

The classic definition of a combatant was first articulated with binding force³⁴ in Article 1 of the Regulations annexed to the 1899 Hague Convention II,³⁵ which was subsequently incorporated verbatim into the first article of the Regulations annexed to Hague Convention IV of 1907.³⁶ The latter, which has long been deemed to reflect customary international law,³⁷ provided,

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”³⁸

The 1949 Geneva Conventions adopted these four conditions, while making the criteria for combatant status even more stringent. Article 4A of Geneva Convention III (“GC III”), which lists the categories of persons who, if captured by the enemy, are to

³¹ Additional Protocol I, *supra* note 3, art. 48.

³² *Id.*, art. 50(1).

³³ *Id.*, art. 51(2).

³⁴ See also Project of an International Declaration concerning the Laws and Customs of War, Brussels, art. 9, Aug. 27, 1874, *reprinted in* THE LAWS OF ARMED CONFLICTS 23 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) (containing the first international attempt to define combatant status). However, the Brussels Declaration was never ratified and thus it did not acquire the force of a binding agreement. See further KUBO MAČÁK, INTERNATIONALIZED ARMED CONFLICTS IN INTERNATIONAL LAW 133–35 (2018) (discussing the relevance of the Brussels Declaration for the historical development of combatant status under IHL).

³⁵ Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention (II) with Respect to the Laws and Customs of War on Land (signed 29 July 1899, art. 1, entered into force 4 September 1900) 32 Stat 1803, TS 403.

³⁶ Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention (IV) respecting the Laws and Customs of War on Land (signed 18 October 1907, art. 1, entered into force 26 January 1910) 205 CTS 277 [hereinafter Hague Regulations].

³⁷ See, e.g., Judgment of the International Military Tribunal for the Trial of German Major War Criminals (30 September 1946) (IMT) 254; Judgment of the International Military Tribunal for the Far East (12 November 1948) (IMTFE), reproduced in R. John Pritchard and Sonia M. Zaide (eds), *The Tokyo War Crimes Trial* (Garland 1981) vol. 22, 491.

³⁸ Hague Regulations, *supra* note 36, art. 1.

be accorded POW status, is universally considered as setting forth the contemporary criteria for combatant status under customary international law.³⁹ It provides, in relevant part:

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

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;
 (b) that of having a fixed distinctive sign recognizable at a distance;
 (c) that of carrying arms openly;
 (d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

Like its Hague Conventions counterparts, Article 4A of GC III distinguishes between regular and irregular armed forces. The latter are subject to four conditions listed in the second subparagraph, including that of having a “fixed distinctive sign,”⁴⁰

³⁹ See, e.g., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 515 ¶ 1677 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) (acknowledging that combatant status was not explicitly affirmed by Article 4A GC III, but considering it implicitly included in the recognition of POW status) [hereinafter ADDITIONAL PROTOCOLS COMMENTARY]; EMILY CRAWFORD, IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT (OUP 2015) 17 (“Article 4A of the Third Geneva Convention outline[s] who is entitled to POW status and, by extension, combatant status”); Sean Watts, *Who Is a Prisoner of War?* in, THE 1949 GENEVA CONVENTIONS: A COMMENTARY 890 ¶ 2 (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds. 2015) (noting that Art 4A GC III “has been perceived as a merger of sorts between conditions for POW status and conditions expected of combatants generally”); Noam Zamir, CLASSIFICATION OF CONFLICTS IN INTERNATIONAL HUMANITARIAN LAW: THE LEGAL IMPACT OF FOREIGN INTERVENTION IN CIVIL WARS 136 (2017) (considering that the original purpose of Art 4A GC III was to determine who was entitled to POW status and consequently to serve as a definition of a combatant).

⁴⁰ Geneva Convention III, *supra* note 5, art. 4A(2)(b).

a requirement satisfied by wear of a uniform, and of carrying their weapons openly.⁴¹ It is these two requirements that Article 44(3) of AP I relaxes by means of its “cannot so distinguish” text.

Experts in the field take differing views on whether the four conditions implicitly apply to members of the armed forces, including members of militia or volunteer corps forming part of the armed forces, such that their failure to comply with them would deprive the individuals concerned of the benefits of combatant status. Proponents of their implicit application, including one of the authors, find support in some case law, such as the Privy Council’s 1968 judgement in *Mohamed Ali et al. v. Public Prosecutor*, and the U.S. Supreme Court’s 1942 *Ex Parte Quirin* decision.⁴² Those taking the opposite view, including the other author, point to the plain wording of the provision and the fact that the conditions textually modify only that part of the Article dealing with irregular forces, as confirmed by an examination of the *travaux* of GC III.⁴³

Nonetheless, this debate need not detain us, for AP I sets forth separate conditions for parties to a conflict in which the instrument applies. Article 43(2) stipulates that all members of armed forces other than medical or religious personnel are combatants, thereby dispensing with the clear distinction between regular and irregular forces found in its predecessors.⁴⁴ Pursuant to Article 44(3) (quoted in full above), combatants must distinguish themselves from the civilian population when conducting attacks or engaging in military operations that are preparatory to an attack. In special situations (discussed at greater length below), this requirement is somewhat relaxed, meaning in particular that the beneficiaries of the exception do not have to wear uniforms or other distinguishing

⁴¹ Geneva Convention III, *supra* note 5, art. 4A(2)(c).

⁴² *Mohamed Ali et al. v. Public Prosecutor* (1968), [1969] AC 430, 449; *Ex Parte Quirin et al.* (1942), 317 US 1, 35-36. *See, e.g.*, Ian Brownlie, *Decisions of British Courts During 1968 Involving Questions of Public or Private International Law* 43 BRIT. Y.,B. INT’L L. 217, 238-39(1969); Gerald Draper, *The Status of Combatants and the Question of Guerrilla Warfare* 45 BRIT. Y.,B. INT’LL 173, 182 fn 1 (1971); W. Thomas Mallison and Sally V. Mallison, *The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict*, 9 Case Western Reserve J. Int’l L. 39, 74 (1977); DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 19, at 50-51. *But see In re von Lewinski (called von Manstein)* (1949) 16 ILR 509, 515-16 (British Military Court at Hamburg) (holding that ‘regular soldiers’ did not have to meet the four requirements in order to qualify as combatants).

⁴³ *See, e.g.*, W. Hays Parks, *Special Forces’ Wear of Non-Standard Uniforms* 4 CHICAGO J INT’L L. 493, 509 (2003); Allan Rosas, THE LEGAL STATUS OF PRISONERS OF WAR (Suomalainen Tiedeakatemia 1976) 328; Watts, *supra* note 39, at 894; MAČÁK, *supra* note 34, at 166-69.

⁴⁴ *See* HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 173 (1988) 173; ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 39, at 511-13 ¶ 1672; MICHAEL BOTHE, KARL J. PARTSCH AND WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 236-238 (1982).

garb or emblems. However, they must still carry their weapons openly while engaged in attacks and during a defined period before such attacks are launched.⁴⁵ Moreover, Article 44(7) stipulates that despite the exception, Article 44 “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.”⁴⁶

Combatants who are captured during a conflict to which the Protocol applies forfeit their POW status if they fail to distinguish themselves from the civilian population to the extent required by Article 44(3),⁴⁷ although they are nevertheless entitled to “protections equivalent in all respects to those accorded to prisoners of war.”⁴⁸ Moreover, even though they may be dressed as civilians, and despite the fact that the reason they may have been so dressed is to enhance their survivability in the battlespace, their conduct in failing to wear distinctive clothing or emblems and hiding their weapons until deployment to an attack does not amount to perfidy.⁴⁹

III. TRAVAUX PRÉPARATOIRES AND THEIR LIMITATIONS

A product of extensive negotiations during the 1974–77 Diplomatic Conference in Geneva, Article 44(3) is hardly an example of concision and brevity. Revealingly, opinions regarding its text began to differ soon after it had been tentatively approved.⁵⁰ As a *pars pro toto* example, while the delegate of Ivory Coast lauded the future Article 44(3) as “crystal clear and requir[ing] no interpretation,”⁵¹ the Spanish representative saw it as “somewhat heterogeneous, sometimes contradictory, and not altogether clear.”⁵²

The central question for the present purposes is the appropriate interpretation of the second sentence of Article 44(3) in the context of contemporary warfare. In this regard, the drafting history of the Protocol is inconclusive. Not all of the delegations actively supported the provision; ultimately, there were seventy-three votes for Article 44, one against, and twenty-one

⁴⁵ Additional Protocol I, *supra* note 3, art. 44(3), second sentence.

⁴⁶ *Id.* art. 44(7).

⁴⁷ *Id.* art. 44(3) (“he shall *retain* his status as a combatant” if the requirements of the exception are satisfied) (emphasis added).

⁴⁸ *Id.* art. 44(4). On the treatment of such individuals despite their loss of POW status, see ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 39, at 538 ¶ 1719; BOTHE ET AL., *supra* note 44, at 289–290.

⁴⁹ *Id.* art. 44(3), third sentence; *see also id.*, art. 37(1)(c).

⁵⁰ See generally OFFICIAL RECORDS, *supra* note 7, vol. XV, at 156–188.

⁵¹ OFFICIAL RECORDS, *supra* note 7, vol. XV, at 171 ¶ 12 (Ivory Coast).

⁵² OFFICIAL RECORDS, *supra* note 7, vol. XV, at 162 ¶ 41 (Spain).

abstentions.⁵³ More to the point, the United Kingdom perceptively opined that “any failure to distinguish between combatants and civilians could only put the latter at risk. That risk might well become unacceptable unless a satisfactory interpretation could be given to [the provision].”⁵⁴ The crucial endeavor, therefore, lay in identifying situations qualifying as ones in which combatants “cannot so distinguish” themselves.

Examination of the instrument’s *travaux* reveals that delegations that did not oppose adoption of the provision in Geneva broadly fell into three categories vis-à-vis its scope of application. Firstly, many Western states insisted that the future Article 44(3) would apply only in occupied territories.⁵⁵ Secondly, some states considered its application to also extend to wars of national liberation as defined in Article 1(4) of AP I.⁵⁶ The remaining states typically praised the adoption of the provision without limiting its application to any specific situation.⁵⁷

Upon ratification of the Protocol, many states that had aligned themselves with one of the two more restrictive positions issued interpretive declarations confirming their understanding of the applicative scope of the provision.⁵⁸ Although there was some movement between the categories following the instrument’s adoption,⁵⁹ the three views continued to be represented among the states parties. This implies that, at the very minimum, the provision applies to situations of occupation because such cases form the lowest common denominator on which all states parties to

⁵³ OFFICIAL RECORDS, *supra* note 7, vol. VI, at 121.

⁵⁴ OFFICIAL RECORDS, *supra* note 7, vol. VI, at 132 ¶ 73 (United Kingdom).

⁵⁵ See, e.g., OFFICIAL RECORDS, *supra* note 7, vol. XV, at 157 ¶ 12 (United Kingdom); *id.* at 167 ¶ 63 (Germany); *id.* at 170 ¶ 7 (Greece); *ibid.* 172 ¶ 19 (France); *id.* at 176 ¶ 39 (Canada); *id.* at 179 ¶ 53 (United States); *id.* at 186 ¶ 83 (New Zealand).

⁵⁶ See, e.g., OFFICIAL RECORDS, *supra* note 7, vol. XV, at 159 ¶ 24 (Norway); *id.* at 166 ¶ 59 (Argentina); 174 ¶ 28 (Sweden).

⁵⁷ See, e.g., OFFICIAL RECORDS, *supra* note 7, vol. XV, at 159–160 ¶¶ 26–27 (Egypt); *id.* at 161 ¶ 36 (Syria); *id.* at 161 ¶ 39 (South Korea); *id.* at 162 ¶ 42 (India).

⁵⁸ For instance, Australia issued a declaration to the effect that “the situation described in the second sentence of paragraph 3 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1.” Australia, Notification by the depositary addressed to the ICRC on 24 June 1991, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=10312B4E9047086EC1256402003FB253>. See also Julie Gadreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims*, 85 INT’L R. RED CROSS 143, 152–153 (2003) (referring to ten such declarations or reservations).

⁵⁹ For example, the United Kingdom modified its position to the extent that “the situation in the second sentence of paragraph 3 can only exist in occupied territory or in armed conflicts covered by paragraph 4 of Article 1” (wars of national liberation). See Corrected Letter of 28 January 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom <<https://ihl-databases.icrc.org/ihl/NORM/OA9E03F0F2EE757CC1256402003FB6D2?OpenDocument>> (emphasis added).

the Protocol seem to be in agreement.⁶⁰ For instance, provided that the situationally specific conditions stipulated in Article 44(3) had been met, it would apply to Russian occupied territories during the international armed conflict in 2008 between Georgia and Russia⁶¹ as well as to the ongoing occupation of Crimea by Russia in its international armed conflict with Ukraine.⁶²

However, belligerent occupation as the least common denominator approach deriving from analysis of the *travaux* cannot be considered conclusive with respect to the provision's interpretation. Chiefly, this is because a limited consensus on the most restrictive interpretation of a rule by the drafters should not be confused with agreement by adherents of more permissive interpretations to abandon their views in order to reach consensus.⁶³ All that can be said is that the most restrictive interpretation appeared to be acceptable to all drafters.

IV. OBJECT AND PURPOSE OF THE EXCEPTION

With respect to the drafters' focus on occupation, it is essential to point out that the *travaux* are preparatory works of a treaty. According to Article 32 of the Vienna Convention on the Law of Treaties (VCLT), which is generally considered reflective of customary law, preparatory work is a "supplementary means of interpretation," one that acquires valence only after the primary

⁶⁰ Vienna Convention, *supra* note 18, art. 31(2)(a) (providing that for the purposes of treaty interpretation, the relevant context also comprises "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty"). In this regard, see MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 430 ¶ 18 (2009) (noting that "the term 'agreement' [in Article 31(2)(a) VCLT] is clearly wider and covers any contractual instrument, in particular also agreements not in written form").

⁶¹ Geneva Academy, Military Occupation of Georgia by Russia (Oct. 2, 2017), <http://www.rulac.org/browse/conflicts/military-occupation-of-georgia-by-russia#collapse2accord>; 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA REPORT, at 22 ¶ 18 (Sept. 2009).

⁶² International Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities, ¶ 158, Nov. 14, 2016, www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

⁶³ *But see* Frits Kalshoven, *The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977*, in FRITS KALSHOVEN, REFLECTIONS ON THE LAW OF WAR: COLLECTED ESSAYS 181, 202 (2007) (suggesting that, at the conference, "there was a marked *unity of opinion* that the situations envisaged in the second sentence of paragraph 3 can arise solely in occupied territory and in the case of wars of national liberation") (emphasis added). Kalshoven's suggestion overstates the point given that many delegations did not subscribe to the two more restrictive views. See note 57 above.

means of interpretation have failed to provide a clear and reasonable meaning of the provision in question.⁶⁴ Accordingly, drafting history, while informative in itself, is of only secondary value in the interpretation of treaties.

By contrast, Article 31 of the VCLT sets forth the determinative interpretive mechanism: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶⁵ Any interpretation of Article 44(3) accordingly must consider its underlying “object and purpose.”⁶⁶ Although the usual order in which the methods of interpretation provided for by the VCLT are employed begins with the ordinary meaning of the terms,⁶⁷ there is no requirement to do so and it is rather understood that they “are all of equal value; none are of an inferior character.”⁶⁸ In the present case, it is particularly helpful to begin with the object and purpose of the provision in question.

Unusually, the *telos* of the provision is set forth expressly in its opening sentence—“to promote the protection of the civilian population from the effects of hostilities.”⁶⁹ At first glance, it might appear that this goal is incongruous with *any* relaxation of the obligation to distinguish oneself. In that vein, it has been argued that allowing some armed participants to dispense with the obligation, even for a limited period of time, “seriously undermine[s] the principle which is so important for the protection of the civilian population, namely the presumption that apparently unarmed persons in civilian clothes pose no threat and should not be attacked.”⁷⁰ This line of argumentation suggests that the attenuation of the principle of distinction embodied in Article 44(3) reduced or even “effectively nullif[ied]” the legal protection for civilians.⁷¹ As Professor Geoffrey Corn has argued, the provision supposedly diluted

one of the most important *quid pro quos* of humanitarian law: in exchange for making yourself more easily distinguishable from the civilian population (and as a result facilitating the ability of an enemy to lawfully attack you),

⁶⁴ Vienna Convention, *supra* note 18, art. 32.

⁶⁵ Vienna Convention, *supra* note 18, art. 31(1).

⁶⁶ *Id.* art. 31(1).

⁶⁷ See, e.g., ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 187 (2007) (“One naturally begins with the text...”).

⁶⁸ VILLIGER, *supra* note 60, at 435.

⁶⁹ Additional Protocol I, *supra* note 3, art. 44(3), first sentence.

⁷⁰ M. H. F. Clarke, T. Glynn and A. P. V. Rogers, *Combatant and Prisoner of War Status*, in *ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION* 120 (Michael A. Meyer ed. 1989).

⁷¹ CRAWFORD, *supra* note 39, at 44.

the law granted you the benefit of POW status with its accordant combatant immunity.⁷²

In our view, these assertions present an incomplete picture of the provision and its legal effects. It must be borne in mind that the threshold for the applicability of the exception in the second sentence of Article 44(3) is particularly high. It requires that the only option the potential beneficiaries have to continue fighting, is to dispense, to a degree, with distinguishing themselves, in line with the ordinary rules.⁷³ Therefore, the actual choice in the situations in question is not as simple as a legal-policy preference for combatants being easily distinguishable from the civilian population or not. Instead, the crucial question is how to treat, as a matter of law, the consequences of the fact that the combatants in question are *unable* to distinguish themselves if they wish to continue fighting. In other words, the choice is between exceptionally permitting this mode of combat in limited circumstances—and thus keeping those who engage in it within the bounds of the law—and labelling them as persons operating in violation of the requirements of IHL.

This being so, there is an even more fundamental *quid pro quo* lying at the core of IHL than that highlighted by Professor Corn, that is, the premise that by bestowing a degree of legal protection on the combatants in question by recognizing the military necessity in limited circumstances of relaxing the distinction requirement, the law incentivizes them to abide by IHL generally.⁷⁴ The inclusiveness of the law exerts a powerful pull dynamic that enables and strengthens overall compliance. This was recognized by a number of delegations in Geneva, as illustrated by a Norwegian delegate who noted that the beneficiaries of the future Article 44(3) would thereby “be motivated to ensure the application of international humanitarian law,”⁷⁵ which “would in turn lead to a better protection of all war victims, and *in particular of the civilian population*.”⁷⁶ As the ICRC Commentary to the provision explains,

[g]uerilla fighters will not simply disappear by putting them outside the law applicable in armed conflict, on the basis that they are incapable of complying with the traditional rules of such law. Neither would this

⁷² Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STANFORD L. & POL’Y REV. 253, 274 (2011).

⁷³ See text accompanying notes 87–92 *infra*.

⁷⁴ See, e.g., HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICTS 46 (Naval War College Press 1979); Steve Nabors, *Right to Fight: The Belligerent’s Privilege*, in RETHINKING INTERNATIONAL LAW AND JUSTICE 23 (Charles Sampford, Spencer Zifcak and Derya Aydin Okur eds. 2016).

⁷⁵ OFFICIAL RECORDS, *supra* note 7, vol. XV, at 158 ¶ 18 (Norway).

⁷⁶ *Id.* (emphasis added).

encourage them to at least comply with those rules which they are in a position to comply with, as this would not benefit them in any way.⁷⁷

Seen from this perspective, it becomes clear why the availability of combatant status for persons who take advantage of Article 44(3)'s exception to the requirement of distinction can actually contribute to the protection of the civilian population. By providing these fighters with legal status and its attendant benefits, such as combatant immunity and formal POW status, the law operates to encourage them to respect and protect the civilian population.⁷⁸ This is because their incentive to comply with the law will be reduced if their legal status lies beyond the accepted boundaries of the law, thus making them liable to prosecution for acts for which they would otherwise enjoy combatant immunity, such as attacking the enemy and enemy military objectives.

Faced with a choice between the Article 44(3) exception possibly reducing civilian protection on the one hand and de-incentivizing compliance with IHL in the absence of the exception on the other, a teleological interpretation of the provision requires endorsing the former, even if it may at first appear counterintuitive. But the question remains, what interpretive standard best advances the *telos* of optimizing protection of the civilian population?

V. ENEMY CONTROL OF BATTLESPACE

The evolution of warfare over the four decades since the adoption of the Protocol, in particular the regular conduct of hostilities among the civilian population, requires a reassessment of the terms of Article 44(3) in light of its object and purpose of “promot[ing] the protection of the civilian population from the effects of hostilities.” Armed with this *telos*, it is possible to shape a contemporary approach to the exception.

Which potential understandings are legally viable falls to be determined by reference to the aforementioned canons of interpretation. As noted, the interpretive process starts with an examination of the specific text of the relevant terms of the treaty in accordance with its ordinary meaning.⁷⁹ A possible initial obstacle in this regard is the text at the beginning of Article 44(3)'s sentence in question—“*Recognizing . . .* that there are situations in armed conflicts.”⁸⁰ It could be objected that the word “recognizing”

⁷⁷ ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 39, at 521 ¶ 1684.

⁷⁸ Geneva Convention III, *supra* note 5, art. 1; Additional Protocol I, *supra* note 3, art. 1.

⁷⁹ Vienna Convention, *supra* note 18, art. 31(1).

⁸⁰ Additional Protocol I, *supra* note 3, art. 44(3) (emphasis added).

indicates that the normative content of the following text is limited to situations that pre-existed adoption of the provision, and thus were within the contemplation of the drafters.

However, it is difficult to reconcile such an objection with the prevailing evolutive approach to the interpretation of AP I. The approach was reflected in the International Court of Justice (ICJ)'s modern construction of the so-called Martens Clause, which is enshrined in Article 1 of the Protocol,⁸¹ when the ICJ addressed "the rapid evolution of military technology."⁸² Similarly, in the context of a well-known debate over whether computer data qualifies as a military objective under Article 52(2) of AP I, both sides notably accepted that the provision is subject to dynamic interpretation, even though they differed on the conclusion to which such interpretation lead.⁸³

The ICJ also employed the evolutive approach in its *Navigational Rights* judgment. There, the court noted:

where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.⁸⁴

Self-evidently, AP I is a treaty of indeterminate duration and the key terms in Article 44(3) ("situations," "nature of the hostilities," and "military deployment") are of a generic nature. By the court's approach, therefore, it is apposite to read the provision in a manner that permits its adaptation to contemporary conflict.⁸⁵ It cannot be otherwise, for law must remain responsive to the

⁸¹ See *id.*, art. 1(2) ("In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."). The clause was first set forth in the 1899 Hague Convention II, *supra* note 35, pmbl., and later replicated in the 1907 Hague Convention IV, *supra* note 36, pmbl.

⁸² *Legality of the Threat or Use of Nuclear Weapons Case* (Advisory Opinion), ¶ 78, 1996 I.C.J. 226.

⁸³ Compare Kubo Mačák, *Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law* 48 ISR. L. REV. 55, 70–71 (2015) and Michael N. Schmitt, *The Notion of 'Objects' During Cyber Operations: A Riposte in Defence of Interpretive and Applicative Precision*, 48 ISR. L. REV. 81, 94–95 (2015).

⁸⁴ *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment), ¶ 66, 2009 I.C.J. 213.

⁸⁵ Cf. HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 507, ¶ 28 (2006) (Isr.), reprinted in 46 INTERNATIONAL LEGAL MATERIALS 373 ("new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on a dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality").

realities of combat in order to serve its function of balancing military necessity and humanitarian concerns.

Since the phrase “situations in armed conflicts” is adaptive to the context in which it is to be applied, the challenge is to identify those situations in modern warfare (in addition to situations of belligerent occupation discussed above) that may qualify as ones in which, “owing to the nature of the hostilities,” combatants “cannot” distinguish themselves from the civilian population. A well-known contemporary critic of the Additional Protocol decried the modal verb “cannot” as “a masterstroke of amoral draftsmanship.”⁸⁶ Beyond such unfortunate hyperbole, though, how is the notion best understood in 2018 in the context of protecting the civilian population from the effects of hostilities?

To begin with, the exemption in the second sentence of Article 44(3) only applies in special situations, and not, for example, to irregular armed forces in general.⁸⁷ After all, “cannot” implies that the individuals in question have no other means of effectively continuing to fight than dispensing with the requirement to wear a uniform, distinctive sign, or other indicia that they are combatants. As the United Kingdom’s *Manual on the Law of Armed Conflict* observes, “The special rule is thus limited to those exceptional situations where a combatant is truly *unable* to operate effectively whilst distinguishing himself in accordance with the normal requirements.”⁸⁸

Accordingly, the fact that the weaker party could gain a military *advantage* by being temporarily relieved of the duty of distinction does not satisfy Article 44(3)’s “cannot” condition precedent. Similarly, it does not suffice that relaxation of the duty would help *balance* any operational inequities between the parties to the conflict. Both of these interpretations would strip the relief in the second sentence of Article 44(3) of its exceptional character; the exception would swallow the rule during the asymmetrical conflicts that have become so prevalent. Indeed, taken to its logical extreme, if the issue was advantaging a party to the conflict, the exception would apply in virtually all conflicts because it would always afford the combatants to which it applied an operational benefit of some sort. Relaxation of the distinction requirement to such a degree would manifestly run counter to the object and purpose of the provision.

Therefore, the test must be much stricter. In that regard, we agree with the ICRC’s commentary to Article 44(3), which emphasizes that in order for the exception to apply, the balance of

⁸⁶ Douglas J. Feith, *Law in the Service of Terror—The Strange Case of the Additional Protocol 1* NATIONAL INTEREST 36, 47 (1985).

⁸⁷ Kalshoven, *supra* note 63, at 201.

⁸⁸ UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, at ¶ 4.5.1 (2004) (emphasis in original) [hereinafter UK MANUAL].

power must be “out of all proportion in favour of one of the Parties.”⁸⁹ Such radical imbalance means that the weaker party’s combatants cannot distinguish themselves while still retaining “a chance of success.”⁹⁰ Qualifying situations are those in which the asymmetrically disadvantaged belligerent has no remaining alternative but to resort to conduct that would otherwise fail to comply with the duty of distinction.⁹¹ In other words, the exception demands that “the visible carrying of arms and distinguishing signs . . . [must] really be incompatible with the practicalities of the action (for example, if the guerrilla fighters use the population for support or are intermingled with it).”⁹² To comply with the requirement of distinction in the situations envisaged would ensure mission failure.

This narrow construction explains why many delegations sought to limit application of the provision either to wars of national liberation or to occupied territories, for in such situations one party to the conflict usually not only exercises far greater control over the area in question, but also typically enjoys superiority in terms of military capability. The opposing side has little prospect of prevailing absent some relaxation of the requirement to distinguish oneself from the civilian population. However, these two situations fall short of optimizing the Article 44(3) exception’s goal of enhancing protection of the civilian population.

It may be the case that occupation reflects a high level of control over territory such that enemy combatants cannot realistically distinguish themselves from the civilian population. Indeed, occupying powers often issue strict security measures that can dramatically hinder the ability of enemy fighters to engage in military activities if they are readily identifiable as such. For instance, during the occupation of Iraq, the Coalition Provisional Authority “de-ba’athified” Iraqi society,⁹³ issued orders governing the possession of weapons⁹⁴ and public gatherings to which

⁸⁹ ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 39, at 532 fn 50.

⁹⁰ OFFICIAL RECORDS, *supra* note 7, vol. XV, at 453 ¶ 19 (Report of Committee III).

⁹¹ ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 39, at 532 ¶ 1702.

⁹² Charles Chaumont, *La recherche d’un critère pour l’intégration de la guérilla au droit international humanitaire contemporain*, in MÉLANGES OFFERTS À CHARLES ROUSSEAU 50 (1974), translated by and quoted in ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 39, at 530 fn 40.

⁹³ Coalition Provisional Authority Number One, De-Ba’athification of Iraqi Society, May 16, 2003,

http://govinfo.library.unt.edu/cpa-iraq/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf

⁹⁴ Coalition Provisional Authority Number 3 (Revised) (Amended), Dec. 31, 2003, http://govinfo.library.unt.edu/cpa-iraq/regulations/20031231_CPAORD3_REV_AMD_.pdf.

criminal penalties attached,⁹⁵ and created a new Iraqi Army under its control.⁹⁶ These and other actions of the occupying forces severely limited the military practicality of insurgent fighters, including the remnants of the former Iraqi Army, complying with the requirement of distinction.

However, the legal test for occupation does not suffice as normative shorthand for the requisite extent of control that is necessary for application of the Article 44(3) exception. The applicable customary law definition of occupation was set forth in treaty form in Article 42 of the 1907 Hague Regulations: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."⁹⁷

This standard is the subject of some debate, thereby rendering it unsuitable to play such an interpretive role. Certain experts are of the view that occupation does not necessarily entail that the occupying power is actually exercising its authority over the entirety of the occupied territory. Rather, it suffices for that power to have the capacity to exert authority over the territory.⁹⁸ An example would be a situation in which forces are moving quickly through enemy territory as the enemy is in full retreat. The former could leave troops in place to establish sufficient control over areas from which they have vanquished the enemy, thereby substituting their authority for that of the enemy government. However, because doing so would slow the pace of the advance, the decision is made to defer establishing that authority in order to press the offensive with all available assets. This was the case for a short period as Coalition forces raced north into Iraq in early 2013. By the aforementioned view as to when occupation commences, it is conceivable that certain territory could be considered legally occupied, and yet the level of control over the area wielded by the offensive force would not be at a level triggering the Article 44(3) exception.

Other scholars, relying on the ICJ's judgement in *Armed Activities on the Territory of the Congo*, are of the view that the

⁹⁵ Coalition Provisional Authority Number 19, Freedom of Assembly, http://govinfo.library.unt.edu/cpa-iraq/regulations/20030710_CPAORD_19_Freedom_of_Assembly_.pdf.

⁹⁶Coalition Provisional Authority Number 22, Creation of a New Iraqi Army, Aug. 7, 2003, http://govinfo.library.unt.edu/cpa-iraq/regulations/20030818_CPAORD_22_Creation_of_a_New_Iraqi_Army.pdf

⁹⁷ Hague Regulations, *supra* note 36, art. 42.

⁹⁸ ICRC, COMMENTARY ON THE FIRST GENEVA CONVENTION, 108 ¶ 302 (2016) ("there cannot be occupation of a territory without effective control exercised over it by hostile foreign forces. However, effective control does not require the exercise of full authority over the territory; instead, the mere capacity to exercise such authority would suffice").

actual exercise of authority in substitution of the enemy's is necessary before occupation ensues as a matter of law.⁹⁹ Consider a scenario in which the forces of a party to the conflict are in military control of an area to such an extent that the enemy cannot effectively operate in the open. However, the military authorities do not supplant the authority of local authorities, for instance by engaging in law enforcement, overseeing operation of the judicial system, performing civil administrative duties, and the like. In such a case, the area would not be considered occupied in the legal sense by those taking this position, but the situation would nevertheless meet the requirements for application of Article 44(3)'s exception.

As noted, some of the Diplomatic Conference delegations included wars of national liberation, defined in Article 1(4) of AP I, as situations giving rise to the requisite control implied in Article 44(3).¹⁰⁰ In our view, such a standard would be overbroad, for in a war of national liberation the force fighting the government may have the military wherewithal necessary to engage in classic operations; indeed, it may control significant territory itself. Further, there is nothing inherent in a war of liberation, which is defined by reference to the *motive* for resorting to armed force against the government, that necessarily implies the type of control that infuses the Article 44(3) exception.

As a practical matter, encompassing wars of national liberation within the scope of the exception would in any event have little practical effect. Article 1(4) has very limited application, which has led to suggestions that it would "never be applied" and that it amounted to "a dead letter."¹⁰¹ Yet, the concept has recently seen some limited revival. In 2015, Switzerland, as the depositary of AP I, accepted an undertaking to apply the Geneva Conventions and the Protocol that had been issued by the Polisario Front in the context of a purported Article 1(4) type conflict in western Sahara.¹⁰² Although this decision was challenged by the government of Morocco as the supposed other party to the conflict,¹⁰³ the events surrounding the declaration have arguably

⁹⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment), ¶ 173, 2005 I.C.J. 116.

¹⁰⁰ See note 56 above.

¹⁰¹ George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 7 (1991).

¹⁰² See Switzerland, Notification to the Governments of the States parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims (June 26, 2015)

<https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150626-GENEVE_en.pdf>.

¹⁰³ Communication by the Kingdom of Morocco (June 30, 2015), annexed to Switzerland, Notification to the Governments of the States parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims (July 9, 2015) <https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150709-GENEVE-avec-ann_e.pdf>, at 2.

breathed new life into Article 1(4).¹⁰⁴ Nevertheless, situations qualifying as “wars of national liberation” in the sense of Article 1(4) are extremely rare and likely to remain so.

In our view, the best interpretive understanding of the exception, especially in the context of the prevalence of war among the civilian population, is that it applies only in “enemy controlled battlespace.” The phrase denotes a degree of control that precludes an opponent force operating in that battlespace from distinguishing itself except as provided for in Article 44(3), at least with any meaningful chance of tactical success. Control must rise to the level of physical control by the military or other security forces over a relatively well-defined area.

These situations are necessarily characterized by a high degree of asymmetry between the parties to the conflict. For example, one party may exercise control over an urban environment, while the other attempts to disrupt and subvert that control. The fact that an armed force or other fighters may still operate in the area does not necessarily deprive the situation of the degree of control necessary to qualify as being under enemy control. But they must not be able to do so openly and cannot meaningfully be able to contest control over the area in question absent application of the Article 44(3) exception.

In our estimation, the notion of enemy-controlled battlespace more closely approximates the object and purpose of Article 44(3) than the unsettled legal standard of occupation or the rare conflict that amounts to a war of national liberation. These two situations may be characterized by the requisite level of control and thus qualify as enemy controlled, but satisfaction of their legal criteria is neither necessary, nor necessarily adequate, for application of the Article 44(3) exception. Therefore, the enemy-controlled battlespace standard better withstands testing against the teleological underpinning of the provision, for it limits the exception to application in only those situations in which such an exception is truly necessary.

VI. LEGAL SAFEGUARDS

The goal of protecting the civilian population militates for great care in applying the standard of enemy control of the battlespace to the requirement of distinction’s Article 44(3) exception. If abused, the standard could endanger the civilian population by denying it the protection typically attendant to distinction. Lest this concern be exaggerated, it is important to highlight a number of safeguards that have been built into the provision itself or can be implied from the applicable law. They

¹⁰⁴ See Kubo Mačák, *Wars of National Liberation: The Story of One Unusual Rule II*, OUP BLOG (July 30, 2018), <https://blog.oup.com/2018/07/wars-national-liberation-unusual-rule-part-2/>.

collectively serve to constrain potential detrimental effects of applying the provision in modern warfare.

First and foremost, the beneficiaries of the exception are not entirely relieved of the requirement of distinction. In order not to lose combatant status, they still must carry their arms openly during the military engagement and “[d]uring such time as [they are] visible to the adversary while [they are] engaged in a military deployment preceding the launching of an attack in which [they are] to participate.”¹⁰⁵

While the concept of “military engagement” poses little difficulty,¹⁰⁶ the notion of “military deployment” as used in this context is less clear.¹⁰⁷ During the Diplomatic Conference, some delegations considered that the latter term applies to the entirety of the tactical movement from a hideaway to the point of attack.¹⁰⁸ Others argued that the concept of military deployment is limited to “the last step in the immediate and direct preparation for an attack,” in other words, the moment of taking up one’s firing position.¹⁰⁹ In our view, this latter position is untenable, for it would negate entirely the goal of protecting the civilian population. If the law permitted the complete concealment of an attacker until the very moment of attack, the presumption that animates this part of the law—that “apparently unarmed persons in civilian dress do not attack”¹¹⁰—would be eliminated. Thus, only the former interpretation of the term military deployment is compatible with the object and purpose of the exception.

However, the phrasing limits the requirement to carry one’s arms openly to such time as the combatants are visible to the adversary. In the spirit of compromise that animates the text of this provision, this aspect benefits the asymmetrically disadvantaged party. At the time of drafting, it was suggested that it includes situations in which the individuals concerned are potentially visible by technological means such as binoculars and

¹⁰⁵ Additional Protocol I, *supra* note 3, art. 44(3).

¹⁰⁶ See ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 39, at 534 ¶ 1708 (explaining that the concept “is self-evident” and “means that the arms must be carried openly during the battle itself, whether it is of an offensive or defensive nature”).

¹⁰⁷ See, e.g., BOTHE ET AL., *supra* note 44, at 288 (“The term ‘deployment’ has many meanings in military usage.”).

¹⁰⁸ See, e.g., OFFICIAL RECORDS, *supra* note 7, vol. XV, at 167 ¶ 64 (West Germany); *id.* at 176 ¶ 38 (Canada). Australia’s declaration stated, “Australia will interpret the word ‘deployment’ in paragraph 3(b) of the Article as meaning any movement towards a place from which an attack is to be launched.” Australia Declaration, *supra* note 58.

¹⁰⁹ OFFICIAL RECORDS, *supra* note 7, vol. XV, at 160 ¶ 29 (Egypt).

¹¹⁰ 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, 268 (1987).

infrared equipment.¹¹¹ Even viewed from the perspective of 1970s technology, that position appears problematic, as it makes the requirement dependent upon the adversary's level of technological sophistication, with obvious negative implications for the principle of equal application of the law.¹¹²

From the perspective of contemporary warfare, such an interpretation is even less defensible. With modern advances in technology, the asymmetrically more powerful party that is in physical control of the battlespace normally possesses technological methods and means of warfare that render much of the battlespace highly transparent. Drones with advanced sensor suites and extended loiter capability, high resolution reconnaissance and surveillance satellites, airborne communications intercept capabilities, and cyber espionage come to mind. In the urban environment, CCTV cameras have the potential to passively surveil nearly every city street. To interpret the condition of visibility as including all these means would render the limitation meaningless because members of the asymmetrically weaker force would have to assume they are constantly visible by the adversary and they therefore would have to carry their arms openly at all times.

The more defensible interpretation is that the condition should be understood as entailing a subjective standard; if combatants know or should reasonably know that they are being actively observed by the enemy, then the duty to carry their arms openly activates.¹¹³ This certainly includes observation by the naked eye. It may also cover active forms of observation using modern technology, albeit only to the extent that the combatants may reasonably infer, with the information available to them at the time, that they are presently visible to the enemy, which is, at the same time, engaged in active observation. If they do not know or should not reasonably conclude that is the case, the obligation does not attach. Although this interpretation serves to limit the period during which the obligation activates, its import is to foster distinction during that time in which it will have its greatest protective effect for the civilian population.

Secondly, the exception does not allow for a "revolving door" phenomenon, whereby persons are only targetable while carrying their arms openly in line with the requirements of the provision, but considered civilians immune from attack at all other times.¹¹⁴

¹¹¹ OFFICIAL RECORDS, *supra* note 7, vol. XV, at 157 ¶ 13 (United Kingdom); *id.* at 165 ¶ 55 (Australia).

¹¹² Watkin, *supra* note 23, at 33.

¹¹³ *Cf. also* OFFICIAL RECORDS, *supra* note 7, vol. XV, 161 ¶ 37 (Syria) ("the rule set forth in paragraph 3 implied that the combatant knew or ought to know that he was visible to the enemy, otherwise the obligation to carry arms openly did not apply").

¹¹⁴ *Cf., e.g.,* Geoffrey Best, *The Restraint of War in Historical and Philosophical Perspective*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 3, 25 (Astrid J. M. Delissen and Gerard J.

In fact, the opposite is true. The requirements of Article 44(3) do not bear upon whether one is a combatant or not; they merely determine whether or not that person has committed a breach of IHL by failing to distinguish themselves.¹¹⁵ The beneficiaries of the rule thus remain targetable irrespective of the exceptional applicability of Article 44(3) at any particular time.

Admittedly, if a group of such persons are collocated with the civilian population, as would be the case in an urban environment, their presence represents a substantial risk of collateral civilian casualties.¹¹⁶ Still, it must be remembered that in targeting these individuals, the adversary must abide by the other applicable rules, including the prohibition of indiscriminate attacks,¹¹⁷ the rule of proportionality,¹¹⁸ the duty to exercise constant care to spare the civilian population,¹¹⁹ and the requirement to take all feasible precautions in attack to minimize incidental civilian injury or death and damage to civilian property.¹²⁰

Thirdly, the same is true with respect to the beneficiaries of the Article 44(3) exception. The provision does not relieve them of their duty to comply with all other applicable obligations under IHL. In particular, when conducting military operations, they still have to respect the principle of distinction, and thus only direct their operations against military objectives.¹²¹ Additionally, they are equally subject to the general obligation to take “constant care . . . to spare the civilian population, civilians and civilian objects” in their military operations,¹²² as well as to the specific obligation to endeavor, to the maximum extent feasible, “to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.”¹²³

Consequently, such individuals remain obliged to avoid any unnecessary harm to civilians even while operating pursuant to the exception. This includes harm that could foreseeably be caused by their enemy in response to the nature of the operation undertaken by the combatants acting under the exception to the requirement of distinction. If, for instance, it is reasonably foreseeable that the

Tanja eds. 1991) (arguing that the effect of Article 44(3) was that guerrillas off combatant duty would qualify as civilians).

¹¹⁵ IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING* 83 (2009).

¹¹⁶ Solf, *supra* note 110, at 275.

¹¹⁷ Additional Protocol I, *supra* note 3, art. 51(4).

¹¹⁸ *Id.*, arts 51(5)(b), 57(2)(a)(iii), and 57(2)(b).

¹¹⁹ *Id.*, art. 57(1).

¹²⁰ *Id.*, art. 57(2)(a)(ii).

¹²¹ *Id.*, art. 48.

¹²² *Id.*, art. 57(1).

¹²³ *Id.*, art. 58(a). For the practical difficulties this requirement poses in the urban environment, see Nathalie Durhin, *Protecting Civilians in Urban Areas: A Military Perspective on the Application of International Humanitarian Law*, 98 INT'L REV. RED CROSS, 177, 195–197 (2016).

enemy's reaction to an ambush in a densely populated area like an open-air market would risk extensive loss of civilian life, the precautionary rules might require refraining from the attack and waiting for another opportunity to act.¹²⁴

Fourthly, the effect of the provision is limited to a single kind of deception in armed conflict, namely the pretense of being an unarmed civilian in highly asymmetrical situation. For this reason, the closing sentence of Article 44(3) clarifies that conduct in accordance with the requirements prescribed by that provision shall not be considered as perfidious within the meaning of Article 37(1)(c) of AP I.¹²⁵ However, all other acts designed to mislead the adversary by feigning protection under IHL, and then betraying any resulting confidence, would still be perfidious and, if they result in the killing, injuring, or capturing the adversary, would qualify as a violation of the prohibition on perfidy.¹²⁶ Consider, for example, a situation of armed violence in the urban environment with the presence of UN relief agencies. Even if the conditions for the applicability of Article 44(3) AP I are met, the asymmetrically disadvantaged party would still be prohibited from using the distinctive UN emblems in attacking their opponents.¹²⁷ Such conduct would qualify as perfidy¹²⁸ and might amount to a grave breach of the Protocol.¹²⁹

Finally, even if combatants meet the requirements of Article 44(3), this only means they retain their combatant status. They nevertheless remain liable for prosecution for war crimes. As reflected in Article 85 of the Third Geneva Convention of 1949, the question of prosecution for such conduct is separate from the determination of combatant or prisoner of war status.¹³⁰

¹²⁴ See also *When War Moves to Cities*, *supra* note 16, at 6 (“Conducting an analysis of civilian patterns of life in an area of planned operations may inform tactical choices to avoid and minimize harm. Indeed, timing an operation so as to minimize civilian harm is a tangible step that parties to conflict can take to fulfill their obligation to take all feasible precautions.”).

¹²⁵ Additional Protocol I, *supra* note 3, art. 44(3), third sentence.

¹²⁶ *Id.*, art. 37(1); see also *Watkin*, *supra* note 23, at 63 (“However, any allegation of perfidy has to be considered carefully. Perfidious conduct requires intent to betray confidence. The simple wearing of civilian clothes even to cloak entry into another country or zone of operations is not perfidious.”).

¹²⁷ Additional Protocol I, *supra* note 3, art. 37(1)(d).

¹²⁸ *Id.*, art. 37(1)(d).

¹²⁹ *Id.*, art. 85(3)(f). See also *ADDITIONAL PROTOCOLS COMMENTARY*, *supra* note 39, at 999 ¶ 3497 and *id.* at 999, fn 27 (noting that if “the United Nations [is] engaged in hostilities ... its emblem is therefore no longer a protective emblem within the meaning of Article 37 and of this sub-paragraph”).

¹³⁰ Geneva Convention III, *supra* note 5, art. 85 (“Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.”).

VII. CONCLUDING REMARKS

The contemporary propensity for, and risk of, armed conflict taking place among the civilian population has cast a new light on a number of the long-standing challenges to the application of IHL during modern warfare. One is the determination of combatant status. This Article explored the possibility of reviving AP I's oft-reviled Article 44(3) by adopting an interpretation thereof that better comports with the object and purpose of the provision than those previously in vogue.

Our view is that it is inapposite to conflate the applicability of this provision with independent legal tests found in IHL. In particular, and although it is possible that the exceptional circumstances to which the Article 44(3) exception applies arise in such situations (as some states participating in the Diplomatic Conference concluded), the legal tests for the existence of occupation or of a war of national liberation do not suffice for determining the applicability of Article 44(3). It is possible, for instance, to have a situation during occupation or a war of national liberation to which the provision does not apply, while it is equally conceivable that the provision would apply in scenarios other than these two.

Accordingly, we suggest that the appropriate test is one of actual control over battlespace. If the enemy maintains a degree of control over the physical battlespace that renders a combatant “truly *unable* to operate effectively whilst distinguishing himself in accordance with the normal requirements,” then the provision applies.¹³¹ This will often, although by no means always, be the case during hostilities occurring in the proximity of the civilian population, such as urban combat, and that are characterized by asymmetrical distribution of power, resources, and physical control between the parties.

In such limited circumstances, the provision—widely considered either obsolete or subsiding into irrelevance—may obtain a fresh lease of life. However, it bears recalling that as a non-customary provision of AP I, it would only apply to international armed conflicts involving states parties to the instrument. Still, with over 170 states having ratified the Protocol so far, and with combat occurring among the civilian population with appalling frequency, its relevance will only increase in the near future. And since nonparties to AP I, notably the United States, now regularly fight in coalitions with states that are party thereto, commanders and other representatives of the former must take into account the manner in which their coalition partners are likely to operate.

Finally, we caution that the applicability of the exception in Article 44(3) does not amount to a “get out of jail free” card for its beneficiaries. Far from it, the compromise between military

¹³¹ UK MANUAL, *supra* note 88, at 42 ¶ 4.5.1 (emphasis in original).

necessity and humanitarian considerations that lies at the heart of the provision entails a number of important safeguards intended to promote the protection of the civilian population in situations to which the exception applies. In this regard, it is incumbent on all parties to the conflict—the asymmetrically weaker as well as the asymmetrically more powerful—to understand that, in the words of Jean de Preaux, “by protecting the civilian population they protect themselves.”¹³²

¹³² Jean de Preaux, *The Protocols Additional to the Geneva Conventions*, 27 INT’L REV. RED CROSS 250, 250 (1987).