UNPRIVILEGED (UNLAWFUL) BELLIGERENTS CAPTURED ON A BATTLEFIELD AND THE GENEVA CONVENTIONS

By Yutaka Arai-Takahashi*

INTRODUCTION

At the Plenary Assembly of the Diplomatic Conference at Geneva (1949), the Dutch representative commented that “[t]he [Geneva] Civilians Convention...deals only with civilians under certain circumstances; such as civilians in an occupied country or civilians who are living in a belligerent country”.¹ He forcefully contended that “it certainly does not protect civilians who are in the battlefield, taking up arms against the adverse party”.² The Dutch delegate’s comment highlights the controversy over the question whether the protection of the Geneva Civilians Convention (the “GCIV”) extends to civilians who are captured on a battlefield, above all, that of their home State. It may be argued that in his analysis, civilians trapped in a combat zone would be excluded from the GCIV. Still, according to a more nuanced assessment, he may have envisaged that only unprivileged belligerents captured on a battleground would fall outside the GCIV’s framework of protection.

The so-called ‘unprivileged/unlawful belligerents/combatants’ ³ are essentially those persons who take part in hostilities without fulfilling the

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* Professor of International Law and International Human Rights Law, University of Kent, Brussels. Special thanks to Prof. Yoram Dinstein and Adv. Jeff Lahav for their helpful comments on the earlier version of this paper.


2 Ibid. [Emphasis added].

conditions spelled out in Article 4A of the Geneva Prisoners of War Convention (the “GCIII”) or Articles 43-44 of the API. This paper defines those unprivileged belligerents who fall into an enemy’s hands in a combat zone of their home State (or of their co-belligerent State) as ‘(homeland) battlefield unprivileged belligerents’.4 It explores whether the GCIV serves as a gap-filler for such battlefield unprivileged belligerents who are excluded from the framework of the GCIII. Before embarking upon substantive analyses, two fundamental premises of this paper ought to be clarified at the outset. First, the term ‘unprivileged belligerents’, as a scholarly term of art, does not constitute any third category of persons outside the combatant-civilian dichotomised framework in international humanitarian law (“IHL”). Second, unprivileged belligerents fall within the ambit of ‘civilians’ defined under Article 50 of the API and covered by the corresponding (but slightly less comprehensive) notion of ‘protected persons’ set forth under Article 4 of the GCIV (subject to meeting the condition of nationality).

From the almost comprehensive scope of ‘protected persons’ defined by Article 4 of the GCIV, one may infer that the GCIV should apply to all civilians that meet such definition. Under that provision, apart from the condition, as stated in the fourth paragraph, that the persons must not fall within any of the other three Geneva Conventions (the “GCs”), it is the nationality criterion that poses a fundamental impediment to the determination of the notion ‘protected persons’, and to the application of the GCIV.5 Nevertheless, as its title suggests, Part III of the GCIV, which

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5 Dörmann, supra note 3, at 73. Conversely, in tune with what is stated in paragraph (1) to (4) of Article 4 of the GCIV, the persons who are disentitled to claim the status of ‘protected persons’ are limited to the following categories: