Summer 1997

Re-examining the Prisoner of War Status of PLO Fedayeen

Christopher C. Burris

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol22/iss3/5
Re-examining the Prisoner of War Status of PLO Fedayeen

Cover Page Footnote
International Law; Commercial Law; Law

This comments is available in North Carolina Journal of International Law and Commercial Regulation:
http://scholarship.law.unc.edu/ncilj/vol22/iss3/5
Re-examining the Prisoner of War Status of PLO Fedayeen

I. Introduction

II. The Background of the Israel-PLO Conflict
   A. Pre-History of Israel/Palestine
   B. The Creation of the Modern State of Israel
   C. The Arab-Israeli Wars
   D. The Emergence of the PLO
   E. PLO Tactics
   F. The Intifada
   G. The Oslo Accords

III. International Law on Prisoners of War
   A. Overview of Prisoner of War Status
   B. International Treaty Law
      1. Introduction
      2. The Hague Convention of 1907
      3. The Third Geneva Convention of 1949
      4. 1977 Protocol I to the Geneva Conventions

IV. Israeli Law and the Current Legal Status of PLO Fedayeen
   A. Israel’s Application of the Third Geneva Convention to PLO Fedayeen
   B. Israeli Treaty Law
      1. Introduction
      2. Declaratory Treaties
      3. Constitutive Treaties
      4. The Geneva Conventions: Constitutive or Declarative?

V. Which Law to Apply?
   A. Possible Standards to Apply
      1. Introduction
      2. The Hague Convention of 1907
      3. The Third Geneva Convention
      4. Protocol I
      5. International Custom
   B. Does the Third Geneva Convention Apply?
I. Introduction

In Washington, DC in September 1995, Yasser Arafat, the chairman of the Palestinian Liberation Organization, and Yitzak Rabin, the late Prime Minister of Israel, signed an agreement which many hoped would lead to the normalization of relations between their peoples. Since that signing, the Middle East has seen the PLO in Tunisia return to parts of the West Bank and Gaza to begin the process of forming a government.

However, while Yasser Arafat and the PLO have been forming a governing body in the West Bank and Gaza, PLO *fedayeen*
remain in Israeli jails. These men are labeled as terrorists by the Israeli government and denied the prisoner of war status they have sought. Such status would prevent criminal prosecution for most acts taken during wartime and create the understanding that those who have been taken as prisoners will be released at the end of hostilities. Instead of treating captured PLO fedayeen this way, the Israeli government has tried, convicted, and sentenced them as criminals.

The Israeli government's treatment of PLO fedayeen has created a troublesome legal and political situation. While the Oslo Accords have allowed the PLO and Yasser Arafat to return to the West Bank and Gaza as the legitimate representatives of the Palestinian people, Israel still regards the PLO's past violent struggle as illegitimate and the people who waged it as terrorists. Ultimately this belief may lead to a situation where two states sit beside each other with one holding as criminals people the other regards as Founding Fathers.

The presence of the PLO fedayeen in Israeli prisons has become a hot button issue in the ongoing negotiations between Israel and the Palestinian Authority. In these negotiations the Israeli government has had to take into account both the legal arguments for releasing or holding on to these people and the


5 For a discussion of Israel's treatment of PLO fedayeen, see infra notes 240-61 and accompanying text. In February 1997, Israel released the last female Palestinian prisoners whom it held. See 30 Palestinian Women Prisoners Freed, JERUSALEM POST, Feb. 12, 1997.

6 See infra notes 429-37 and accompanying text (describing the prosecution of war crimes).

7 For an overview of prisoner of war law see infra notes 177-94 and accompanying text.

8 For a description of Israel's treatment of PLO fedayeen see infra notes 240-61 and accompanying text.

9 See generally Bruck, supra note 1, at 64-91 (describing the return of the PLO to the West Bank and Gaza).

10 See infra notes 240-61 and accompanying text.

political effects that doing either would create. While releasing all Palestinian prisoners would satisfy Palestinian political demands, it would also anger many Israelis who oppose releasing those they regard as rank murderers. But refusing to release all Palestinian prisoners could hamper future negotiations with the Palestinian Authority and dim chances for a lasting peace.

The legal analysis of the position of PLO fedayeen in Israeli jails is based upon whether or not the PLO’s past violent struggle should now be considered legitimate. To answer this question international law on privileged combatancy must be examined. If PLO fedayeen should now be considered privileged combatants, then those who are in Israeli jails would deserve the corresponding status of prisoners of war. If they are not privileged combatants, then they can still be treated as criminals. The criminal nature of the means which many of those fedayeen used to achieve their political ends must also be considered. Because their actions were at times violations of the laws of war, granting PLO fedayeen a measure of legitimacy by extending to them privileged combatancy would not correspondingly legitimize the criminal tactics which may have been used. Such acts would still be punishable criminally even if committed by privileged combatants.

Adding to the confusing nature of the situation is the fact that while the Oslo Accords did not explicitly deal with the prisoner of war status of PLO fedayeen, they did call for a series of prisoner releases by the Israeli government. The releases have been limited, with certain narrowly defined groups having their sentences commuted. This can either be viewed as purely political in nature or as partial acknowledgment of a legal right. If purely political, then the releases were simply part of the give and

---

12 See id.
13 See infra notes 111-39 and accompanying text.
14 See Preuss, supra note 11. The significance of these violations is that if privileged combatancy and the corresponding prisoner of war status was granted to PLO fedayeen in Israeli jails, only those who were not convicted of actions which fall under the rubric of war crimes would be released. For a discussion of the prosecution of war crimes see infra notes 429-37 and accompanying text.
15 See infra notes 147-76 and accompanying text.
16 See infra notes 147-76 and accompanying text.
take of negotiations. But if they are a partial acknowledgment of a legal right, then they lend credence to the idea that the status of PLO fedayeen in Israeli jails needs to be re-examined.

Answering the question of the prisoner of war status of PLO fedayeen has implications which go beyond the fate of the roughly 3000 Palestinians who remain in Israeli jails. How observers answer this question depends upon how they view the claims of Palestinian nationalism and the issues underlying the Israeli-Palestinian conflict in general. Certain conflicting assumptions lie behind the different positions on this question.

Chief among these is whether what is being created in the West Bank and Gaza is a state in the international legal sense of the word. The issue of Palestinian nationalism lies at the heart of whether the PLO was a legitimate army fighting a legitimate war. This issue may come to the forefront if the question of prisoner of war status is decided before a legal tribunal instead of during political negotiations.

This Comment will explore the legal considerations behind re-examining the prisoner of war status of PLO fedayeen. The main issue will be whether combatants who have been denied prisoner of war status should be granted that status retroactively when the movement they fight under gains legal and political recognition. This issue will be explored in the contexts of the Israeli legal system and of international law. The political considerations

---


18 This Comment will only address the status of PLO fedayeen. Members of Islamic Jihad, Hamas, Hizballah, etc., will not be considered. This decision is based on Israel's recognition of the PLO in the Oslo accords. This recognition and the embryonic PLO government in the West Bank and Gaza are the foundations for re-examining the issue of the prisoner of war status of Palestinians in Israeli jails. Because this recognition has largely been limited to the PLO, this Comment will also limit itself thus. This Comment of course excludes from consideration many Palestinians who were arrested for actions taken against Israel who are not formally tied to any group. But as is explained in Part III, prisoner of war status is traditionally limited to persons serving within a military chain of command. See infra notes 177-94 and accompanying text. This limitation is not intended to question the validity of extending any amnesty programs to reach prisoners unaffiliated with the PLO.
raised by these issues will be briefly acknowledged, but the primary concern will remain the legal aspects of this issue.

Part II of this Comment will give the background of the Israeli-PLO conflict. In Part III, an overview of the relevant international treaty law on prisoner of war status will be provided. Part IV will examine Israel's application of that treaty law to PLO fedayeen. Part V will discuss the applicable law in regard to re-examining the status of PLO fedayeen. In Part VI, the effects of violations of the laws of war by prisoners of war will be noted. Part VII of this Comment will discuss the possible forums where this issue can be litigated. Finally, the Conclusion in Part VIII argues that while no solid legal argument for granting prisoner of war status to PLO fedayeen exists, the political considerations for granting an amnesty should be closely explored.

II. The Background of the Israel-PLO Conflict

A. Pre-History of Israel/Palestine

The current conflict between Arab and Jew in the Middle East is rooted in the history of the region, with both sides making extensive historical claims to the same land. Over 3,000 years ago, according to the Bible, the ancient Hebrews fled Egypt and eventually entered Canaan, an area encompassing what is today Israel/Palestine, and took the land as their own. Except during

19 See infra notes 26-176 and accompanying text.
20 See infra notes 177-239 and accompanying text.
21 See infra notes 240-86 and accompanying text.
22 See infra notes 287-428 and accompanying text.
23 See infra notes 429-37 and accompanying text.
24 See infra notes 438-48 and accompanying text.
25 See infra notes 449-55 and accompanying text.
26 Throughout the section dealing with the time prior to 1948, the land encompassing what is today the State of Israel and the territories of the West Bank and Gaza will be referred to as Israel/Palestine. While this nomenclature sacrifices historical accuracy for the sake of simplicity, the confusion which could be created by trying to differentiate the many names used for the area in question over the centuries far outweighs the benefits. Also of consideration is that the borders of the many political entities which have controlled the area have varied dramatically. Quite often the area
POW STATUS OF PLO Fedayeen

1997]

had no political existence of its own, but instead existed as part of a larger whole. To accurately differentiate the many boundaries would require recourse to an extensive series of maps, which is unavailable in this forum. Sufficient to say, the name Israel derives from Biblical times. See BERNARD LEWIS, THE MIDDLE EAST: 2000 YEARS OF HISTORY FROM THE RISE OF CHRISTIANITY TO THE PRESENT DAY 23-24 (1995). Palestine was the name adopted by the Romans in the Second Century AD, after the Philistines whom the ancient Hebrews had conquered in taking Canaan. See id. at 31.


28 See id. at 250-57. The belief that the entire population was taken into exile in Babylon has been challenged. See id.

29 See id. at 336.

30 See id. at 310-11.

31 See id. at 311, 327-31.

32 See id. at 311, 334-37.

33 See THE NEW JEWISH ENCYCLOPEDIA 112 (David Bridger et al. eds., 1976). Jews not living in Israel are still considered to be living in the Diaspora. See id.


35 See id. at 43-54.

36 See generally HOURANI, supra note 34, at 22-262; LEWIS, supra note 26, at 51-129 (for a more in depth explanation of the different political dynasties during this period).
the III, invaded Israel/Palestine. The presence of European Crusaders in Israel/Palestine was to last on and off until 1244, when they were expelled by Turan Shah. In the following centuries, the Ottoman Empire, centered in what is today Turkey, established dominion over the whole Middle East, including Israel/Palestine.

After World War I, Israel/Palestine became part of the British Mandate of Palestine in the Middle East. What is today Jordan made up the other half of the Mandate. During this time, the trickle of Jews which had begun returning to Israel/Palestine during the late nineteenth century turned into a steady stream. This stream turned into a flood following the Holocaust and the end of World War II. While Britain attempted to staunch the flow of Jews into Israel/Palestine, their efforts were undermined by an organized effort by the Yishuv, which was the name for the Jewish community within Israel/Palestine.

B. The Creation of the Modern State of Israel

The movement of Jews into Israel/Palestine was part of the Zionist movement’s effort to recreate a Jewish homeland. This influx created tensions with the Arabs already living in the area. These tensions led to violence between the two communities with

37 See Lewis, supra note 26, at 90.
38 See id. at 104, 401.
39 See id. at 114.
40 See id. at 343; Bureau of Pub. Affairs, U.S. Dep’t of State, Background Notes: Israel 2 (Mar. 1, 1995).
41 See Lewis, supra note 26, at 343-44.
42 See id. at 347-48; Dep’t of State, supra note 40, at 2.
43 See id. at 361-62; Dep’t of State, supra note 40, at 2.
45 See generally Arthur Hertzberg, The Zionist Idea 15-100 (1959) (for a more in depth description of Zionist ideas); Dep’t of State, supra note 40, at 2.
46 See Sachar, supra note 44, at 163-67, 171-73. This tension was caused not only by differences in religion and culture, but by a displacement in both land and jobs. Jewish immigrants displaced Arab laborers and purchased land from absentee Arab landlords, displacing local Arab peasants. See id.
the British caught in the middle. After many years of attempting to retain the status quo, the British turned the issue over to the newly formed United Nations. While the Yishuv, led by David Ben-Gurion, desired the formation of a Jewish homeland in part of Israel/Palestine, the Arabs in Israel/Palestine and the surrounding Arab states opposed this.

On November 29, 1947, the United Nations’ General Assembly voted in favor of a plan that would partition Israel/Palestine into a Jewish state and an Arab state. The areas of the West Bank and the Gaza Strip, together with what is today northwestern Israel along the Lebanese border, would have made up the territory of the Arab state. Jerusalem was to be an international city, while the Negev Desert in the south, most of the coastal region and the Galilee Valley in the northeast were to make up the Jewish state.

Instead of a peaceful partition occurring under international supervision, British refusal to cooperate and Arab non-recognition of the United Nations’ authority led to violence. The level of violence between Arab and Jew escalated as the British began pulling their forces out of Israel/Palestine, with the conflict eventually turning into a full scale civil war. On May 14, 1948, while fighting raged throughout the area, Ben-Gurion declared the
independence of the new State of Israel.55

The Declaration of Independence by the newly formed state was quickly followed by an invasion by the surrounding Arab states.56 Israel was eventually able to repel the Arab armies and establish control in an area greater than what it was given under the U.N. Partition Plan.57 In the process, a massive wave of Arab refugees fled the areas which became Israel, settling throughout the Arab world.58 The territory now known as the West Bank was taken by Transjordan, while Egypt gained control over what is now the Gaza strip.59 While the fighting was eventually ended by an armistice, no peace agreements were signed by the warring parties.60

C. The Arab-Israeli Wars

The end of fighting had left the new State of Israel staring across hostile borders at its Arab neighbors. While Israel consolidated its position, many of its neighbors planned its destruction. Israel’s population was harassed by a constant stream of cross-border guerrilla raids.61 The West Bank and Gaza, with their large refugee populations, were the source of many of these raids.62 These raiders were known as fedayeen, or those who sacrifice themselves.63 Israel often resorted to retaliatory measures against the villages from which these fedayeen came and against

55 See Sachar, supra note 44, at 311; Lewis, supra note 26, at 363; Dep’t of State, supra note 40, at 2.
56 See Sachar, supra note 44, at 314-19; Lewis, supra note 26, at 363-64; Dep’t of State, supra note 40, at 2. The invading forces were made up of the armies of Iraq, Syria, Egypt, Lebanon and Transjordan, now known as Jordan. See Sachar, supra note 44, at 317-19.
57 See Sachar, supra note 44, at 330-36; Lewis, supra note 26, at 363-64.
58 See Sachar, supra note 44, at 330-36, 436-43; Lewis, supra note 26, at 363-64.
59 See Sachar, supra note 44, at 347-53; Lewis, supra note 26, at 363-64.
60 See Sachar, supra note 44, at 347-53; Lewis, supra note 26, at 363-64; Dep’t of State, supra note 40, at 2.
61 See Sachar, supra note 44, at 443-53; Gunther E. Rothenberg, Israeli defense forces and low-intensity operations, in Armies in Low-Intensity Conflict: A Comparative Analysis, 54-59 (1989); Dep’t of State, supra note 40, at 2.
62 See Rothenberg, supra note 61, at 54-59.
63 See id. at 58.
the neighboring states which harbored them.64

Tensions came to a head in 1956 when Israel, along with France and Britain, invaded the Sinai Peninsula over disputes stemming from Egypt’s nationalization of the Suez Canal.65 Retaliating against the fedayeen bases located in the Sinai was also an additional motivation for Israel.66 Pressure from the two superpowers, the United States and the Soviet Union, eventually forced Israel, France, and Britain to withdraw.67 But war erupted again in 1967 when Israel invaded Syria, Jordan, and Egypt in a pre-preemptive strike to forestall an invasion of Israel.68 In the 1967 war, Israel took the entire Sinai peninsula and the Gaza Strip from Egypt, the West Bank from Jordan and the Golan Heights from Syria.69 Along with this land came control over the large numbers of Palestinians living in Gaza and the West Bank.70

War once again broke out between Israel and its Arab neighbors in 1973.71 Egypt and Syria launched an attack against Israel which almost succeeded in driving Israel’s forces off of the Golan and out of the Sinai.72 But military assistance in the form of much needed supplies was sent by the United States, and Israel was able to hold its positions in both the Golan and the Sinai.73 In the decade following the 1973 war, United States brokered negotiations were able to bring Egypt and Israel to the peace table.74 In exchange for normalization of relations and the promise of the demilitarization of the Sinai by Egypt, Israel agreed to

---

64 See SACHAR, supra note 44, at 443-53; Rothenberg, supra note 61, at 54-59.
65 See SACHAR, supra note 44, at 485-97; DEP’T OF STATE, supra note 40, at 2.
66 See Rothenberg, supra note 61, at 58-59.
67 See SACHAR, supra note 44, at 503-10.
68 See id., at 625-39; DEP’T OF STATE, supra note 40, at 2.
69 See SACHAR, supra note 44, at 667-73; DEP’T OF STATE, supra note 40, at 3.
70 See SACHAR, supra note 44, at 667-73.
71 See id. at 746-62.
72 See id. at 746-62; DEP’T OF STATE, supra note 40, at 3.
73 See SACHAR, supra note 44, at 766-84; DEP’T OF STATE, supra note 40, at 3.
return the Sinai to Egypt. The Gaza Strip was not included in the territory returned to Egypt.

D. The Emergence of the PLO

While Israel engaged in recurring conflicts with its Arab neighbors, a burgeoning guerrilla campaign against Israel by Palestinians outside Israel's borders also evolved from the moment of the state's creation. When Israel was established in 1948, huge numbers of Palestinian Arabs living in what became Israel fled their homes. These refugees, along with the inhabitants of the West Bank and Gaza, make up the Palestinian people.

It was from this Palestinian population that the PLO emerged. Guerrilla raids by Palestinian fedayeen began almost as soon as Israel was founded. These raids were in large part a mere continuation of the violence which existed between the Arab community and the Yishuv prior to 1948. After the Yishuv's victory in 1948, many Palestinian Arabs who had taken part in the pre-state violence fled to the surrounding Arab states and formed loose knit fedayeen groups. These groups were closely tied to the governments in their host countries, at times being little more than proxies for governments unwilling to risk their own troops.

75 See id.
76 See id.
77 See O'BRIEN, supra note 3, at 33-34.
78 See supra notes 45-60 and accompanying text (discussing the formation of Israel).
79 Many of the people living in Jordan are also Palestinians, even though they are not refugees from Israel/Palestine. This is because the area which is today Jordan made up the eastern half of the Ottoman district of Palestine and the British Mandate of Palestine. Consequently, those Arabs whose families have lived in this area since that time consider themselves to be Palestinians. This identity is reinforced by the fact that the rulers of Jordan are members of the Hashemite dynasty, natives of the Arabian Peninsula installed by the British in the inter war years. See LEWIS, supra note 26, at 363-64.
80 See O'BRIEN, supra note 3, at 33-34.
81 See id.
82 See id.
83 See SACHAR, supra note 44, at 443-50 and 682-83; Rothenberg, supra note 61, at 55-59.
Although the PLO was not created until 1964, its most powerful component, the Fatah, was established in the mid-1950s by Yasser Arafat. Arafat first began as a fedayeen leader in Egypt, but in 1957 he moved his headquarters to Syria. In Syria, his Fatah fedayeen were able to strike across the Syria-Israel border with the encouragement of the Syrian government. In contrast, the Egyptian government under Nasser began restraining fedayeen activity following the 1956 Sinai War.

In 1964, the PLO was created in Jerusalem to serve as an umbrella organization for various fedayeen groups. The organization served primarily as a government tool under Egyptian president Nasser and Syrian king Salah Jadid. Its first chairman was Ahmed Shukeiry, a Palestinian attorney, whose tenure lasted but three years. Having led PLO involvement in the 1967 War, the disastrous defeat of Arab forces, for whom the PLO was seen as a proxy, ruined his reputation.

Following this war, the Fatah, headed by Arafat, commandeered control of the PLO, and Arafat became the PLO’s official chairman. Among his first efforts as the organization’s new leader was urging Palestinian residents of the West Bank and Gaza, who had just come under Israeli control, to resist their annexation. Rather than relying completely upon cross-border attacks, the PLO now attempted to create an armed rebellion inside

84 See SACHAR, supra note 44, at 619.
85 See id. at 682-83.
86 See id. It should be noted that Arafat is a member of the powerful Husseini family whose patriarch during World War II was the Mufti of Jerusalem, who led the Palestinian Arabs in Israel/Palestine during the civil war with the Yishuv. See id.
87 See id.
88 See O’BRIEN, supra note 3, at 33-34. Nasser’s restraining influence was not a symptom of any love for Israel. Rather, it was in response to the Israeli military retaliation against Egyptian forces for fedayeen using Egypt as a staging ground. See id.
89 See Rothenberg, supra note 61, at 60. At first, the PLO and Fatah were rivals. See SACHAR, supra note 44, at 619.
90 See SACHAR, supra note 44, at 619-20.
91 See id.
92 See id. at 633-34, 683.
93 See id. at 698.
94 See id. at 682-86.
Israeli controlled territory.\textsuperscript{95}

The newly reformulated PLO was unable to touch off a popular armed uprising in the West Bank.\textsuperscript{96} In fact, the Israeli suppression of their activities soon forced the PLO to rely on cross-border attacks from Jordan.\textsuperscript{97} However, the PLO was more successful in the densely packed Gaza Strip.\textsuperscript{98} Arafat's forces held great power in Gaza until 1971, when the new commander of the area, Ariel Sharon, carried out brutal counter-measures and effectively ended the PLO's power in Gaza.\textsuperscript{99}

After the PLO was forced to operate out of Jordan in 1968, tensions between the Jordanian King and the PLO guerrillas in his country escalated.\textsuperscript{100} These tensions eventually exploded in 1970, with the Jordanian military decisively defeating the PLO and other fedayeen groups.\textsuperscript{101} Forced out of Jordan, the PLO took up residence in southern Lebanon and Syria, creating a PLO controlled area in Lebanon, known as "Fatahland."\textsuperscript{102}

From Lebanon, the PLO was able to fall back on its tradition of cross-border raids into Israel.\textsuperscript{103} These tactics eventually escalated, with the PLO relying on large artillery and rocket attacks into Israeli population centers in the north.\textsuperscript{104} A series of reprisal attacks by Israel occurred until finally in 1982, Israel launched a full scale invasion of Lebanon to drive the PLO out of the country.\textsuperscript{105} The invasion was successful in driving much of the

\begin{itemize}
  \item \textsuperscript{95} See id.
  \item \textsuperscript{96} See id.
  \item \textsuperscript{97} See id. The PLO's failure can be attributed to both the efficiency of the Israeli security forces and a lack of support for such an uprising among the West Bank population. See id.
  \item \textsuperscript{98} See id. at 684-85.
  \item \textsuperscript{99} See id.
  \item \textsuperscript{100} See id. at 685-86. This was due not only to the PLO's left-wing stance which placed it in political opposition to the monarchy, but also to the largely Palestinian population of Jordan, which the king felt was a threat to his power. See id.
  \item \textsuperscript{101} See id. The battles which drove the PLO out of Jordan are memorialized by the PLO as "Black September." See id.
  \item \textsuperscript{102} Id. at 686, 698.
  \item \textsuperscript{103} See id. at 697-702.
  \item \textsuperscript{104} See Rothenberg, supra note 61, at 70.
  \item \textsuperscript{105} See id. at 70-71; O'BRIEN, supra note 3, at 41-52.
\end{itemize}
PLO out of Lebanon, except for forces in the north protected by Syria.\textsuperscript{106} While the main body of the PLO set up headquarters in Tunisia, internecine warfare among the \textit{fedayeen} who remained in Lebanon broke out.\textsuperscript{107} The end result of this fratricide was the expulsion of Arafat from Syria and the removal of the remaining Fatah \textit{fedayeen} to Tunisia.\textsuperscript{108}

While Fatah was largely based in Tunisia, many of the other factions were able to retain a presence in Lebanon and re-instituted border attacks when Israel pulled its forces back to southern Lebanon.\textsuperscript{109} By the late 1980s the long dreamed of popular uprising in the West Bank and Gaza occurred in the form of the \textit{Intifada}.\textsuperscript{110}

\textbf{E. PLO Tactics}

The PLO and Fatah traditionally relied on small scale cross-border guerrilla attacks.\textsuperscript{111} While the PLO has attacked military units, the great majority of its attacks have been against counter-value targets—i.e., non-combatant civilians.\textsuperscript{112} These attacks have included indiscriminate killing in border villages,\textsuperscript{113} taking school children hostage,\textsuperscript{114} storming hotels in Tel Aviv,\textsuperscript{115} attacking school buses\textsuperscript{116} and planting explosives in public places.\textsuperscript{117} The goal has essentially been to infiltrate small groups of \textit{fedayeen} into Israel,
and then create as much havoc as possible.\textsuperscript{118}

These tactics were chosen based on the knowledge that the PLO could not compete militarily with Israel.\textsuperscript{119} Except after the 1967 War when the PLO tried to initiate a popular uprising in the occupied territories, the PLO has not seriously tried to engage Israel militarily.\textsuperscript{120} Instead, with the goal of being seen as the sole representative of the Palestinian people, the PLO has used terror attacks to gain publicity for itself and to provoke the Israelis into harsh counter reprisals.\textsuperscript{121} The PLO hoped that these reprisals would in turn cause world public opinion to shift against Israel when its raids on PLO camps caused large civilian casualties among the surrounding populace.\textsuperscript{122} Further, the PLO hoped to pull the surrounding Arab countries into the conflict.\textsuperscript{123}

After the PLO failed to create an armed uprising in the wake of the 1967 War, the organization changed its tactics to include attacks on Israel outside of its borders.\textsuperscript{124} Because of increased border patrols and the effectiveness of reprisal raids, cross-border attacks were becoming less and less effective. In reaction, the PLO faction, known as the Popular Front for the Liberation of Palestine (PFLP) pioneered the idea of attacking Israeli citizens outside the borders of Israel.\textsuperscript{125} This new tactic took advantage of the fact that outside of its own territory Israel was unable to

\textsuperscript{118} See O'Brien, \textit{supra} note 3, at 13-18.

\textsuperscript{119} See id. at 7-18.

\textsuperscript{120} See id.

\textsuperscript{121} See id.

\textsuperscript{122} See id. It should be noted that such civilian casualties occurred because PLO forces resided among the populations they recruit from, the Palestinian refugee camps. Therefore, any assault by air or artillery against PLO forces had a high chance of causing civilian casualties. See id.

\textsuperscript{123} See id. Israeli reprisals often included attacks against the country from which \textit{fedayeen} had infiltrated. The Israeli goal was to make supporting the PLO so painful to the Arab countries that support for the PLO would eventually dry up. The PLO tried to use Israeli tactics against Israel in order to widen the conflict from an Israel-PLO war to one involving the Arab states. This in fact occurred when Israel invaded Lebanon in 1982 to attack PLO bases and Syria was pulled into the conflict. See id. at 18-26.

\textsuperscript{124} See Sacher, \textit{supra} note 44, at 697-702.

\textsuperscript{125} See id. at 699.
provide the same level of security it could within its borders.\textsuperscript{126}

These new tactics led to some of the most infamous international terrorist incidents of the 1960s and 1970s. PLO fedayeen carried out numerous airline hijackings and bombings, murdered a group of Israeli athletes at the 1972 Munich Olympics,\textsuperscript{127} attacked Jewish retirement homes in Europe,\textsuperscript{128} killed Israeli embassy employees in South America,\textsuperscript{129} murdered an Israeli attaché in Washington D.C.,\textsuperscript{130} and attacked synagogues throughout the world.\textsuperscript{131}

By the late 1970s, the PLO began using a new series of tactics. With their bases in Lebanon, the PLO began to establish the rudimentary nucleus of a conventional army.\textsuperscript{132} They began deploying large quantities of artillery pieces, rocket launchers and other heavy equipment in the south of Lebanon,\textsuperscript{133} even including a large number of heavy tanks.\textsuperscript{134} Their forces soon took on the appearance of an organized army, but with the Israeli invasion of Lebanon and the PLO's escape to Tunisia, the PLO quickly reverted to its old tactics.\textsuperscript{135} It should be noted that even when the PLO had a large force of conventional weaponry it frequently targeted Israeli population centers in the north instead of engaging the Israeli military itself.\textsuperscript{136}

The PLO's tactics throughout its history have largely been focused on harassing the populace of Israel and creating terror.\textsuperscript{137} Intentional engagements with the Israeli military, while occurring,

\begin{itemize}
  \item \textsuperscript{126} See id.
  \item \textsuperscript{127} See id. at 701. The group which attacked the Israeli team members called itself the Black September Organization, which was essentially a front group for the Fatah. See id.
  \item \textsuperscript{128} See id. at 700.
  \item \textsuperscript{129} See id.
  \item \textsuperscript{130} See id.
  \item \textsuperscript{131} See id.
  \item \textsuperscript{132} See O'BRIEN, supra note 3, at 41-47.
  \item \textsuperscript{133} See id. at 44, 47.
  \item \textsuperscript{134} See id. at 47.
  \item \textsuperscript{135} See id. at 52-55.
  \item \textsuperscript{136} See id. at 133, 140.
  \item \textsuperscript{137} See id. at 11-18.
\end{itemize}
have not been frequent.\textsuperscript{138} Even during the Intifada, the violent uprising which occurred in the West Bank and Gaza, conventional military attacks on the Israeli military were uncommon.\textsuperscript{139}

\textbf{F. The Intifada}

The Intifada was in spirit an uprising against an occupying power.\textsuperscript{140} Large parts of the populations of both the West Bank and Gaza Strip began a revolt against Israeli control, bringing normal life in the areas to a stand still.\textsuperscript{141} The Israeli military was forced to send in large numbers of troops to try and control the situation.\textsuperscript{142} Rather than being instigated by the PLO, the Intifada occurred spontaneously, only later coming under the control of the PLO.\textsuperscript{143}

The most important aspect of the Intifada for this discussion is the role it played in bringing Israel to the negotiating table. Israeli actions against Palestinian rioters, often only adolescents, pushed world opinion against Israel. Pressure mounted on Israel, especially from the United States, to begin negotiations with the Palestinians. At first Israel refused to negotiate with the PLO. Because the PLO charter explicitly denies Israel’s right to exist.\textsuperscript{144} Questions about the PLO refuting terrorism as an instrument of policy were also brought to the fore.\textsuperscript{145} But by 1992, when Yitzak

\textsuperscript{138} See id.

\textsuperscript{139} See id. at 222-26.

\textsuperscript{140} See id.

\textsuperscript{141} See id.

\textsuperscript{142} See id.

\textsuperscript{143} See id.

\textsuperscript{144} See Shmuel Katz, \textit{A Very Pernicious Process}, JERUSALEM POST, Jan. 27, 1997. Eventually this section of the PLO Charter was repudiated by Arafat and he promised to have it removed from the document by the Palestinian National Council. See id. However, the Palestinian National Council has yet to formally strike that language from the Covenant and the issue was again taken up in the negotiations over Israeli withdrawals from Hebron which occurred in January 1997. See Barton Gellman, \textit{Netanyahu Wins Vote on Hebron; Israeli Cabinet Approves Past After Heated Debate}, WASH. POST, Jan. 16, 1997, at A1.

\textsuperscript{145} See O'BRIEN, \textit{supra} note 3, at 59-64. This issue was interwoven with the question of whether Arafat was able to control all the factions making up the PLO. Being an umbrella organization, not all groups were loyal to Arafat. See id.
Rabin became Prime Minister, peace negotiations with the Palestinians, the Jordanians, and the Syrians were under way.\textsuperscript{146}

\textbf{G. The Oslo Accords}

While official negotiations went on in Washington, back channel negotiations between Israel and the PLO were under way in Oslo, Norway.\textsuperscript{147} It was out of these negotiations that a peace agreement was reached.\textsuperscript{148} Two sets of agreements were eventually signed. The first set was a Declaration of Principles\textsuperscript{149} agreed to in August 1993 and signed in Washington on September 13, 1993, known as "Oslo I."\textsuperscript{150} The second set, "Oslo II,"\textsuperscript{151} was much more comprehensive and was signed in September 1995 in Washington.\textsuperscript{152} These two sets of agreements gave control over certain areas in the West Bank and Gaza to the PLO.\textsuperscript{153} While Israel was to control the borders of both territories, a Palestinian authority was to have civil control over Palestinian areas.\textsuperscript{154} The area under full Palestinian control was at first to be very small, but the accords envisioned a gradual expansion of Palestinian control and a concomitant withdrawal of Israeli forces.\textsuperscript{155} Expansion of Palestinian authority and Israeli pull backs were to occur in a three part process, with the West Bank and Gaza split into three areas, designated $A$, $B$, and $C$.\textsuperscript{156} The first phase placed area $A$ under Palestinian control, while authority in area $B$ was to be shared with Israel maintaining overall control of security issues.\textsuperscript{157} Area $C$ was

\textsuperscript{146} See Bruck, \textit{supra} note 1, at 68.
\textsuperscript{147} See id. at 68-73.
\textsuperscript{148} See id.
\textsuperscript{150} See Bruck, \textit{supra} note 1, at 73.
\textsuperscript{152} See Bruck, \textit{supra} note 1, at 79.
\textsuperscript{153} See id. at 68-79.
\textsuperscript{154} See id. at 74-79.
\textsuperscript{155} See id. at 76-79.
\textsuperscript{156} See id. at 77-79.
\textsuperscript{157} See id.
left entirely under Israeli control. The second phase was to occur in September 1996, with Israel beginning withdrawal from area B. Phase three is scheduled to begin in September 1997. The accords envisioned final permanent status negotiations to be carried out in the future.

This same gradual approach was also used for prisoner releases. Thousands of Palestinians have been taken prisoner over the last five decades. Following the signing of Oslo I, over 4,500 Palestinian prisoners were released in May 1994. The Oslo II Accords also called for a limited amnesty towards Palestinian prisoners which was to occur in three phases. The first phase of

---

158 See id.
159 See id.
160 See id.
161 See id.
163 The text of Oslo II reads:

ANNEX VII—RELEASE OF PALESTINIAN PRISONERS AND DETAINES

1. The release of detainees and prisoners, as agreed upon in Article XVI of this Agreement will be carried out in three stages.

2. The following categories of detainees and/or prisoners will be included in the above mentioned releases:
   a. all female detainees and prisoners shall be released in the first stage of release;
   b. persons who have served more than two thirds of their sentence;
   c. detainees and/or prisoners charged with or imprisoned for security offenses not involving fatality or serious injury;
   d. detainees and/or prisoners charged with or convicted of non-security criminal offenses; and
   e. citizens of Arab countries being held in Israel pending implementation of orders for their deportation.

3. Detainees and prisoners from among the categories detailed in this paragraph, who meet criteria set out in paragraph 2 above, are being considered by Israel to be eligible for release:
   a. prisoners and/or detainees aged 50 years and above;
   b. prisoners and/or detainees under 18 years of age;
   c. prisoners who have been imprisoned for 10 years or more; and
   d. sick and unhealthy prisoners and/or detainees.
the release occurred in October 1995, following the signing of the Accords.\textsuperscript{164} Close to 900 prisoners were released, including almost all female prisoners.\textsuperscript{165} The second phase, during which over 800 prisoners were released, occurred before the Palestinian elections held in January 1996.\textsuperscript{166} The final phase of prisoner releases is scheduled to take place during the permanent status negotiations.\textsuperscript{167}

The release of prisoners held in Israeli civilian jails has occurred under the authority of the president of Israel.\textsuperscript{168} This is because the president, although in a largely ceremonial position, has the power to commute sentences handed down by Israeli Courts.\textsuperscript{169} Prisoners who were tried by Israeli military courts in the West Bank and Gaza are released under the authority of the head of the military governments in the two regions.\textsuperscript{170} Neither of these officials are legally bound by the Accords to automatically pardon or commute a prisoner’s sentence.\textsuperscript{171} In fact, President Weizman refused to commute the sentences of four Palestinian women during the first release, because they had been convicted of murder.\textsuperscript{172} When the issue was taken to court, the Israeli Supreme

\begin{footnotesize}

4. The third stage of release will take place during permanent status negotiations and will involve the categories set out above, and may explore further categories.

Interim Agreement, supra note 151.

\textsuperscript{164} See Horan, supra note 162.

\textsuperscript{165} See Israel and the Palestinians: Prison Potholes, supra note 5, at 53. The release of all female prisoners was completed in February 1997. See 30 Palestinian Women Prisoners Freed, JERUSALEM POST, Feb. 12, 1997.


\textsuperscript{167} See Horan, supra note 162.

\textsuperscript{168} See id. The president of Israel is Ezer Weizman. See id.


\textsuperscript{170} See Gellman, supra note 169.

\textsuperscript{171} See id.

\textsuperscript{172} See id.

\end{footnotesize}
Court approved this use of the president's discretion.\footnote{See Israeli Supreme Court Rejects Freeing Palestinians, APS DIPLOMATIC RECORDER, Oct. 21, 1995, available in 1995 WL 8163373. These women, along with others who had refused amnesty in solidarity with them, have since been released. See 30 Palestinian Women Prisoners Freed, supra note 5.}

Because of this and other issues, the extent to which prisoners will be ultimately released is unclear. The language of Annex VII of Oslo II on the release of prisoners states that some categories of prisoners will be definitely released, some prisoners among other categories will be considered for release and that "further categories" may be explored.\footnote{Interim Agreement, supra note 151.} Whether the final release will include only some or all members of the groups up for consideration is not known, and the prospect of exploring "other categories" now seems largely ephemeral.\footnote{This is based on the 1996 election of Benjamin Netanyahu as the prime minister of Israel. He has stated that he will abide by the agreements past Israeli governments have signed with the PLO, but he has also taken a conservative line in regard to any future concessions by Israel.} Because of the vagueness of this part of the Accords, deciphering the intent of the negotiators is extremely difficult, and with the change in the Israeli government, these provisions will likely be read as narrowly as possible. This leads to the conclusion that most PLO fedayeen who have not yet been released will probably not be released under this amnesty, especially considering President Weizman's earlier refusal to release prisoners with "blood on their hands."\footnote{Gellman, supra note 169. Most PLO fedayeen have been tried in the Military Court system. See William V. O'Brien, The PLO In International Law, 2 B. U. INT'L L.J. 349, 404 n.205 (1983). The military commanders with the power to commute sentences, however, have followed President Weizman's lead in deciding who to set free. See Gellman, supra note 169.}

III. International Law on Prisoners of War

A. Overview of Prisoner of War Status

In the not so distant past, captured soldiers could expect to be sold into slavery or to be put to death.\footnote{See generally ALLAN ROSAS, LEGAL STATUS OF PRISONERS OF WAR 43-81 (1976) (providing a discussion of the evolution of prisoner of war status).} History has provided many examples of such brutality, from Roman consuls whose
heads were used as polo balls by Sassanid Emperors to defeated armies thrown into slavery or put to the sword by the Roman Legions. But today, soldiers captured during war can expect a certain level of restraint from their captors. This includes the right to adequate food and shelter, the right to be free from torture and, most importantly for PLO fedayeen, freedom from criminal prosecution for most acts taken during hostilities and, finally, the right to be repatriated at the end of hostilities.

The rights accorded to prisoners of war are based on the idea that soldiers are engaged in hostilities under the authority of their sovereign and are therefore exempt from the normal bonds of law as privileged combatants. Upon capture, privileged combatants are held as prisoners of war even though their acts, if taken during peacetime, would normally make them criminals. As prisoners of war, they are free from prosecution for such acts. It is also expected that prisoners of war will be released at the end of...

---

178 See id.
179 See id.
182 See HINGORANI, supra note 181, at 9-10; ROSAS, supra note 177, at 305-13. It should be noted that many combatants denied prisoner of war status are executed by their captors. See DE LUPIS, supra note 180, at 119. In general, Israeli policy has been to not impose the death penalty on PLO fedayeen. Subsequently, Adolph Eichmann is the only person in Israel to have been actually sentenced to death and executed. See BIN-NUN, supra note 169, at 116-17. Israel’s policy makes re-examining the status of PLO fedayeen something more than an academic exercise because such a re-examination could have tangible effects.
183 See HINGORANI, supra note 181, at 9-10. This is not to say that soldiers are free to do as they like. Soldiers breaking the laws of war will be held to answer for their crimes. The right of privileged combatancy is not a right to kill and pillage as one likes. See generally DE LUPIS, supra note 180, at 232-63 (describing prohibited methods of warfare). Also see infra notes 429-37 and accompanying text for a discussion of PLO fedayeen’s culpability for violations of the laws of war.
hostilities. \textsuperscript{184} This is because prisoners of war are not held as criminals.\textsuperscript{185} Rather, they are held to prevent them from taking future actions against their captors. When hostilities are over that need is gone.\textsuperscript{186}

Freedom from prosecution and release at the end of hostilities are the greatest benefits that PLO \textit{fedayeen} would derive from prisoner of war status. However, up until the late nineteenth century, international law generally only granted privileged combatancy to the regular armies of a sovereign involved in a military conflict.\textsuperscript{187} Over time, privileged combatancy has been extended to cover some combatants outside the regular armed forces, but only if they have met certain criteria.\textsuperscript{188} These criteria are aimed at making privileged combatants distinguishable from the normal civilian population and ensuring that privileged combatants obey the laws of war.\textsuperscript{189} Being able to distinguish between the civilian population and privileged combatants is thought to be to the benefit of all involved.\textsuperscript{190} Soldiers benefit because they can tell whether they are facing an enemy soldier and need to prepare for hostilities. Soldiers unable to distinguish between privileged combatants and civilians are more likely to attack civilians under the theory that it is “better to be safe than sorry.”\textsuperscript{191} Armies may also carry out indiscriminate attacks

\begin{flushleft}
\textsuperscript{184} See \textit{Rosas}, \textit{supra} note 177, at 81-84.
\textsuperscript{185} See \textit{id.}
\textsuperscript{186} See \textit{id.}

\textsuperscript{187} See Mallison & Mallison, \textit{supra} note 181, at 43-45; see also \textit{infra} notes 195-239 and accompanying text.

\textsuperscript{188} See Mallison & Mallison, \textit{supra} note 181, at 43-45; see also \textit{infra} notes 195-239 and accompanying text (examining the treaties spelling out these criteria and the gradual expansion of privileged combatancy which has come along with those treaties).

\textsuperscript{189} See \textit{De Lupis}, \textit{supra} note 180, at 106-12. In fact, one of the most important criteria which must be met is that the combatants follow the rules of war. Israeli courts used PLO \textit{fedayeen}’s failure to adequately distinguish themselves from the civilian populations and to obey the laws of war as reasons to deny them privileged combatant status. See \textit{infra} notes 240-61 and accompanying text (describing the Israeli legal position on the prisoner of war status of PLO \textit{fedayeen}).

\textsuperscript{190} See \textit{De Lupis}, \textit{supra} note 180, at 106.

\textsuperscript{191} But, as already noted, it can be to the advantage of one side to blend seamlessly with the civilian population. This is to avoid capture or in a more ruthless vein, to provoke retaliation against the civilian populace in order to create international
\end{flushleft}
POW STATUS OF PLO FEDAYEEN

because the low intensity operations necessary to distinguish between civilians and disguised combatants are extremely time consuming and costly in terms of casualties. Therefore, avoiding such indiscriminate attacks by making it easy to distinguish civilian from combatant is generally in the best interest of civilian populations. In this way, the ability to distinguish between civilians and combatants also helps ensure that combatants obey the rules of war.

B. International Treaty Law

1. Introduction

The criteria necessary to be considered a privileged combatant have been embodied in a number of international treaties. In the

indignation against the retaliating country, and to swell sentiments against the attacker among the civilian population. See O'BRIEN, supra note 3, at 13.

Another reason for indiscriminate attacks on mixed populations of civilians and hidden combatants is to hamper what Mao Tse-Tung referred to as the need for revolutionaries to be able to mingle with the population like fish in the sea. See MAO-TSE TUNG, ON GUERRILLA WARFARE 92-93 (Samuel B. Griffith, trans.) (1961). By retaliating against the civilians among whom the disguised combatants hide, an opponent may seek to turn the population against the hidden combatants. This is based on the rationale that civilians are less likely to give aid to a hidden combatant if they know that their village is likely to be attacked when that hidden combatant uses it as a base of operations. See O'BRIEN, supra note 3, at 18-26.

That is to say, generally it is in the best interests of the civilian population in terms of avoiding indiscriminate attacks. It could be argued that allowing combatants to mix easily among the civilian population is in the best interests of that population if those same combatants are fighting to liberate that population. This would require a weighing of the positives and negatives inherent in either being the target of indiscriminate attacks or of being kept in a state of occupation.

A cynical observer would point out that this logic requires liberation movements to make themselves easy targets in order to prevent atrocities by the other side. This places the liberation movement in the position of having to endanger the civilians or give up their greatest weapon, surprise. As one writer has observed, “[T]he hallmark of any resistance movement is concealment.” DE LUPIS, supra note 180, at 112.

practice of international law, lawyers traditionally look to these treaties for guidance. The criteria they contain have evolved over time, with a gradual loosening of the rules allowing privileged combatancy to be granted to groups, such as resistance movements, which were traditionally treated as criminals instead of soldiers.\textsuperscript{196} One purpose of this Comment is to show that the treaties binding Israel have not expanded these criteria to the point where they would allow prisoner of war status for PLO fedayeen.\textsuperscript{197}

The major treaties on the issue of prisoners of war are the Hague Conventions of 1907,\textsuperscript{198} the Third Geneva Convention of 1949,\textsuperscript{199} and the 1977 Protocol I addition to the Geneva Conventions.\textsuperscript{200} It should be noted that international treaties are not the only foundation for international law.\textsuperscript{201} International law can also be formed by the actions and practices of states which create customary international law.\textsuperscript{202} While this Section will only deal with privileged combatancy as described in international treaties, Section V will examine the issue of whether customary international law provides different criteria for granting privileged combatancy.\textsuperscript{203}

2. The Hague Convention of 1907

The Hague Convention of 1907 is the basis of much of the current law on prisoners of war.\textsuperscript{204} It was the culmination of a

\textsuperscript{196} See G.I.A.D. Draper, The Red Cross Conventions 26-47 (1958); Rosas, supra note 177, at 85-96 (discussing the expansion of the right to privileged combatant status).

\textsuperscript{197} See infra notes 204-39 and accompanying text (discussing the extent to which privileged combatant status has been extended).

\textsuperscript{198} Hague Convention of 1907, supra note 195.

\textsuperscript{199} Third Geneva Convention, supra note 195.

\textsuperscript{200} Protocol I, supra note 195.


\textsuperscript{202} See id. at 35-41.

\textsuperscript{203} See infra notes 287-428 and accompanying text.

\textsuperscript{204} See Rosas, supra note 177, at 86-93. The Hague Convention of 1907 was a renewal of the Hague Convention of 1899. See id. Both of the Hague Conventions built upon the Brussels Declaration of 1874. See Mallison & Mallison, supra note 181, at 43-45. The Brussels Declaration was never ratified by the governments that produced it. See id. at 45.
movement, started in the eighteen and nineteenth centuries, to inject humanitarian concepts into the maelstrom of war. Its criteria for granting privileged combatant status to those outside the regular armies of sovereigns was as follows:

Section I.—On Belligerents

Chapter I.—The Qualifications of Belligerents

Article 1.

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.”

Article 2.

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

“Militia” and “volunteer corps” have been interpreted to mean units connected to a sovereign power. Such militia or volunteer corps may be non-professional units fighting alongside or in the place of regular army units or independent units indirectly

---

205 See id. at 56-75. These concepts were intended to lessen the cruelty of war on both soldiers and civilians.


207 See De Lups, supra note 180, at 106-11, 50-51; see also Mallison & Mallison, supra note 181, at 45 (arguing that while irregular combatants must be connected to a state which is a party to the conflict, they do not have to have the authorization of that state to participate in hostilities).
connected to a state. As one writer has said, this language means that the “[r]egular forces of belligerents may include ‘militia or volunteer corps,’” while in other situations “militia and volunteers are separate from the regular forces and form the core of what is called ‘irregular forces.’” In both situations, such units must carry arms openly, follow the rules of war, wear a distinctive insignia, and be led by a responsible party.

While Article 1 would authorize resistance movements fighting in the territory of a sovereign occupied by an opposing power, liberation movements fighting on behalf of a colonized people would not be authorized because of the absence of a connection to a state. While these two types of movements may seem similar, resistance movements are generally thought of as combatants whose territory has been occupied and are fighting against an occupation. On the other hand, liberation movements are usually connected to Third World peoples fighting to end a period of colonization. While the distinction may seem slight, its basis is the relationship between the movement and a sovereign state. The resistance movement’s sovereign has lost a war or control of part of its territory, while the “liberation movement” is usually not linked to a sovereign.

During the International Military Tribunals at Nuremberg and Tokyo, the Hague Convention of 1907 was held to be customary international law, binding on all states. However, the Hague

208 See De Lupis, supra note 180, at 106-11.
209 See id. at 108-09.
211 See supra note 207 and accompanying text.
212 See De Lupis, supra note 180, at 48-49.
213 See id. at 43-45.
214 Id. at 43-49. The denial of privileged combatant status to “liberation movements” has often been attacked as a European invention to deny colonized peoples their right of self-determination. The people in colonized areas find themselves in a no win situation. In order to have privileged combatant status, they must represent a sovereign government. But in order to create that sovereign government, they must fight to push out the colonizing power. So while fighting, they are denied privileged combatant status. For a discussion on whether privileged combatant status should attach retroactively see infra notes 308-39 and accompanying text.
215 See Draper, supra note 196, at 12 (quoting Judgment of the Tribunal, Cmd.
Constitution of 1907 now has largely been replaced by the Geneva Conventions of 1949.216

3. The Third Geneva Convention of 1949

The Geneva Conventions of 1949 were a response to the inadequacies in the international laws of war, which became apparent after World War II.217 The Third Geneva Convention expanded the scope of privileged combatancy to explicitly include some groups not mentioned in the Hague Convention of 1907.

The relevant sections of the Convention reads:

Article 4.

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, fulfill 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;

6964, pp. 64 and 125).

216 See ROSAS, supra note 177, at 91.

217 See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 3-10 (1960) [hereinafter ICRC]. Between the Hague Conventions of 1907 and the Third Geneva Convention of 1949 came the Geneva Prisoner of War Convention of 1929. See id. Because this convention has largely been superseded by the Third Geneva Convention of 1949, it will not be discussed. For the few instances where the Geneva Prisoner of War Convention of 1929 may still be controlling law, see ROSAS, supra note 177, at 91-93.
(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 . . . .

The language of Article 4A(2), specifically its inclusion of "resistance movements," expanded the scope of privileged combatancy to explicitly allow the citizens of an occupied state to resist an occupation. The treatment of partisan resistance movement during World War II by Axis forces led to this expansion. But, unlike the Hague Convention, the Geneva Convention’s language explicitly requires the resistance or militia forces to be linked to a Party to the Conflict, thus excluding liberation movements. Resistance movements must also still clearly distinguish themselves from the civilian population by following the four criteria laid out in the Hague Conventions of 1907. With the retention of the Hague Convention’s language, the rights of an occupied citizenry to resist occupying forces are still restricted. Few occupied peoples will have the ability to organize into the types of well regulated units called for by Article 218 Third Geneva Convention, supra note 195, at 3320 (emphasis added).

219 See ICRC, supra note 217, at 49-50.

220 See id. at 52-61. German forces denied privileged combatant status to resistance forces, often carrying out summary executions. See ROSAS, supra note 177, at 297-98; see also Mallison & Mallison, supra note 181, at 47-49.

221 See ICRC, supra note 217, at 56-59; see also Mallison & Mallison, supra note 181, at 50-53 (arguing that this provision can be read as requiring irregular forces to be either connected to their own state or to another state which is a Party to the Conflict). But see Mallison & Mallison, supra note 181, at 53-55 (explaining the argument that organized movements may themselves be considered to be a Party to the Conflict if they meet certain criteria).

222 See ICRC, supra note 217, at 56-59. These are criteria which the movement itself must meet, so that combatants will be judged not only on their behavior, but also by their comrades in arms. See G.I.A.D. Draper, The Status of Combatants and the Question of Guerrilla Warfare, 1971 BRIT. Y.B. INT’L L. 173, 196; Mallison & Mallison, supra note 181, at 62-63. On an individual basis, members must wear a distinctive sign, carry arms openly, and follow the laws of war in order receive privileged combatant status. See id.; see infra notes 240-61 and accompanying text (discussing Israel’s application of this analysis).
4A(2).\(^{223}\) Based on the number of signers, the Geneva Conventions of 1949 have become one of the most widely accepted international treaties of all time. As of January 31, 1997, 188 states had become parties to the Geneva Conventions.\(^{224}\) But with the wave of decolonization which followed World War II, its restrictions on “liberation movements” came under harsh attack by many writers and governments from the Third World.\(^ {225}\) The laws of war, as formulated largely by the European powers, were regarded as merely tools to reinforce Western hegemony over the Third World.\(^ {226}\) It was partially out of this desire to expand the rights of “liberation movements” that the 1977 Protocols I & II were born.\(^ {227}\)

4. 1977 Protocol I to the Geneva Conventions

The 1977 Protocols I & II dealt with two separate spheres in the law of war. While Protocol I related to international conflicts, Protocol II dealt with internal conflicts. It is Protocol I which is relevant to this discussion.\(^ {228}\) In comparison to the Hague

\(^{223}\) See DE LUPIS, supra note 180, at 112.


\(^{226}\) See Graham, supra note 225, at 38.


\(^{228}\) Protocol I declares that it applies to wars of liberation, Article I(4) stating that the Protocol applies to situations which “include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their rights of self determination . . . .” Protocol I, supra note 195, art. I(4), 16 I.L.M. at 1397.
Convention of 1907 and the Third Geneva Convention of 1949, Protocol I granted privileged combatancy much more readily to irregular combatants. Its relevant portions state:

PART III—

Section II—Combatant and Prisoner of War Status

Article 43—Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system, which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

Article 44—Combatants and Prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a Prisoner of war.

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.

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 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 offenses he has committed.229

These provisions, taken in context with Article 1(4),230 grant prisoner of war status to members of liberation movements.231 Article 43(1) on “armed forces” includes the armed forces of a party that is not a government but an “authority” even if it is “unrecognized by the adverse party.”232 This would allow citizens in an occupied territory, fighting under the command of a liberation movement to claim the liberation movement as the “authority” required under Article 43(1).233 In addition, Article 44(2) grants prisoner of war status even to combatants who violate the laws of war,234 while Article 44(3) greatly reduces the required distinctions between combatant and civilian.235 Read literally, Protocol I may do away with the four criteria first laid out in the Hague Convention of 1907 and reiterated in the Third Geneva Convention of 1949.236

---

229 Protocol I, supra note 195, art. 43, 44 and 16 I.L.M. 1410-11.
230 Article 1(4) states that Protocol I applies to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their rights of self-determination . . . .” Id. at 1397.
232 Protocol I, supra note 195, art. 43(1), 16 I.L.M. 1410.
233 See Fenrick, supra note 231, at 113-14.
234 See Protocol I, supra note 195, art. 43(1), 16 I.L.M. 1410.
235 See id. at 1411.
236 Some writers disagree with this obituary, stating that the distinguishing criteria have only been rephrased, not negated. See De Lupis, supra note 180, at 112-17.
While Protocol I purports to greatly expand privileged combatant status, its binding effects over the current issue are limited. Some western countries, fearful of the legal shield it could give to "terrorist" movements, refused to sign. Consequently, neither the United States nor Israel have signed,\textsuperscript{2} arguing that the Protocols provided too few reasons for liberation movements to obey the laws of war.\textsuperscript{238} Because of Israel's refusal to sign, the binding effects of Protocol I over the Israel-PLO conflict are at best debatable.\textsuperscript{239}

IV. Israeli Law and the Current Legal Status of PLO Fedayeen

A. Israel's Application of the Third Geneva Convention to PLO Fedayeen

Israel ratified the Third Geneva Convention on July 6, 1951.\textsuperscript{240} Since then, Israel has consistently denied the requests of PLO fedayeen seeking prisoner of war status, citing their failure to meet the criteria laid out in Article 4A.\textsuperscript{241}

In \textit{Military Prosecutor v. Ohmar Mahmud Kassem},\textsuperscript{242} the Military Court operating in the West Bank denied prisoner of war status to members of the Popular Front for the Liberation of Palestine (PFLP) who had infiltrated the West Bank from

\textsuperscript{2} See ICRC Home Page, \textit{supra} note 224. As of January 31, 1997, 147 states had ratified Protocol I. See id.


\textsuperscript{239} See \textit{infra} notes 340-46 and accompanying text (discussing Protocol I as illustrating customary international law).


\textsuperscript{241} See \textit{infra} note 261 and accompanying text.

In denying them prisoner of war status, the Court stated that the PFLP members did not meet the criteria of Article 4A. In adjudicating the issue, the Court interpreted the Convention as requiring a combatant to be related to a Government or State responsible for their actions. In referring to combatants who did not fight under the authority of a State, the Court said, "They are to be regarded as combatants not protected by the international law dealing with prisoners of war, and the occupying Power may consider them as criminals for all purposes.

The Court went on to hold that even if the PFLP could be said to have been fighting under the authority of a "Party to the conflict," they would still be denied prisoner of war status because of their failure to meet the four criteria required of irregular combatants under Article 4A(2). The defendants failed the first condition by not being able to prove that they were "commanded by a person responsible for his subordinates." While the Court did find that they had a distinctive insignia, they failed to both "carry arms openly," and conduct "their operations in accordance with the laws and customs of War."

See Kassem, 42 INT’L L. REP. at 470, 473. The PFLP is one of the groups making up the PLO. See O’Brien, supra note 3, at 11.

See Kassem, 42 INT’L L. REP. at 475-83. See supra notes 217-27 and accompanying text (detailing Article 4A).

See id. at 476-78. But see Mallison & Mallison, supra note 181, at 71-72 (arguing that this interpretation requiring state control, in contrast to some lesser connection, over irregular units was abandoned following the Brussels Declaration and the Hague Convention); Georg Schwarzenberger, Human Rights and Guerrilla Warfare, 1 ISR. Y.B. ON HUM. RTS. 246, 249-52 (1971) (making the same argument).

Kassem, 42 INT’L L. REP. at 477.

See id. at 478-483.

Id. at 478. This highlights the difficulty an underground combatant would have demonstrating the existence of a responsible command structure without relinquishing the names of his leaders, whose identities would need to remain secret for security reasons.

See id. The court found the distinctive insignia requirement met because the PFLP wore green clothing and mottled hats. See id.

Id. at 478-83. The Court pointed to PFLP acts which:

were all wanton acts of terrorism aimed at men, women, and children who were certainly not lawful military objectives. They are utterly repugnant to the principles of international law, and according to the authorities quoted are
In *Military Prosecutor v. Abu-Kabar*, a Military Court likewise refused to grant prisoner of war status to members of Arafat’s Fatah organization. Following the principles explained in *Kassem*, the Court stated that not only was Fatah not a “Party to the conflict” but that they did not meet the four criteria required of irregular combatants under Article 4A(2). The Court also pointed to the case of *Mohamed Ali v. Public Prosecutor*, where the English Privy Council held that even if a combatant belonged to a “Party to the conflict,” failure to meet the four criteria laid out in Article 4A(2) would result in forfeiture of prisoner of war status.

While these two cases are illustrative of Israel’s legal approach to evaluating prisoner of war status of PLO *fedayeen*, Israel has taken other approaches on a limited basis. During the Israeli invasion of Lebanon in the early 1980s, Israel captured many PLO *fedayeen* during conventional engagements. Israel treated these *fedayeen* not as criminals or as prisoners of war, but as “‘detainees’ under the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.” Many of these crimes for which the perpetrators must pay the penalty. Immunity of non-combatants from direct attack is one of the basic rules of the international law of war.

*Id.* at 483.


252 See *id.* at 266.


254 See Domb, *supra* note 251, at 265.


257 *Id.*
“detainees” were later released in a prisoner swap, with Israel releasing roughly 4,500 Palestinians in exchange for Arafat’s Fatah releasing six Israeli soldiers captured during the invasion of Lebanon.  

While this release may lend credence to the argument that Israel has at times treated PLO fedayeen as de facto prisoners of war, the Israeli position has remained steadfast that PLO fedayeen in Israeli jails are criminals, not prisoners of war.  

As one writer has pointed out, Israel views such releases as analogous to situations where governments are forced to concede to the demands of kidnappers in order to save the lives of the kidnap victims.

The current Israeli position on the legal status of PLO fedayeen is unmistakably clear. Ambassador Colette Avital, the current Israel Consul General in New York City, recently stated:

There is no basis for the proposition that Palestinian prisoners have in any way gained the right to prisoner of war status following the conclusion and implementation of the Interim Agreement. This is reflected in the case law of the Israeli High Court which, on the basis of both conventional and customary International law, indicates that individuals arrested by Israel for acts committed against the security of Israel or its citizens are not prisoners of war regardless of their membership in the PLO or any other organization. The rationale and legal foundation of this position have not been changed by the legal instruments of the peace process.

---


259 See Rubin, supra note 255, at 183-85.

260 See O’Brien, supra note 176, at 407; Rubin, supra note 255, at 183-85.

B. Israeli Treaty Law

1. Introduction

In denying prisoner of war status to PLO fedayeen the Israeli courts have relied on the text of Article 4A of the Third Geneva Convention. In doing so, they have explicitly applied the provisions of an international treaty which Israel has signed to domestic criminal cases. In contrast, their courts have refused to apply Protocol I because it has not been ratified by Israel. However, under Israeli law it may be argued that the Third Geneva Convention should not be controlling. This could have important implications when considering what law to apply in re-evaluating the prisoner of war status of PLO fedayeen.

2. Declaratory Treaties

The Israeli legal system interprets treaties signed by the Israeli Government as either "declaratory" or "constitutive." A declaratory treaty is a treaty which codifies international customary law and its provisions are automatically part of Israeli domestic law. This means that a declaratory treaty is enforceable in the Israeli Courts by parties affected by the provisions of the treaty. This stems from the Israeli Supreme Court decision in Shimshon v. Attorney General which held that customary international law is part of Israeli domestic law.

262 See supra notes 240-61 and accompanying text.

263 See Ruth Lapidoth, International Law Within the Israeli Legal System, 24 ISR. L. REV. 451, 478 (1990); Rubin, supra note 255, at 172-73. But if Protocol I was held to be indicative of customary international law then it could possibly be controlling in Israeli courts. See infra notes 340-46 and accompanying text for a discussion of Protocol I as customary international law.

264 See infra notes 265-307 and accompanying text.


266 See Lapidoth, supra note 263, at 458.

267 Shimshon, 17 INT’L L. REP. 72 (1950); see also Lapidoth, supra note 263, at 456-57 (explaining the court’s holding).

268 See Shimshon, 17 INT’L L. REP. at 75. The Court has also held, however, that if there is a contrary Israeli statute, the Israeli statute will prevail over customary
Therefore, a declaratory treaty is only codifying law which was already part of the Israeli legal system.

In *Abu Aita v. Commander of the Judea and Samaria Region*, the Israeli Supreme Court placed the burden of proof in establishing an international custom on the proponent of that custom. In addition, in *Affu v. Commander of the IDF Forces in the West Bank*, the Israeli Supreme Court held that the burden of proof is even higher than usual when the custom being advanced is meant to show a "binding rule of the laws of war."  

3. Constitutive Treaties

In contrast to declaratory treaties, in the Israeli system a constitutive treaty contains new international law. Much like a non-self executing treaty in the U.S. system, a constitutive treaty creates binding effects on Israel internationally but not within its domestic legal system. The provisions of a constitutive treaty only become part of Israeli domestic law upon transformation through domestic legislation by either the Knesset or by a Cabinet Minister who has been delegated that power by the Knesset.

If private individuals attempt to sue on rights or obligations created by a treaty which Israel has ratified but which is neither a codification of international customary law nor has been transformed, they will fail. This was the result in *Custodian of international law*. See Lapidoth, *supra* note 263, at 456-57.

---

269 See Lapidoth, *supra* note 263, at 454 (citing *Abu Aita v. Commander of the Judea & Samaria Region*, 37(ii) P.D. 197, 7 S.J. 1 (Hebrew, 1983)).

270 See id. at 454-55 (citing *Abu Aita*, 37(ii) P.D. 197, 7 S.J. 1 (Hebrew, 1983)).

271 29 I.L.M 139 (1990); see also Lapidoth, *supra* note 263, at 455 (explaining the court's holding).

272 *Affu*, 29 I.L.M at 163.


274 See id. at 458-59.

275 The Knesset is the Israeli Parliament. Unlike most parliamentary systems, the Israeli Prime Minister is directly elected by the Israeli public. The Prime Minister heads a cabinet whose composition must be approved by the Knesset. See DEP'T OF STATE, *supra* note 40.

276 See Lapidoth, *supra* note 263, at 460-64.

277 See id. at 458-59.
Absentee Property v. Samarah, where the Israeli Supreme Court held that private individuals could not sue under the auspices of the Armistice agreement between Israel and Jordan.

One author has explained the rationale behind requiring such transformation this way:

The primary reason given by the Court in support of the view that treaties must be enacted into law in order to have force in domestic Israeli law was the separation of powers. Since the government is authorized to conclude treaties without the consent of the Knesset, their direct adoption into domestic law would, in effect, give legislative power to the executive branch of the Government.

4. The Geneva Conventions: Constitutive or Declarative?

In Dwikat v. The Government of Israel, the Israeli Supreme Court considered a petition by inhabitants of the West Bank challenging a seizure of land by the military government as a violation of the Fourth Geneva Convention. The Court held that the Fourth Geneva Convention was constitutive and was therefore not enforceable in Israeli Courts in regard to actions taken by the military government in the West Bank. The Court found instead that the Hague Convention of 1907 was controlling because, in contrast to the Fourth Geneva Convention, it was declarative of customary international law.

This conclusion that "[t]he Hague

\[\text{\cite{278} 22 INT'L L. REP. 5 (1955); see also Lapidoth, supra note 263, at 458-59 (explaining the court's holding).}\]

\[\text{\cite{279} Samarah, 22 INT'L L. REP. at 7.}\]

\[\text{\cite{280} See Zilbershats, supra note 261, at 248. The reaction of one eminent Israeli legal scholar to the differentiation between declaratory and constitutive treaties should be noted. Shabtai Rosenne, in a letter to the Israeli Law Review, said: "Such an idea has no basis in modern public international law nor, so far as I am aware, in that part of the theory on international law which deals with the relationship between international law, whether conventional or customary, and domestic law." Shabtai Rosenne, Communication to the Editor, 15 ISR. L. REV. 463 (1980).}\]


\[\text{\cite{282} See id. at 131.}\]

\[\text{\cite{283} See id. at 131-32.}\]

\[\text{\cite{284} See id.}\]
Regulations form part of the domestic law [of Israel], but the Geneva Convention that deals with the same subjects has no place in Israeli law has since been followed in a number of cases.

The holding that the Fourth Geneva Convention is constitutive under Israeli law raises three related questions. First, is the Third Geneva Convention also constitutive in nature or is it instead declaratory? Second, if it is constitutive, would that affect whether it is held to be the controlling treaty in regard to the prisoner of war status of PLO fedayeen? Finally, if the Third Geneva Convention is not the applicable law, what is?

V. Which Law to Apply?

A. Possible Standards to Apply

1. Introduction

There are four possible legal standards which could be applied to PLO fedayeen: the Hague Convention of 1907, the Third Geneva Convention of 1949, Protocol I, or an international legal custom not embodied in those treaties. The Israeli legal system currently applies the Third Geneva Convention to this issue. If the Third Geneva Convention is constitutive, however, it may be necessary to look to international customary law to find the appropriate law to apply in re-examining the prisoner of war status of PLO fedayeen. This custom may be in the form of either of

285 Zilbershats, supra note 265, at 251.
286 See id. at 248-53.
287 See supra notes 240-61 and accompanying text.
288 The results of this inquiry would only be relevant in regard to a lawsuit brought within the Israeli legal system by individual PLO fedayeen. This is because the constitutive nature of a treaty only prevents it from being applied internally as Israeli domestic law. Such a treaty, however, still creates binding international obligations on Israel. Therefore, if suit were brought before the International Court of Justice the Third Geneva Convention would probably control. This is because Israel is a party to the Third Geneva Convention and the PLO has made an attempted accession to the Third Geneva Convention. This attempted accession was done by notifying the Swiss Federal Department of Foreign Affairs of their intent to adhere to the convention. See ICRC, supra note 224. The Swiss Federal Council has stated that it is unable to rule on the validity of this accession because of the “uncertainty” over the issue of Palestinian statehood. See id. Also see infra notes 438-48 and accompanying text (for a discussion
the other two treaties or some other custom not yet embodied in a
treaty. The results of any re-examination of the prisoner of war
status of PLO fedayeen by the Israeli Courts or the International
Court of Justice depends on which of these bodies of law
controls.289

2. The Hague Convention of 1907

By holding in Dwikat that the Hague Convention of 1907 was
declaratory, the Israeli Supreme Court explicitly found that it
embodied customary international law.290 The Nuremberg Tribunal
following World War II also came to this result.291 Therefore, the
Hague Convention is enforceable under Israeli domestic law and
would be applicable unless superseded.

The Hague Convention’s requirements for privileged
combatant status are in some ways stricter than those applied by
the Israeli courts in Kassem and Abu Kabar, because it does not
explicitly include resistance movements among those who are
eligible for privileged combatant status.292 The Israeli courts have
held that the PLO failed to meet the four criteria set out in Article
4A(2) of the Third Geneva Convention. These criteria are also
present in the Hague Convention of 1907.293 Therefore, re-
examining fedayeen status under the Hague Convention would
produce the same results as doing so under the Geneva
Convention.

3. The Third Geneva Convention

The Third Geneva Convention is the standard which has been

---

289 As already noted in supra note 288, any suit brought before the International
Court of Justice would likely be decided under the standards set out in the Third Geneva
Convention.

290 See Goldenstein & Schottenfels, supra note 281, at 131.

291 See supra note 215 and accompanying text.

292 See supra notes 204-16 and accompanying text.

293 Hague Convention of 1907, supra note 195, at 2295-96. It should be noted,
however, that the Hague Convention of 1907 does not contain the explicit requirement
of "belonging" to a Party to the conflict. Id. The analysis made in infra notes 315-18 and
accompanying text that such status can be applied retroactively diminishes the
importance of this.
applied by Israeli courts in determining the prisoner of war status of PLO fedayeen. In the Kassem and Abu Bakar cases, the Israeli courts held that the PLO had not met the criteria of Article 4A of that treaty.294

While whether the PLO has ever been a “Party to the conflict” may be debated, there is little question that in the past the PLO did not meet the criteria of Article 4A.295 Because of this, any re-examination of prisoner of war status under the Third Geneva Convention must focus on whether privileged combatancy can be granted retroactively to combatants denied prisoner of war status. This would require that the PLO’s failure to meet Article 4A criteria in the past could be annulled by current conditions.296

4. Protocol I

Because Israel is not a signatory to Protocol I, there is little possibility that an Israeli court or the International Court of Justice would find this treaty to be controlling. But if Protocol I were held to codify customary international law which has superseded the Third Geneva Convention then, because Israeli law incorporates customary international law,297 Protocol I could be controlling.298

5. International Custom

It is also possible that a custom of international law, not codified in any treaty, may be controlling in this situation. Such a custom would have to relate to the treatment members of a resistance or liberation movement initially denied prisoner of war status should receive if the movement is subsequently granted recognition by the opposing state.299

294 See supra notes 242-54 and accompanying text.

295 See supra notes 111-39 and accompanying text (detailing indiscriminate PLO attacks upon civilian targets).

296 See infra notes 308-39 and accompanying text (discussing the retroactivity of privileged combatancy).

297 See supra note 268 and accompanying text.

298 See infra notes 340-46 and accompanying text (discussing the possibility that Protocol I controls).

299 See infra notes 347-428 and accompanying text (discussing the creation of a customary international law on prisoner of war status).
B. Does the Third Geneva Convention Apply?

1. Constitutive or Declaratory?

While Israel refuses to apply the Fourth Geneva Convention to disputes in the West Bank, it uses the Third Geneva Convention to decide the prisoner of war status of PLO fedayeen. This could be based on a number of factors. It could be possible that while the Fourth Geneva Convention is constitutive, the Third Geneva Convention is declaratory. This is entirely possible given that the Third Geneva Convention is largely repetitive of the provisions of the Hague Convention, which the Israeli Supreme Court has held is declaratory. However, the Third Geneva Convention does differ from the Hague Convention in its inclusion of resistance movements as privileged combatants. This could lead to the argument that the Third Geneva Convention, through the expansion of privileged combatancy to resistance movements, has created new law and is therefore constitutive.

Even if the Third Geneva Convention was constitutive at its creation it can be argued that its almost universal acceptance shows that is has become customary international law. If so, the Third Geneva Convention controls because of its declarative nature, and the question of the retroactive application of privileged combatancy arises. This issue of retroactivity will be discussed in the following section.

If it is constitutive, because the Third Geneva Convention, like

---

300 See supra notes 281-86 and accompanying text.
301 See supra notes 240-61 and accompanying text.
302 See supra notes 281-86 and accompanying text.
303 See supra notes 217-27 and accompanying text.
304 See supra notes 217-27 and accompanying text (discussing the Third Geneva Convention and the post World War II push to expand privileged combatancy).
305 There are 188 parties to the Third Geneva Convention. See ICRC, supra note 224. In comparison, there are 185 member states in the United Nations. See id. This argument is weakened by the Israeli Supreme Court's decision that the Fourth Geneva Convention, which is as universally accepted as the Third Geneva Convention, is constitutive. See supra notes 281-86 and accompanying text (discussing the Israeli Supreme Court decision to declare the Fourth Geneva Convention constitutive).
306 See infra notes 308-39 and accompanying text.
the Fourth Geneva Convention, has not been transformed by the
Knesset, it should not be controlling in Israeli courts. Rather,
Israeli courts should apply customary international law. The
question would then be whether to look for customary
international law in either the Hague Convention, Protocol I, or a
custom not yet codified in a treaty.307

If the Hague Convention controls, the questions over the
retroactivity of privileged combatancy discussed in the next
section are relevant. This is because the texts of the Third Geneva
Convention and the Hague Convention are almost identical in
regard to prisoners of war. Therefore, a re-examination under the
Hague Convention would produce the same results as one under
the Third Geneva Convention.

It is possible, however, that international custom has been
extended beyond the Hague Convention and is now embodied in
Protocol I or a yet uncodified custom. This possibility will be
examined in Section C and D of Part IV.

2. Is the Third Geneva Convention Retroactive?

If the Third Geneva Convention is declaratory or if the
provisions of the Hague Convention are controlling, changing the
prisoner of war status of PLO fedayeen would require that
privileged combatancy be applied retroactively. While there is
little weight in the argument that the PLO met the criteria of
Article 4A in the past, it can be argued that they meet its criteria
today. These requirements should be broken down into two parts:
1) being a “Party to the conflict,” and 2) meeting the four
enumerated requirements of Article 4A(2).308

In 1988, the PLO declared the existence of the Palestinian

307 See infra notes 340-428 and accompanying text.
308 I am using Article 4A(2)'s four criteria because the armed forces of the
Palestinian Authority, over 30,000 men under arms organized into roughly ten or more
separate para-military units, are more characteristic of militia units than the regular
armed forces of a state. This is because these units are organized as police/security
units, not exclusive combat units. See Graham Usher, Palestinian Authority, Israeli
are considered militia or members of the armed forces, they still must fulfill Article
4A(2)'s four criteria.
State. That "state" has an elected government, the Palestinian Authority headed by Yasser Arafat, and is in control of definite territory, most of the Gaza Strip and almost a quarter of the West Bank. Certain issues over final borders have yet to be worked out with Israel, but the beginnings of a state now exist. This should be enough to meet the minimum threshold necessary to be a "Party to the conflict."

The PLO’s military force also meets the four enumerated criteria of Article 4A(2). The Palestinian Police Forces, which are largely made up of Fatah and other PLO fedayeen, are arguably "commanded by a person responsible for his subordinates." This is based on the fact that these forces are subordinate to commanders who are under the authority of the Palestinian Authority. They have uniforms, fulfilling the need to "have a fixed distinctive sign" and they "carry their arms openly." Whether they are "conducting their operations in accordance with the law of war" is a difficult question because the Palestinian Authority is not currently involved in any official hostilities. If obeying the laws of war is assumed, an overall conclusion could be made that, with the transformation of the PLO’s guerrilla army into the rudiments of a state police force, the four requirements of Article 4A(2) have been met.

If the PLO now meets the Third Geneva Convention’s criteria for privileged combatancy, it would still be necessary that the PLO’s current status be effective retroactively for PLO fedayeen in Israeli jails to receive any benefits. The Third Geneva Convention makes no mention of retroactively granting privileged

310 See Bruck, supra note 1, at 76-82.
311 See infra notes 446-48 and accompanying text (discussing the criteria Palestine must meet to achieve statehood).
312 See Bruck, supra note 1, at 80-82.
313 Id.; Usher, supra note 308, at 15-18.
314 Because the Palestinian Authority has established a police force instead of an official army, it is useful to analyze them in terms of a "militia." See Usher, supra note 308, at 16.
POW STATUS OF PLO FEDAYEEN

In that case, the United States Supreme Court held that the actions of a Venezuelan rebel army were clothed in the authority of the Venezuelan state once the rebel army took power. On the principle of retroactive application, the Court said, "It is idle to argue that the proceedings of those who thus triumphed should be treated as the acts of banditti, or mere mobs."\(^{316}\)

This case could form the basis of a useful analogy if the only basis for denying privileged combatancy had been the PLO not being a "Party to the conflict."\(^{317}\) But in Kassem, the court held that even if the defendants were under the authority of a "Party to the conflict" they would still be denied privileged combatant status because of their failure to meet the Article 4A(2)’s four requirements.\(^{318}\)

The Mohamed Ali case, which was relied on in Abu Kabar,\(^{319}\) supports the position that a failure to meet Article 4A(2)’s four requirements cannot be negated by vicariously clothing combatants with the status of others.\(^{320}\) In Mohamed Ali, the Singapore government tried and eventually hung, two Indonesian soldiers who had carried out a bomb attack in Singapore.\(^{321}\) The attack was targeted against civilians and the soldiers were dressed in civilian clothing.\(^{322}\) On appeal, the British Privy Council held

---

\(^{315}\) 168 U.S. 250 (1897).

\(^{316}\) Id. at 253.

\(^{317}\) The precedential value of this case depends greatly upon where suit is brought. If suit is brought before the Israeli Supreme Court, Israeli Justices would have little incentive to rely on United States Supreme Court opinions. The International Court of Justice’s Charter, however, explicitly allows for the Court to base its holdings on the opinions of the highest courts in the United Nations member states. See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179, at art 38(1)(d).

\(^{318}\) See Shapiro-Libai, supra note 242, at 459-60.

\(^{319}\) See Domb, supra note 251, at 266-67.

\(^{320}\) See id.


\(^{322}\) See id. at 294.
that even regular army soldiers acting under the sovereign authority of a state must still meet the four enumerated criteria of Article 4A(2) lest they be denied the benefits of privileged combatancy. \textsuperscript{323} The United States Supreme Court held similarly in \textit{Ex Parte Quirin}, \textsuperscript{324} when it refused to grant writs of habeas corpus to seven Nazi saboteurs who infiltrated the United States during World War II. \textsuperscript{325} There the Court relied on the Hague Convention’s definition of privileged combatancy when it held that combatants who donned civilian dress gave up any rights to prisoner of war status. \textsuperscript{326}

These two cases show that even if \textit{fedayeen} actions could be retroactively clothed with the authority of the Palestinian Authority, \textit{fedayeen} failures to meet the four enumerated criteria of Article 4A(2) would prevent them from receiving privileged combatant status. \textsuperscript{327} Both the Malaysian Army and the German Army clearly met all the four enumerated criteria of Article 4A(2) at the time of the two incidents, but the failure of the individual defendants in \textit{Mohammed Ali} and \textit{Ex Parte Quirin} to meet that criteria deprived those defendants of privileged combatant status. \textsuperscript{328} If the status of the main body of an army cannot be used to vicariously clothe members not meeting Article 4A(2)’s four requirements then the status of a liberation movement years after the event should not retroactively clothe its members with privileged combatant status. \textsuperscript{329} For that reason, PLO \textit{fedayeen} who failed to meet Article 4A(2)’s four criteria in the past cannot expect any benefits from a change in the PLO’s status.

If being a “Party to the conflict” is applied retroactively,

\textsuperscript{324} 317 U.S. 1 (1942).
\textsuperscript{325} See id. at 48.
\textsuperscript{326} See id. at 30-36.
\textsuperscript{327} Only privileged combatants are due prisoner of war status upon capture. Other combatants are considered illegal combatants and are subject to criminal sanctions. See supra notes 177-203 and accompanying text.
\textsuperscript{328} See supra notes 319-26 and accompanying text.
\textsuperscript{329} See supra note 222 and accompanying text (discussing the requirement that all four criteria must be met by the movement while individual combatants must themselves wear a distinctive sign, carry arms openly and follow the laws of war).
however, then PLO fedayeen who were captured and did meet Article 4A(2)'s four enumerated requirements might arguably be granted prisoner of war status retroactively. In Kassem, the Court held that the PFLP's failure to meet Article 4A(2)'s four enumerated criteria would be applied to all of its members, even if they individually met Article 4A(2)'s four criteria when captured. But would later compliance with those criteria by the movement clothe these members who themselves had followed them? An analogy with the criminal law on justifications and excuses leads to the conclusion that this later compliance is insufficient to protect even these members of the PLO.

In the criminal law, a party who takes an action which in most circumstances is a crime may be found not guilty if certain circumstances existed at the time of the event. One such circumstance is mental illness. If a defendant was insane at the time of the crime, he would ordinarily not be held responsible. But if the person becomes insane after having committed the crime, his mental illness cannot be retroactively applied to find him not guilty of the act taken while sane. By analogy, a combatant would only be excused for his actions if he were acting as a privileged combatant at the time the action took place. Therefore, a retroactive extension of privileged combatancy to the

330 See Shapiro-Libai, supra note 242, at 460. This analysis of Article 4A(2) has also been made by Draper and Mallison and Mallison See Draper, supra note 222, at 196; Mallison & Mallison, supra note 181, at 62-63.


332 See BIN-NUN, supra note 331, at 111-13; see also DRESSLER, supra note 331, at 309-32 (explaining the law on insanity).

333 See DRESSLER, supra note 331, at 310-11. The result of such an occurrence would be to make the defendant incompetent to stand trial until they regained their competency. See id. Similarly, becoming mentally incompetent after having been found guilty would not negate the conviction.

334 Another useful analogy may be made to the justification of “public authority” which shields many of the actions of police officers which would otherwise be criminal. See id. at 249-60. Such a justification could not shield the actions of an officer which occurred outside the course of his employment or which occurred prior to joining the police force.
combatant would be unavailable.\textsuperscript{335}

While being a "Party to the conflict" may arguably be retroactive based on an analogy with Underhill,\textsuperscript{336} the same cannot so readily be said of meeting Article 4A(2)'s four criteria. Both the holdings in Mohamed Ali\textsuperscript{337} and Ex Parte Quirin\textsuperscript{338} make it doubtful that privileged combatancy may be applied retroactively to those who have failed to meet Article 4A(2)'s criteria. Similarly, the criminal law on justifications and excuses shows that privileged combatancy in general should not be applied retroactively to any combatants.\textsuperscript{339}

\textbf{C. Should Protocol I Apply?}

Protocol I has not been signed by Israel and the Israeli government has repeatedly voiced its refusal to accept it as international law.\textsuperscript{340} Therefore, Protocol I could only be controlling if the Third Geneva Convention were held to be constitutive and the Israeli Supreme Court held that Protocol I embodied customary international law in this area. As customary international law it would then be integrated into Israeli domestic law.\textsuperscript{341} For Protocol I to be binding in a suit brought before the International Court of Justice, the Court would have to hold that Protocol I had become customary international law which has superseded the Third Geneva Convention in regard to states which are not a party to it.

The argument that Protocol I has become customary international law has been discussed by Benjamin Rubin, a former Special Assistant to Israel's Attorney General, who has said:

\textsuperscript{335} This analogy would of course be applied to the retroactivity of privileged combatancy in general, not just to combatants who had individually met Article 4A(2)'s four criteria.

\textsuperscript{336} See supra notes 315-18 and accompanying text.

\textsuperscript{337} See supra notes 319-23 and accompanying text.

\textsuperscript{338} See supra notes 324-27 and accompanying text.

\textsuperscript{339} See supra notes 331-33 and accompanying text.

\textsuperscript{340} See infra note 342 and accompanying text.

\textsuperscript{341} See Lapidoth, supra note 263, at 452. This integration would also require the Court to hold that Israel has not been a constant objector to such a custom, which is doubtful.
The possibility that this Article will gain anything approaching general adherence is not even worth considering. Moreover, even if this provision should become customary international law, it will still not be binding upon Israel, since Israel objected to it from the outset and made its objections clear during the Diplomatic Conference of 1977.\(^{342}\)

If for some reason Protocol I was controlling, its expansion of privileged combatancy would give PLO fedayeen prisoner of war status. Not only does Article I(4) say that Protocol I applies to "liberation movements,"\(^{343}\) Protocol I also has few criteria to restrict granting privileged combatancy.\(^{344}\) The commentary on Protocol I shows that the drafters' intentions were to implicitly grant privileged combatancy to the PLO.\(^{345}\) Because of its clear language and the intent of the drafters, prisoner of war status would have to be granted to PLO fedayeen under Protocol I.\(^{346}\)

\section*{D. Is There an International Custom on Prisoners of War?}

\subsection*{1. Customary International Law}

Customary international law is law founded on the customs of states. As one writer has noted, "Customary rules crystallize from usages or practices which have evolved in approximately three sets of circumstances: (a) Diplomatic relations between states . . . (b) Practice of international organs . . . and (c) State laws, decisions of state courts, and state military or administrative practices."\(^{347}\) Customary international law is therefore a combination of both the practices of states in certain areas and the expectation of the international community that these practices will continue.

If there is international custom controlling this issue, it would

---

\(^{342}\) Rubin, \textit{supra} note 255, at 172–73 n.12.

\(^{343}\) See Protocol I, \textit{supra} note 195, at 1397.

\(^{344}\) See supra notes 228-39 and accompanying text.


have to be demonstrated by examining the past treatment of liberation movements. The central question is whether jailed guerrillas and revolutionaries have been granted prisoner of war status after the movement to which they belonged to was granted recognition. The following case studies demonstrate that such a practice may exist.

a) Britain and Irish Independence: 1916-1922

In April 1916, Irish Catholic “Volunteers” began an armed uprising against the British presence in Ireland. While the majority of the Irish population favored political separation from Britain, the Volunteers were among the few who favored the use of violence to free Ireland from British control and form an Irish Republic.

Fighting soon broke out throughout Dublin and in parts of the countryside. The Volunteers attempted to fight a conventional battle with the British. Outnumbered in men and weapons, the Volunteers were defeated within a week. Of those not killed in the fighting, the British executed sixteen and sentenced the rest to hard labor in English prisons.

Demands for prisoner of war status for those taking part in the uprising were refused. Eventually the poor treatment of the prisoners led to political pressure on Britain from the United States. This in turn led to the declaration of amnesty in December 1916, freeing most of those who had taken part in the Uprising. The rest of the prisoners were released in June 1917.

In the years following their release, the Volunteers adopted a new form of warfare under the tutelage of Michael Collins, a
leader in the uprising who had avoided execution by happenstance. The Volunteers' new tactics were the foundation of what was to become modern urban guerrilla warfare. Ambushes of British soldiers and police were the most common tactics, complemented by the assassination of suspected British spies and informers to cut off the flow of intelligence to the British.

Full scale urban warfare broke out in 1920. The year before, Collins had formed his "Squad," a team of assassins carrying out attacks on the British police system. The effectiveness of the "Squad" and other Volunteer actions led to an increase in British forces throughout Ireland, which in turn escalated the conflict. Murder and counter-murder were the rule, not the exception.

Volunteers who were captured could expect torture or summary execution. Prisoner of war status was not granted to Volunteers. Many Volunteers who were captured were prosecuted and sentenced to death. In response to this denial of prisoner of war status, Volunteers held in Mountjoy Prison went on a hunger strike, demanding release or prisoner of war status. The prisoners were only released after English Labour leaders called a strike in support of the prisoners. A second hunger strike at Wormwood Scrubs Prison produced similar results. While this tactic worked at first, later hunger strikes failed to produce concessions.

357 See id. at 46.
358 See id. at xi-xii.
359 See id. at 116-18, 140.
360 See id. at 122, 140.
361 See id. at 116-18.
362 See id. at 122-27.
363 See id. at 132-34, 140-44.
364 See id. at 134, 145-47.
365 See id. at 140.
366 See id. at 179.
367 See id. at 139.
368 See id.
369 See id. at 139-40.
370 See id. at 155.
As a result of the toll the war was taking on British prestige and its effects domestically the British government entered into peace negotiations with the Volunteers. The treaty which followed established an Irish Republic in all of Ireland except for six counties in the north whose populations were largely Protestant and loyal to Britain. British military units in southern Ireland were quickly evacuated after the ratification of the treaty. The treaty did not end the violence in Ireland. A Civil War broke out among the Republicans over the treaty, and sectarian violence in the six northern counties continues to this day. It did result, however, in the release of political prisoners arrested prior to its signing.

b) Britain and the Palestine Mandate

During the British Mandate in Palestine, the Jewish community was divided into three factions. The Yishuv and its military arm, the Haganah, represented the majority of the population. The Yishuv and Haganah were socialist in orientation and favored compromise and working with the British during World War II to help secure a Jewish Homeland. Opposed to the Yishuv’s method of compromise were the Irgun, led by future Israeli Prime Minister Menachem Begin, and LEHI, which was also known as the Stern Gang. These two groups represented non-socialist Zionism and were unwilling to compromise with the British, favoring the use of violence as a catalyst for change.

In January 1944, the Irgun declared a revolt against the British. The revolt began with the firebombing of government offices and shoot-outs with British police. From there the activities of the Irgun escalated, following the path of LEHI which had been engaged in attacks on the British since its foundation as a

---

372 See COOGAN, supra note 352, at 355.
373 See J. BOWYER BELL, ON REVOLT 37 (1976) [hereinafter BELL, ON REVOLT].
374 See id. at 38.
375 See id. at 37-38.
376 See id.
377 See id. at 45-46.
splinter group of the Irgun.\textsuperscript{378} The Yishuv feared that terrorist actions by the Irgun and LEHI would lead to reprisals against the whole Jewish community in the Mandate. Thus, the Yishuv cooperated with the British against the two groups and in particular against the more numerous Irgun. This was the beginning of what became known as the “Season.”\textsuperscript{379} Yishuv cooperation was limited at first to small scale kidnappings of Irgun men. After LEHI assassinated the British Minister of State in the Middle East, Lord Moyne, however, Yishuv cooperation was expanded,\textsuperscript{380} leading to the arrests of hundreds of Irgun members.\textsuperscript{381} This alliance lasted only a few months and when World War II ended, the Haganah, the Irgun, and LEHI formed a short-lived united front against the British.\textsuperscript{382} The united front evaporated when the Yishuv returned to negotiations and the Irgun and LEHI continued the revolt. Martial law was eventually declared.\textsuperscript{383}

Members of the Irgun who were captured could expect to be tried as criminals, possibly facing death sentences.\textsuperscript{384} Many Jews arrested by the British were deported to Eritrea.\textsuperscript{385} After two Irgun members were sentenced to flogging, the Irgun kidnapped three British officers and flogged them in retaliation.\textsuperscript{386} This soon ended the British practice of flogging prisoners.\textsuperscript{387} Likewise, the Irgun hanged two British police officers in response to the hanging of three Irgun men captured in a raid on a British prison.\textsuperscript{388}

This and other pressures led the British to turn the problem of the Palestine Mandate over to the newly formed United Nations.\textsuperscript{389}

\begin{itemize}
\item \textsuperscript{378} See id. at 40.
\item \textsuperscript{379} See id. at 49.
\item \textsuperscript{380} See id. at 49-50.
\item \textsuperscript{381} See id. at 51.
\item \textsuperscript{382} See id. at 55.
\item \textsuperscript{383} See id. at 63.
\item \textsuperscript{384} See id. at 63-64; J. Bowyer Bell, Terror Out Of Zion 197-99 (1977) [hereinafter Bell, Terror].
\item \textsuperscript{385} See Bell, Terror, supra note 384, at 125, 178.
\item \textsuperscript{386} See Bell, On Revolt, supra note 373, at 61.
\item \textsuperscript{387} See id.
\item \textsuperscript{388} See Bell, Terror, supra note 384, at 227-28, 235-38.
\item \textsuperscript{389} See supra notes 45-60 and accompanying text.
\end{itemize}
The United Nations voted for partition, and the British began their withdrawal. After the British presence in Palestine was ended, the remaining Jewish prisoners were freed. In July 1948, the deportees in Eritrea were returned to Israel by the British ship Ocean Vigour. Many of the men who had been considered wanted terrorists by the British and who were at one time hounded by the Yishuv went on to enter mainstream Israeli politics. Menachem Begin, the leader of the Irgun, became the Israeli Prime Minister from 1977-1983. One of his successors as prime minister was Yitzak Shamir, a leader in LEHI who had been deported to Eritrea. While denied prisoner of war status during the revolt, those who were captured and not executed were eventually freed. Even those tried in foreign countries for actions taken outside the Palestine Mandate were returned to Israel by 1950.

c) France and Algeria

In 1954, France was drawn into war in Algeria by a liberation movement seeking to free Algeria from French rule. The Algerian Liberation Front fought the French until 1962, when the French agreed to allow an Algerian election on self-determination.

During the eight years of fighting, the French did not grant official prisoner of war status to Algerian prisoners. Some authors have noted, however, that French treatment of prisoners "on a de facto basis tended to bring the status of captured Algerian combatants close to that of prisoners of war." While the French did not bring criminal charges against all FLN members, those

390 See supra notes 45-60 and accompanying text.
391 See BELL, TERROR, supra note 384, at 343-44.
392 See id.
393 See id.
394 See QUANDT, supra note 74, at 261, 349.
395 See BELL, TERROR, supra note 384, at 167.
396 See id. at 343.
397 See ROSAS, supra note 177, at 146.
398 See id.
399 Id. at 149.
accused of terrorist acts were charged, and sometimes executed.\textsuperscript{400} Those that were not tried in French courts were detained in military camps.

The French treatment of Algerian prisoners seems to have occurred in two phases. Maltreatment of Algerian prisoners was the norm in the first years of the war, and many prisoners were summarily executed or sentenced to death by the French legal system. But as the war progressed, the French stance on executions softened, possibly, as one author noted, “to calm down internal and international criticism and to increase the inclination of the enemy troops to surrender.”\textsuperscript{401} While the maltreatment of prisoners also lessened, torture was still used at times for the purpose of gathering information.\textsuperscript{402}

Negotiations between the FLN and the French Government began in the early 1960s, culminating with the French concession to Algerian demands for self-determination. This agreement between the FLN and the French government led to the release of “all prisoners of both sides taken in combat,” even though prisoner of war status had not been granted.\textsuperscript{403}

d) South Africa and the African National Congress

Until 1994, the government of South Africa was controlled by that country’s white minority population.\textsuperscript{404} Many groups formed in opposition to this system of racial domination. Chief among these was the African National Congress, founded in 1912.\textsuperscript{405} The ANC changed over time from a group representing the black middle class to one advocating the violent overthrow of the South African system.\textsuperscript{406}

The military wing of the ANC, Umkhonto we Sizwe (Spear of

\textsuperscript{400} See \textit{id}.  
\textsuperscript{401} \textit{Id.} at 149-50.  
\textsuperscript{402} See \textit{id.} at 150-51.  
\textsuperscript{403} \textit{Id.} at 148.  
\textsuperscript{404} See \textit{NELSON MANDELA, LONG WALK TO FREEDOM} 535-40 (1994).  
\textsuperscript{405} See \textit{MORGAN NORVAL, POLITICS BY OTHER MEANS: THE ANC'S WAR ON SOUTH AFRICA} 21 (1993).  
the Nation) engaged in attacks against the South African state, with civilians often being caught in the crossfire. To avoid the internal security measures taken by the South African state, many of Umkhonto we Sizwe’s forces were eventually based and trained in neighboring states. During the mid-1980s the level of unrest and violence in South Africa escalated. A state of emergency was declared in the black townships where much of the state’s black population had been segregated.

During this period, the level of violence was astronomical. Violent retributions were carried out against people believed to be government informers and there have been many allegations that the South African police force operated unofficial and official hit squads. ANC members who were arrested during this period were denied prisoner of war status, facing imprisonment or execution.

Eventually, the white minority government in South Africa entered into negotiations with the ANC. These negotiations resulted in an agreement which led to the creation of a democratically elected government. Nelson Mandela, a former prisoner and leader of the ANC, was elected as president of the New South African state. As part of the process, prisoners held for political crimes were released and amnesty was granted to those wanted for political crimes committed in the past.

---

407 See Norval, supra note 405, at 26-36.
408 See Mandela, supra note 404, at 250, 382-83.
409 See Price, supra note 406, at 190-217.
410 See id. at 249-51.
412 See Mandela, supra note 404, at 271-330 (describing the Rivonia Trial where Nelson Mandela and others were sentenced to life in prison for their part in Umkhono we Sizwe activities).
413 See Price, supra note 406, at 251-81.
414 See Mandela, supra note 404, at 531-40.
415 See id. at 540-41.
416 See Copson, supra note 411; Matloff, supra note 411.
e) Portugal in the Congo

During the 1960s and early 1970s, Portugal fought against several liberation movements in its African colonies of Angola, Guinea-Bissau and Mozambique. The Portuguese government denied prisoner of war status to members of the various liberation movements. Treatment of prisoners by the Portuguese was reportedly harsh. The Portuguese came down severely on combatants who did not distinguish themselves from the civilian populace. The following was allegedly a Portuguese statement of policy:

According to military practice, a fighting man who is captured out of uniform should be shot. It is important to take prisoners, for they can give useful information; it is for that reason that they should not be shot immediately. The prisoner must be given the opportunity to speak voluntarily but should he refuse to do so, more efficient methods must be adopted that will rapidly persuade him to co-operate. After that, he will be shot in accordance with military practice, given the fact that he is a fighting man out of uniform.

In 1974, a change in the Portuguese government led to negotiations with the liberation movements. This ultimately led to the independence of Angola, Guinea-Bissau and Mozambique, and the release of prisoners captured by both sides during the wars.

---

417 See ROSAS, supra note 177, at 160.
418 See id. at 162-63.
419 See id. at 163. One U.N. report stated:
Captured freedom fighters and families of freedom fighters are subjected to brutal, inhuman and savage methods of torture. Examples are: the captured men are maimed and forced to eat parts of their bodies. Their wives are raped in their presence and killed. Aged parents are tortured and murdered and their flesh is offered as food.
420 Id. at 164 (quoting from the 1970 report of the UN Ad Hoc Working Group of Experts, UN Doc. E/CN.4/1020/Add. 1, pp. 56-57 (para.169)).
421 See id. at 160, 163.
422 See id. at 160.
423 See id. at 163.
2. Has a Custom Been Shown?

These case studies demonstrate a reluctance to grant formal prisoner of war status to liberation movements during wartime. There does seem to be a custom, however, of releasing guerrillas during and after political negotiations leading up to a peace agreement. These releases occurred in a political, not legal, context, with the prisoners largely being used as bargaining chips. Rarely have these actions been phrased in terms of the rights owed to prisoners of war.\textsuperscript{424}

Regardless, these cases do seem to show a de facto recognition of the principle that combatants should be released once hostilities are over. As in other aspects of international relations, countries seem to be saying one thing while doing another. In analyzing the customs of states, actions rather than words are important. Therefore, an argument can be made that an international custom exists requiring the release of members of liberation movements when and if a political settlement is concluded.

Proving such a custom in an Israeli court of law would be a heavy burden. While the \textit{Shimshon} case has held that customary international law is part of Israeli domestic law,\textsuperscript{425} the \textit{Abu Aita} case places the burden of proof on the proponent of the custom,\textsuperscript{426} while \textit{Affu} increased the burden of proof when the custom to be shown is a rule on the laws of war.\textsuperscript{427} Further, because Israel has consistently objected to Protocol I and its expansion of prisoner of war status, it can be argued that it should be considered a consistent objector to such a custom and thus should not be bound by it. Israel’s unwavering application of the Third Geneva Convention to prisoner of war status is also relevant. By consistently basing their legal decisions on that treaty, Israel reiterates its rejection of any opposing criteria. Through such a

\textsuperscript{424} This will affect whether or not these practices can be said to create an expectation of similar conduct in the future. Since many of these releases occurred as the result of organized negotiations, it can be argued that just like with any bargaining chip, there is no legal requirement that other states must relent on the issue.

\textsuperscript{425} \textit{See Shimshon}, 17 INT’L L. REP. 72, 75 (1950).

\textsuperscript{426} \textit{See Lapidoth, supra} note 263, at at 454 (citing \textit{Abu Aita v. Commander of the Judea and Samaria Region,} 37(ii) P.D. 197, 7 S.J. 1 (Hebrew, 1983)).

\textsuperscript{427} 29 I.L.M at 163.
rejection, Israel strengthens its position as a consistent objector to any such custom.\textsuperscript{428}

VI. War Crimes by Privileged Combatants and Others

Perhaps the greatest factor weighing against the release of all PLO fedayeen is the nature of PLO tactics in the past.\textsuperscript{429} Even if it is effectively argued that PLO fedayeen deserve prisoner of war status, many would still face criminal liability for their past actions. While privileged combatants are not normally tried for their actions during hostilities, they can be tried for actions which fall under the rubric of war crimes.\textsuperscript{430}

Many of the tactics used by the PLO in the past fall in to such a category.\textsuperscript{431} These tactics have included the taking of civilian hostages and the intentional killing of civilians.\textsuperscript{432} As the court in Kassem said about PFLP actions:

The attack upon civilian objectives and the murder of civilians in the Mahane Yehuda Market in Jerusalem, the Night of the Grenades in Jerusalem, the placing of grenades and destructive charges in the Tel Aviv Central Bus Station, etc., were all

\textsuperscript{428} These same arguments can also be applied to any contentions before the International Court of Justice that Israel should be bound by such a custom.

\textsuperscript{429} See supra notes 111-39 and accompanying text.

\textsuperscript{430} The Third Geneva Convention allows for the trial of war criminals even if they are prisoners of war. See Third Geneva Convention, supra note 195, at 3392-400. Protocol I also contains supplementary material on prosecuting the laws of war. See Protocol I, supra note 195, at 1427-31; see also Solf & Cummings, supra note 181, at 225-29 (describing attacks on civilian targets as both violations of customary international law and Protocol I); see generally R.R. Baxter, The Municipal and International Law Basis of Jurisdiction Over War Crimes, 28 BRIT. Y.B. INT’L L. 382 (1951) (examining different procedures used to prosecute war crimes in the aftermath of World War II and distinguishing the denial of privileged combatancy from prosecution for war crimes).


\textsuperscript{432} See generally LIVINGSTONE & HALEVY, supra note 431, at 94-137 (describing PLO tactics). For a description of PLO tactics, see supra notes 111-39 and accompanying text.
wanton acts of terrorism aimed at men, women, and children who were certainly not lawful military objectives. They are utterly repugnant to the principles of international law, and according to the authorities quoted are crimes for which their perpetrators must pay the penalty. Immunity of non-combatants from direct attack is one of the basic rules of the international law of war.433

International law on this subject has been clear: Combatants can be tried for crimes against the laws of war. This was applied during the Nuremberg War Crimes Trials434 and during the trials of Japanese war criminals.435 This has also been the case in the recent trials held by the War Crimes Tribunal investigating crimes in the former state of Yugoslavia.

This means that even if PLO fedayeen were granted prisoner of war status, those who have been tried for acts which amount to war crimes would not be eligible for release. They would have to serve out their sentences unless amnesty was granted them by the Israeli government.436 Because of the nature of PLO tactics a large percentage of those who remain is Israeli prisons could likely be considered war criminals.437


435 See In re Yamashita, 327 U.S. 1, 7-18 (1946); see generally Baxter, supra note 430 (describing the war crimes trials following World War II).

436 Such an amnesty would be solely at the discretion of the Israeli government. This would raise the interesting question of whether PLO fedayeen released by Israel could be prosecuted by other states for any war crimes they had committed. This question arises because universal jurisdiction exists for the prosecution of war crimes, which means third party states can prosecute war crimes neither committed against their nationals nor on their territory. See Baxter, supra note 430, at 390-393. Similarly, Article 86 of Protocol I calls for not only the Parties to a conflict to repress breaches of the laws of war, it also calls for all the High Contracting Parties to Protocol I to do so. See Protocol I, supra note 195, at 1428.

437 See generally LIVINGSTONE & HALEVY, supra note 431, at 94-137 (describing PLO tactics). For a description of PLO tactics, see supra notes 111-39 and accompanying text.
VII. What Forum Can Hear This Issue?

Two options exist for bringing suit to challenge the current legal status of PLO fedayeen. Under the first option, PLO fedayeen could personally appeal their status to the Israeli Supreme Court. The Israeli Supreme Court has jurisdiction to hear such an appeal under its authority to sit as a High Court of Justice. Sitting as a High Court of Justice, the Supreme Court has the authority to "order the release of person[s] unlawfully detained or imprisoned." Such an appeal by a prisoner would be analogous to a petition for habeas corpus in the United States.

The second option would be for the Palestinian Authority to file suit against Israel in the International Court of Justice, seeking an order for their release. Such an action would be similar to one of the routes taken by the United States during the Iranian hostage situation. The United States filed suit against Iran in the International Court of Justice seeking an order to free the hostages. The International Court of Justice did issue that order, but because the International Court of Justice has no real enforcement powers, that order was of no significance beyond political and propaganda purposes.

An order by the International Court of Justice to release PLO fedayeen likely would also be of little legal significance. It would be of great political and propaganda value, however. To grant such an order, the International Court of Justice would first

---


440 See Case Concerning United States Diplomatic And Consular Staff In Tehran, 1979 I.C.J. 7.

441 See id. at 20-21.

442 This is based on the assumption that Israel would likely refuse to honor such an order and that effective coercion by outside actors on Israel would not be forthcoming.
have to rule on the issue of whether the Palestinian Authority is the government of a Palestinian state. This is because only states have standing before the International Court of Justice. Disputes between a state and a non-state actor will not be heard. To hear a suit brought by the Palestinian Authority, the International Court of Justice would have to find that the areas of the West Bank and Gaza which the Palestinian Authority controls are a state. Such a holding would have political value both in negotiations with Israel and in gaining recognition from other countries. Such a ruling could form the basis for an attempt at full United Nations membership.

The differences between these two avenues are enormous. While the International Court of Justice would likely be a much more hospitable forum for these issues, suing in the Israeli system, if successful, would provide greater utility to PLO fedayeen. The Israeli Supreme Court could order the release of PLO fedayeen...

---


444 See International Court of Justice, supra note 317, art. 34(1).


446 The Montevideo Convention on Rights and Duties of States created four criteria for statehood: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the ability to enter into relations with other states. See Montevideo Convention on Rights and Duties of States, 49 Stat. 3097, T.S. 881, 165 L.N.T.S. 19, 3 Bevans 145 (1933). Two interpretive theories have since developed. One, the declarative theory, holds that “a political entity professing to be a state would in fact be one if it, objectively, complies with the criteria . . . enunciated in the Montevideo Convention.” J.D. van der Vyver, Statehood In International Law, 5 Emory Int’l L. Rev. 9, 12 (1991). The other, the constitutive theory, “is founded on the assumption that statehood is dependent on the political entity in question being recognized as a state by other states.” Id. The declaratory is the more accepted theory of the two. See id.

447 The position of Israel remains that the West Bank and Gaza do not make up a Palestinian State. As Ambassador Colette Avital has stated, “[T]he status of these territories has not been changed by the agreement, as stated, inter alia, in Article XI(1) of the Interim Agreement.” Avital Letter, supra note 261.

who were not guilty of war crimes. Suing before the International Court of Justice, however, could produce a finding of statehood which would have great political value even if an order for release from that Court might not be obeyed by Israel.

VIII. Conclusion

Even with the recognition of the PLO and the creation of an embryonic Palestinian state, the argument for granting prisoner of war status to PLO *fedayeen* is questionable at best. While a change in status would entitle PLO *fedayeen* to release at the end of hostilities, which would ostensibly occur when the upcoming final round of negotiations between Israel and the Palestinians is finished,\(^\text{449}\) any real chance for such a release is grounded in the political, not the legal, sphere.

The first basis for granting prisoner of war status is the argument that privileged combatancy should be applied retroactively under the Third Geneva Convention. While a case can be made that being a "Party to the conflict" is retroactive,\(^\text{450}\) the holdings in *Mohamed Ali* and *Ex Parte Quirin* show that violations of Article 4A(2)'s four enumerated requirements should not be overcome by a later adherence to those four criteria.\(^\text{451}\)

The second basis for granting prisoner of war status is if Protocol I was held to be a codification of customary international law. While this is unlikely, even if it were found to be so, Israel falls into the category of a persistent objector to such a custom and thus would not be bound by that custom.\(^\text{452}\)

The final basis for granting prisoner of war status would be reliance on an international custom that requires members of liberation movements to be treated as prisoners of war if and when their movements are recognized politically.\(^\text{453}\) While in many cases states have treated prisoners as de facto prisoners of war

\(^{449}\) PLO *fedayeen* who are guilty of war crimes of course would not be eligible for such a release.

\(^{450}\) This case is in conflict with the earlier analogy to the criminal law on justifications and excuses. *See supra* notes 331-34 and accompanying text.

\(^{451}\) *See supra* notes 308-39 and accompanying text.

\(^{452}\) *See supra* notes 340-46 and accompanying text.

\(^{453}\) *See supra* notes 347-428 and accompanying text.
after hostilities are over, whether these countries have felt legally bound to do so is another question. 454 Any custom which could be argued to exist would also be non-binding on Israel because of its consistent objection to prisoner of war criteria differing from that of the Third Geneva Convention. 455

Any legal attempt to change the prisoner of war status of PLO fedayeen would likely fail. But even without a persuasive legal argument to grant prisoner of war status to PLO fedayeen, a sound political argument can be made in favor of simply granting amnesty to these prisoners. If Israel and a Palestinian state are to eventually be neighbors, some form of reproachment must be made. Years of bloodshed separate the two people, and they will likely never live beside each other harmoniously. Only through some form of reconciliation or healing process is there any chance that those tensions can be reduced. But to grant such an amnesty is in itself a danger to peace if those that are released have not forsworn violence and their victims have not forsworn revenge.

CHRISTOPHER C. BURRIS

454 See supra notes 347-428 and accompanying text.
455 See supra note 342 and accompanying text.