

- persons engaging in spying, sabotage, and similar acts behind enemy lines;²⁷ and
- private persons engaging in hostilities.²⁸

4.3 LAWFUL COMBATANTS AND UNPRIVILEGED BELLIGERENTS

In addition to distinguishing between the armed forces and the civilian population, the law of war also distinguishes between “privileged” and “unprivileged,” or “lawful” and “unlawful” combatants. As the Supreme Court has explained:

Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.²⁹

“Unlawful combatants” or “unprivileged belligerents” are persons who, by engaging in hostilities, have incurred one or more of the corresponding liabilities of combatant status (*e.g.*, being made the object of attack and subject to detention), but who are not entitled to any of the distinct privileges of combatant status (*e.g.*, combatant immunity and POW status).³⁰

4.3.1 “Unprivileged Belligerents” as a Category in Treaty Law. States have, in a few cases, explicitly recognized in treaties certain categories of unprivileged belligerents, such as spies and saboteurs.³¹ However, States have generally refrained from explicitly recognizing unprivileged belligerents as a class in treaties in the way that classes of lawful combatants have been defined.³²

Law of war treaties have been understood to reflect restrictions on the conduct of hostilities by States,³³ and States have been reluctant to conclude treaties to afford unprivileged

²⁷ Refer to § 4.17 (Spies, Saboteurs, and Other Persons Engaging in Similar Acts Behind Enemy Lines).

²⁸ Refer to § 4.18 (Private Persons Who Engage in Hostilities).

²⁹ Ex parte Quirin, 317 U.S. 1, 31 (1942). See also Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality) (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”) (quoting Ex parte Quirin at 28, 30).

³⁰ Refer to § 4.19 (Rights, Duties, and Liabilities of Unprivileged Belligerents).

³¹ See, *e.g.*, HAGUE IV REG. arts. 29-31 (defining the category of spy and regulating the treatment of captured spies); GC art. 5 (regulating the treatment of certain protected persons “detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power”). See also GC COMMENTARY 5 (“It may, nevertheless, seem rather surprising that a humanitarian Convention should tend to protect spies, saboteurs or irregular combatants. Those who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare. Surely they know the dangers to which they are exposing themselves. It might therefore have been simpler to exclude them from the benefits of the Convention, if such a course had been possible, but the terms espionage, sabotage, terrorism, banditry and intelligence with the enemy, have so often been used lightly, and applied to such trivial offences, that it was not advisable to leave the accused at the mercy of those detaining them.”).

³² See, *e.g.*, GWS art. 13; GWS-SEA art. 13; GPW art. 4.

³³ Refer to § 1.3.3.1 (Law of War as Prohibitive Law).

enemy belligerents the distinct privileges of POW status or the full protections afforded civilians.³⁴

Although seldom explicitly recognized as a class in law of war treaties, the category of unprivileged belligerent may be understood as an implicit consequence of creating the classes of lawful combatants and peaceful civilians.³⁵ The concept of unprivileged belligerency, *i.e.*, the set of legal liabilities associated with unprivileged belligerents, may be understood in opposition to the rights, duties, and liabilities of lawful combatants and peaceful civilians. Unprivileged belligerents include lawful combatants who have forfeited the privileges of combatant status by engaging in spying or sabotage, and private persons who have forfeited one or more of the protections of civilian status by engaging in hostilities.³⁶

4.3.2 Combatant – Notes on Terminology.

4.3.2.1 “Combatant” and “Belligerent”. “Combatant” and “belligerent” have sometimes been used interchangeably and, in this usage, they generally describe individuals who are not “civilians.”

“Belligerent,” however, has also sometimes used to describe States and to contrast such States with “neutral” or “non-belligerent” States.³⁷ “Belligerent” has also been used to contrast armed groups that have “belligerent rights” with armed groups that lack such rights, such as “insurgents.”³⁸

³⁴ See, *e.g.*, IIA FINAL REPORT OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 433 (ICRC representative explaining that “[t]he present Conference was engaged in framing a Convention to protect members of armed forces and similar categories of persons, such as members of organized resistance movements, and another convention to protect civilians. Although the two Conventions might appear to cover all the categories concerned, irregular belligerents were not actually protected.”); *id.* at 612 (Swiss representative taking the view that “[i]n regard to the legal status of those who violated the laws of war, the [Civilians] Convention could not of course cover criminals or saboteurs.”); *id.* at 621 (UK representative rejecting a draft which “would mean that persons who were not entitled to protection under the Prisoners of War Convention would receive exactly the same protection by virtue of the Civilians Convention, so that all persons participating in hostilities would be protected, whether they conformed to the laws of war or not. . . . The whole conception of the Civilians Convention was the protection of civilian victims of war and not the protection of illegitimate bearers of arms, who could not expect full protection under rules of war to which they did not conform. Such persons should no doubt be accorded certain standards of treatment, but should not be entitled to all the benefits of the Convention.”).

³⁵ See, *e.g.*, 10 U.S.C. § 948a (“The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who” engages in certain conduct); *Ex parte Quirin*, 317 U.S. 1, 35 (1942) (“Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear ‘fixed and distinctive emblems.’”).

³⁶ Refer to § 4.3.4 (Types of Unprivileged Belligerents).

³⁷ Refer to § 15.1.2 (Classification of States as Belligerent, Neutral, or Non-Belligerent).

³⁸ See, *e.g.*, Memorandum submitted in *United States v. Shakur*, 690 F. Supp. 1291 (S.D.N.Y. 1988), III CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-88 3436, 3448 (“The concept of ‘insurgency’ was traditionally used to describe a conflict that did not meet the rigid standards of customary international law for recognition of belligerency.”); Anthony Eden, Secretary of State for Foreign Affairs, United Kingdom, *Oral Answers to Questions*, Dec. 8, 1937, HANSARD 330 HOUSE OF COMMONS DEBATES § 357 (“His Majesty’s Ambassador at Hendaye has been instructed to inform the Salamanca authorities that as belligerent rights

4.3.2.2 *“Lawful,” “Privileged,” and “Qualified”*. The distinction between “lawful” and “unlawful” combatants has sometimes been called a distinction between “privileged” and “unprivileged” belligerents, *i.e.*, distinguishing between persons who are entitled to the privileges of combatant or belligerent status, and those who are not.³⁹ This distinction has also sometimes been called a distinction between “qualified” and “unqualified” belligerents, *i.e.*, distinguishing between persons who have met the qualifications to receive the privileges of combatant status and those who have not.⁴⁰

4.3.2.3 *“Combatant” Used Without Modification*. “Combatant” and “belligerent,” when used without modification (such as “lawful” or “unlawful,” or “privileged” or “unprivileged”), have often referred implicitly to lawful or privileged combatants.⁴¹ However, in some cases, “combatant” or “belligerent” has been used to refer to all persons who engage in hostilities, without taking a position as to whether they are entitled to receive the privileges of combatant status.

4.3.2.4 *General Usage of “Combatant” in This Manual*. This manual generally uses “combatant” to refer implicitly to lawful or privileged combatants.

This manual generally uses the term “unprivileged belligerent” (instead of, *e.g.*, “unlawful combatant,” “unlawful belligerent,” “unprivileged combatant,” etc.) to refer to persons who are subject to one or more of the liabilities of combatant status, but are not entitled to receive its distinct privileges.

4.3.3 *Types of Lawful Combatants*. Three classes of persons qualify as “lawful” or “privileged” combatants:

- members of the armed forces of a State that is a party to a conflict, aside from certain categories of medical and religious personnel;⁴²
- under certain conditions, members of militia or volunteer corps that are not part of the armed forces of a State, but belong to a State;⁴³ and

have not been recognised to either party in the Spanish conflict. His Majesty’s Government are not prepared to admit their right to declare any such blockade.”). Refer to § 3.3.3 (State Recognition of Armed Groups as Belligerents).

³⁹ See, *e.g.*, 1958 UK MANUAL ¶96 (“Should *regular* combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture.”); Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerillas, and Saboteurs*, 28 BRITISH YEAR BOOK OF INTERNATIONAL LAW 323 (1951); LIEBER CODE art. 49 (describing who is “exposed to the inconveniences as well as entitled to the privileges of a prisoner of war”).

⁴⁰ See, *e.g.*, JAMES M. SPAIGHT, AIRCRAFT IN WAR 51 (1914) (referring to “that outlaw of war law—the unqualified belligerent”); HAGUE IV REG. arts. 1-3 (describing who meets “[t]he Qualifications of Belligerents”).

⁴¹ See, *e.g.*, API art. 43(2) (describing “combatants” as those who “have the right to participate directly in hostilities.”).

⁴² Refer to § 4.5 (Armed Forces of a State).

⁴³ Refer to § 4.6 (Other Militia and Volunteer Corps).

- inhabitants of an area who participate in a kind of popular uprising to defend against foreign invaders, known as a *levée en masse*.⁴⁴

4.3.4 Types of Unprivileged Belligerents. Unprivileged belligerents may generally be classified into two categories that may be distinguished from one another by the presence or absence of State authorization:

- persons who have initially qualified as combatants (*i.e.*, by falling into one of the three categories mentioned above), but who have acted so as to forfeit the privileges of combatant status by engaging in spying or sabotage;⁴⁵ and
- persons who never meet the qualifications to be entitled to the privileges of combatant status, but who have, by engaging in hostilities, incurred the corresponding liabilities of combatant status (*i.e.*, forfeited one or more of the protections of civilian status).⁴⁶

These two categories of unprivileged belligerents generally receive the same treatment.⁴⁷ However, the distinction that the first category has State authorization, while the second category does not, may be important and create different legal results. For example, the combatant who spies regains the entitlement to the privileges of combatant status upon returning to friendly lines, but the private person who spies cannot regain a status to which the person was never entitled.⁴⁸ Similarly, acts of unprivileged belligerency on the high seas may constitute piracy, a crime under international law, although similar acts by persons acting under State authority, even if they were not members of the armed forces, could not constitute piracy.⁴⁹

4.4 RIGHTS, DUTIES, AND LIABILITIES OF COMBATANTS

Combatants have a special legal status, *i.e.*, certain rights, duties, and liabilities. As discussed below, combatants may engage in hostilities and are liable to being made the object of attack by enemy combatants. Combatants must conduct their operations in accordance with the law of war. They have the right to POW status if they fall into the power of the enemy during international armed conflict. Combatants have legal immunity from domestic law for acts done under military authority and in accordance with the law of war.

4.4.1 Combatants – Conduct of Hostilities. In general, combatants may engage in hostilities and may be made the object of attack by enemy combatants.⁵⁰ However, combatants

⁴⁴ Refer to § 4.7 (*Levée en Masse*).

⁴⁵ Refer to § 4.17 (Spies, Saboteurs, and Other Persons Engaging in Similar Acts Behind Enemy Lines).

⁴⁶ Refer to § 4.18 (Private Persons Who Engage in Hostilities).

⁴⁷ Refer to § 4.19 (Rights, Duties, and Liabilities of Unprivileged Belligerents).

⁴⁸ Refer to § 4.17.5 (Spying and Sabotage – Forfeiture of the Privileges of Combatant Status).

⁴⁹ Refer to § 4.18.5 (Private Persons Who Engage in Hostilities and the Law of War).

⁵⁰ Refer to § 5.7 (Combatants).

placed *hors de combat* must not be made the object of attack.⁵¹

Combatants must conduct their operations in accordance with the law of war. For example, combatants must take certain measures to distinguish themselves from the civilian population.⁵² Combatants also may not kill or wound the enemy by resort to perfidy.⁵³ Combatants may make enemy combatants and other military objectives the object of attack, but may not make the civilian population and other protected persons and objects the object of attack.⁵⁴ Combatants must exercise due regard to reduce the risk of incidental harm to the civilian population and other persons and objects that may not be made the object of attack.⁵⁵ Chapter V addresses in detail the rules that combatants must follow in the conduct of hostilities.

4.4.2 Combatants – POW Status During Detention. Combatants are liable to capture and detention by enemy combatants, but are entitled to POW status when they fall into the power of the enemy during international armed conflict. POWs, like all detained individuals, must be treated humanely.⁵⁶ In addition, POWs are afforded a variety of privileges in detention in accordance with the GPW, such as camp canteens, advances of pay, and permission to wear their badges of rank, nationality, or decorations.⁵⁷ POWs also have duties in detention, such as identifying themselves to their captors,⁵⁸ and they are subject to the laws, regulations, and orders of the Detaining Power.⁵⁹ Chapter IX addresses in detail the treatment of POWs and their duties.

In general, POWs shall be released and repatriated without delay after the cessation of active hostilities.⁶⁰ However, seriously wounded, injured, or sick POWs should be returned before the end of hostilities.⁶¹ In addition, after the hostilities have ended, certain POWs may be held in connection with criminal proceedings.⁶²

In general, combatants retain their right to POW status and treatment, even if they are alleged to have committed crimes before capture.⁶³ For example, POWs are entitled to a variety

⁵¹ Refer to § 5.9 (Persons Placed *Hors de Combat*).

⁵² Refer to § 5.4.8 (Obligation of Combatants to Distinguish Themselves When Conducting Attacks).

⁵³ Refer to § 5.22 (Treachery or Perfidy Used to Kill or Wound).

⁵⁴ Refer to § 5.5 (Discrimination in Conducting Attacks).

⁵⁵ Refer to § 5.10 (Proportionality in Conducting Attacks).

⁵⁶ Refer to § 9.5 (Humane Treatment and Basic Protections for POWs).

⁵⁷ Refer to § 9.17 (Canteens for POWs); § 9.18.3 (Advance of Pay); § 9.22.4 (Rank and Age of POWs).

⁵⁸ Refer to § 9.8 (Interrogation of POWs).

⁵⁹ Refer to § 9.26.1 (POWs Subject to the Laws, Regulations, and Orders in Force in the Armed Forces of the Detaining Power).

⁶⁰ Refer to § 9.37 (Release and Repatriation After Hostilities).

⁶¹ Refer to § 9.36.1 (Direct Repatriation of Seriously Wounded, Injured, or Sick POWs).

⁶² Refer to § 9.37.4.3 (POWs Undergoing Criminal Proceedings for an Indictable Offense).

⁶³ Refer to § 9.26.4 (Retention of Benefits of the GPW Even if Prosecuted for Pre-Capture Acts).

of rights in relation to judicial proceedings against them.⁶⁴ In addition, POWs serving disciplinary punishment shall continue to receive the benefits of the GPW, except insofar as these benefits are necessarily rendered inapplicable by the mere fact that the POW is confined.⁶⁵

Combatants captured while engaged in spying or sabotage forfeit their entitlement to POW status.⁶⁶ In cases of doubt as to whether a detainee is entitled to POW status, that person should be afforded the protections of POW status until their status has been determined by a competent tribunal.⁶⁷

4.4.3 Combatants - Legal Immunity From a Foreign State's Domestic Law. International law affords combatants a special legal immunity from the domestic law of the enemy State for their actions done in accordance with the law of war.⁶⁸ This legal immunity is sometimes called the "combatant's privilege" or "combatant immunity." This means that a combatant's "killing, wounding, or other warlike acts are not individual crimes or offenses,"⁶⁹ if they are done under military authority and are not prohibited by the law of war.⁷⁰ Similarly, a combatant's warlike acts done under military authority and in accordance with the law of war also do not create civil liability.⁷¹

⁶⁴ Refer to § 9.28 (Judicial Proceedings and Punishment).

⁶⁵ Refer to § 9.27.6.2 (Retention of the Benefits of the GPW While Undergoing Disciplinary Punishment).

⁶⁶ Refer to § 4.17.5 (Spying and Sabotage – Forfeiture of the Privileges of Combatant Status).

⁶⁷ Refer to § 4.27.2 (POW Protections for Certain Persons Until Status Has Been Determined).

⁶⁸ This legal immunity would also be applicable with respect to neutral States to the extent they sought to exercise jurisdiction over the conduct of belligerents. Traditionally, however, neutral States generally did not assert jurisdiction over conduct committed between belligerents. Refer to § 18.21.1 (Jurisdiction Over War Crimes).

⁶⁹ LIEBER CODE art. 57. See also *Johnson v. Eisentrager*, 339 U.S. 763, 793 (1950) (Black, J., dissenting) (explaining that "legitimate 'acts of warfare,' however murderous, do not justify criminal conviction" and that "it is no 'crime' to be a soldier."); WINTHROP, *MILITARY LAW & PRECEDENTS* 778 ("The State is represented in active war by its contending army, and the laws of war justify the killing or disabling of members of the one army by those of the other in battle or hostile operations."); *Arce v. State*, 202 S.W. 951 (Texas Court of Criminal Appeals 1918) (reversing homicide conviction of Mexican soldiers prosecuted in connection with hostilities between the United States and Mexico). Consider AP I art. 43(2) ("combatants ... have the right to participate directly in hostilities.").

⁷⁰ See *United States v. List, et al. (The Hostage Case)*, XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1236 ("acts done in time of war under the military authority of an enemy cannot involve criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war."); Daniel Webster, Department of State, *Letter to John G. Crittenden, Attorney General*, Mar. 15, 1841, reprinted in THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 134-35 (1848) (explaining "[t]hat an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations").

⁷¹ See *Freeland v. Williams*, 131 U.S. 405, 416 (1889) ("Ever since the case of *Dow v. Johnson*, 100 U.S. 158, the doctrine has been settled in the courts that in our late civil war, each party was entitled to the benefit of belligerent rights, as in the case of public war, and that, for an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority."); *Dow v. Johnson*, 100 U.S. 158, 165 (1879) ("There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings.").

Combatants lack legal immunity from an enemy State's domestic law for acts that are prohibited by the law of war.⁷² Also, combatants lack legal immunity from an enemy State's domestic law while engaging in spying or sabotage.⁷³ Combatants, however, must receive a fair and regular trial before any punishment.⁷⁴

4.4.3.1 *Combatants - Legal Immunity and POW Status.* The “combatant’s privilege” from liability under domestic law has been associated with POW status.⁷⁵ In that vein, U.S. courts have inferred from provisions of the GPW the combatant’s privilege against being prosecuted by capturing States.⁷⁶ However, the legal immunity that combatants may be afforded is not the same as POW status. For example, a combatant’s conduct may be protected by legal immunities even when that person is not in the power of the enemy and thus is not a POW. As another example of how POW status and legal immunity may differ, the GPW generally affords the same treatment to all classes of POWs identified in Article 4. However, not all the categories of POWs identified in Article 4 of the GPW, such as persons authorized to accompany the armed forces, receive the general license to commit belligerent acts that is afforded members of the armed forces.⁷⁷

4.4.3.2 *Combatants – Legal Immunity and Sovereignty.* In addition to being associated with humanitarian principles governing the treatment of POWs, the combatant’s privilege has also been viewed as an application of the immunity that international law affords

⁷² See *United States, et al. v. Göring, et al., Judgment*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE IMT 223 (“He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.”).

⁷³ Refer to § 4.17.3 (Spying and Sabotage – Forfeiture of the Privileges of Combatant Status).

⁷⁴ Refer to § 9.28.4 (Rights of Defense and Trial Procedure).

⁷⁵ See, e.g., Memorandum submitted in *United States v. Shakur*, 690 F. Supp. 1291 (S.D.N.Y. 1988), III CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-88 3436, 3451 (“It is well-accepted that individuals who enjoy the status of prisoner of war are generally immune from prosecution for legitimate acts of war in international armed conflicts.”); ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 305 (1976) (“there has traditionally been a close relationship between the concept of prisoners of war and that of lawful combatants.”); LIEBER CODE art. 56 (“A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.”).

⁷⁶ See *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (memorandum opinion) (interpreting articles 87 and 99 of GPW to “make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers’ lawful acts of war”); *United States v. Khadr*, 717 F.Supp.2d. 1215, 1222 footnote 7 (USCMCR 2007) (same); *United States v. Pineda*, 2006 U.S. Dist. LEXIS 17509, 6-8 (D.D.C. Mar. 23, 2006) (D.D.C. 2006) (same). See also *United States v. Noriega*, 746 F. Supp. 1506, 1529 (S.D. Fla. 1990) (“As is evident from its text and construed as a whole, the essential purpose of the Geneva Convention Relative to the Treatment of Prisoners of War is to protect prisoners of war from prosecution for conduct which is customary in armed conflict.”).

⁷⁷ ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 305 (1976) (“The relationship between the concepts of lawful combatants and prisoners of war has been said to arise from the fact that lawful combatants are always entitled to prisoner-of-war status, while the reverse is not necessarily true, as there are categories of persons entitled to the status of prisoners of war who as civilians enjoy no general license to commit belligerent acts.”).

States from each other's jurisdiction.⁷⁸ In this view, "the act of the soldier who conforms to the law of war and does not engage in private acts of warfare is an act of state depriving the enemy state of jurisdiction."⁷⁹ This view of the combatant's privilege requires that combatants act under the commission of a belligerent State.⁸⁰ This view also reflects the principle that only States may authorize the resort to force.⁸¹

4.4.4 Nationality and Combatant Status.

4.4.4.1 *Nationals of Neutral States in Enemy Forces.* Members of enemy armed forces may include nationals of neutral or non-belligerent States. For example, the U.S. armed forces include many foreign nationals, and the United States could be engaged in hostilities when those foreign nationals' home States are not. Nationals of a neutral or non-belligerent State who are members of the armed forces of a belligerent State should be treated like other members of that State's armed forces.⁸² For example, such nationals are entitled to POW status if they fall into the power of the enemy during international armed conflict.⁸³

4.4.4.2 *Nationals of a State Who Join Enemy Forces.* The special privileges that

⁷⁸ Cf. *United States v. Thierichens*, 243 F. 419, 420 (E.D. Pa. 1917) ("The well-settled rule that, under the comity existing between nations, the public armed ship of a friendly nation, acting under the immediate and direct command of the sovereign power, is not to be interfered with by the courts of a foreign state, is based upon the principle that, if the courts did attempt to assume jurisdiction over such vessel, it would require the sovereign of the nation to which the vessel belongs to be impleaded in the court from which the process issued, and, by common consent of nations, such situations could not arise without interference with the power and dignity of the foreign sovereign. Therefore the courts will not assume jurisdiction over such vessel or its officers, while acting as such, but leave controversies arising out of the acts of the vessel, and its officers, while acting in their official character, for settlement through diplomatic channels.").

⁷⁹ Richard Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 28 BRITISH YEAR BOOK OF INTERNATIONAL LAW 382, 385 (1951). See also Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CALIFORNIA LAW REVIEW 530, 549 (1943) ("That a State violates international law if it punishes as a criminal, according to its national law, a member of the armed forces of the enemy for an act of legitimate warfare, can be explained only by the fact that the State by so doing makes an individual responsible for an act of another State. According to international law, the act in question must be imputed to the enemy State and not to the individual who in the service of his State has performed the act. It cannot be considered as a crime of the individual because it must not be considered as his act at all."); LIEBER CODE art. 41 ("All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.").

⁸⁰ See Wharton, *Com. Am. Law*, § 221, VII MOORE'S DIGEST 175 ("It is necessary in order to place the members of an army under the protection of the law of nations, that it should be commissioned by a state. ... Hence, all civilized nations have agreed in the position that war to be a defence to an indictment for homicide or other wrong, must be conducted by a belligerent state, and that it can not avail voluntary combatants not acting under the commission of a belligerent.").

⁸¹ Refer to § 1.11.1.1 (Competent Authority (Right Authority) to Wage War for a Public Purpose).

⁸² Refer to § 15.6.2.1 (No More Severe Treatment Than Nationals of an Opposing Belligerent State).

⁸³ LEVIE, POWS 74-75 ("Normally, the nationality of the individual falling within one of the categories enumerated in Article 4 is that of the belligerent Power for which he is fighting. However, he may have the nationality of a neutral, or of an ally of the belligerent in whose armed forces he is serving at the time that he falls into the power of the enemy--or even of the adverse Party, or one of its allies. Does this affect his entitlement to prisoner-of-war status? Apparently there is no dispute with respect to the entitlement to prisoner-of-war status of an individual who is a national of a neutral State or of a State which is an ally of the belligerent in whose armed forces he is serving.").