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## SOME COMMENTS ON PROFESSOR RODES' DRAFT CONVENTION

FREDERIC L. KIRGIS, JR.\*

Professor Rodes has prepared a Draft Convention on Clandestine Warfare that would have no chance of adoption at any intergovernmental conference on humanitarian law. Some would question the usefulness of such an exercise. Those pragmatic doubters, I think, would be missing the point. It is very useful indeed to see whether, and how, humanitarian rights and duties could be formulated for an increasingly common type of armed conflict, if we could be free from the political constraints imposed by governments that do not wish to impart legitimacy to insurrections and revolutions within their own territories.<sup>1</sup> Only if someone like Professor Rodes is willing to try to formulate these rights and duties in such an "unrealistic" way can we judge whether the attempts governments are actually willing to make—such as the attempts embodied in the two 1977 Protocols to the 1949 Geneva Conventions<sup>2</sup>—are themselves realistic or useful.

Professor Rodes asks the reader to consider the methods of clandestine warfare from the standpoint of a person who believes in the cause, while the countermeasures should be considered from the standpoint of a person who believes that the clandestine force should be rigorously suppressed.<sup>3</sup> It would have been better simply to ask the reader to accept two propositions: (a) clandestine warfare is not simply a matter for municipal law even though the clandestine forces may not satisfy the conditions of Protocol I, article 1(4)<sup>4</sup> or of Protocol II, article 1(1);<sup>5</sup> and (b)

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<sup>1</sup> One aspect of Professor Rodes' Draft Convention on Clandestine Warfare (Draft Convention) (*reprinted at* 39 WASH. & LEE L. REV. 358 (1982)) does seem excessively unrealistic. In article 1(4) he seems to say that the Convention would bind nonparties. *See* Rodes, *On Clandestine Warfare*, 39 WASH. & LEE L. REV. 333, 358-59 (1982) [hereinafter cited as Rodes]. Moreover, it apparently would bind them even if no party to the conflict is a party to the Convention, so long as the warfare is in or merely "affects" the territory of a party to the Convention. *See* Draft Convention, art. 1(1). The international political-legal order simply has not reached the stage at which one may talk seriously about such legislative decision-making for nonconsenting political entities.

<sup>2</sup> Protocols I and II Additional to the Geneva Conventions of 12 August 1949, signed June 10, 1977, 16 INT'L LEGAL MATERIALS 1391 and 1442 (1977) [hereinafter cited as Protocol I and Protocol II].

<sup>3</sup> Rodes, *supra* note 1, at 334-35.

<sup>4</sup> Protocol I, art. 1(4), *supra* note 2, relates to armed conflicts of self-determination.

<sup>5</sup> Protocol II, art. 1(1), *supra* note 2, relates to internal armed conflicts when dissident forces are under responsible command and exercise a significant degree of territorial control.

humanitarian rules that do not effectively recognize clandestine forces' need to be clandestine, and central governments' need to find and engage their enemies, will not be obeyed. Acceptance of these propositions would be sufficient for Professor Rodes' purposes, and would avoid the necessity of asking whether a true believer would accept each provision that limits the freedom of one side or the other.

Any attempt to evaluate or to reformulate the humanitarian law of clandestine or conventional war must focus clearly on the purposes of humanitarian law. Professor Rodes has accurately identified two central purposes: to sustain some sort of relation between two "litigants," each of whom struggles to obtain a favorable judgment; and to give some degree of precision to moral principles about how fighting should be conducted if there must be fighting at all.<sup>6</sup> The former purpose looks toward the conclusion of the struggle, when the judgment has been rendered. Its underlying premise is that if the parties have been given some standards of permissible conduct to obey during the struggle, and if they have actually observed them, there is a better chance for reconciliation—or at least for peaceful coexistence—among former enemies after the war than if they had been free to act as they pleased toward their opponents or toward civilians during the struggle. The latter purpose simply recognizes that conflict, no matter how bitter, cannot justify the suspension of certain moral principles if humankind is to avoid a descent into savagery, and tries to supply reasonably clear guidance for the attainment of those principles.

Both of these purposes are served by protecting noncombatants from the terrors of war, insofar as it is feasible to do so. International law always has recognized that noncombatants' interests will not be honored in practice when they stand in the way of combatants' attainment of military objectives, at least if those objectives are "legitimate." Consequently, it would be futile for the law to try to place noncombatants' interests ahead of combatants' interests in such cases. Thus the humanitarian law of war has tried to strike a delicate balance, protecting civilians whenever possible, but recognizing overriding military necessity.

My primary criticism of Professor Rodes' Draft Convention is that it fails adequately to weigh the noncombatants' interests in that balance. He does acknowledge their interests,<sup>7</sup> and he tries to limit the categories of persons subject to attack.<sup>8</sup> In his concern for giving clandestine forces the authority to ply their trade, however, he makes their failure to distinguish themselves from noncombatants neither a war crime nor a cause for forfeiture of prisoner-of-war status. This permissiveness is a radical departure from the Third Geneva Convention of 1949, which con-

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<sup>6</sup> Rodes, *supra* note 1, at 353.

<sup>7</sup> *Id.* at 355, 356.

<sup>8</sup> *Id.* at 356-57; Draft Convention, arts. 3, 6.

ditions prisoner-of-war status on, inter alia, the wearing of a distinctive sign recognizable at a distance and the carrying of arms openly.<sup>9</sup> It is a less radical, but significant, departure from Protocol I. That Protocol drops the distinctive sign requirement, but requires combatants to distinguish themselves from civilians while engaged in an attack or in a military operation preparatory to an attack. It denies prisoner-of-war status to clandestine forces who are captured while failing to carry arms openly during a military engagement or while visible to the adversary during a military deployment preceding an attack.<sup>10</sup> Concerned persons have long recognized that civilians are exposed to grave personal risks if forces vulnerable to attack from irregulars cannot, in moments of danger, distinguish their actual or potential adversaries from the rest of the populace.<sup>11</sup> Proscriptions against indiscriminate bombing or free fire zones<sup>12</sup> will not protect civilians in such cases.

Probably the Protocol I solution is the best balance currently attainable between recognition of clandestine forces' need to be clandestine, on the one hand, and the need to protect noncombatants, on the other.<sup>13</sup> That solution, however, should be extended beyond Protocol I conflicts (i.e., international conflicts, including "wars of self-determination") to include any clandestine warfare situation that meets the conditions of Professor Rodes' Draft Convention articles 1(1) and 2(1). This extension would provide clandestine forces in "noninternational" conflicts with some incentive to distinguish themselves from civilians at crucial times, and thus would offer civilians in such conflicts a degree of protection not currently available to them.

Professor Rodes' restrictions on the conduct of hostilities would establish one new set of rules for clandestine forces and another set for their opponents.<sup>14</sup> The new rules for clandestine forces are tailored to tactics heretofore used by such forces, and the rules for government forces are similarly tailored to their usual tactics. In practice, however, most of the restrictions could profitably be applied to the forces on either side. Professor Rodes probably has indirectly imposed his rules for clandestine forces on both sides, by saying that government forces remain subject to the obligations they would have in wars against con-

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<sup>9</sup> Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(2), 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

<sup>10</sup> Protocol I, art. 44(3) and (4), *supra* note 2.

<sup>11</sup> See, e.g., H. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 46-47 (Naval War College International Law Studies, vol. 59, 1978).

<sup>12</sup> Draft Convention, art. 6(1)(g) and (h).

<sup>13</sup> Cf. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764, 773-74 (1981). I am not maintaining that the Protocol I solution is free from ambiguity or would be ideal if the ambiguities could be resolved. For some of the conflicting interpretations of its key provisions, see Herczegh, *The Extension of the Notion of Combatant in the Light of the Geneva Protocols of 1977*, reprinted in EUROPEAN SEMINAR ON HUMANITARIAN LAW 47, 53-54 (1979).

<sup>14</sup> Draft Convention, arts. 3, 6.

<sup>15</sup> Draft Convention, art. 6.

ventional forces.<sup>15</sup> The usual rules against such things as perfidy and the intentional terrorizing of civilians<sup>16</sup> incorporate Professor Rodes' restrictions on clandestine forces. On the other hand, he has not effectively taken the pertinent rules intended for government forces and imposed them upon clandestine forces. For example, government forces have been known to expose innocent persons to danger in order to discourage attacks, a tactic proscribed by Professor Rodes for those forces;<sup>17</sup> but clandestine forces have been known to adopt the same tactic, and they should similarly be prohibited from doing so.

My final point concerns Professor Rodes' provisions on the administration of justice by clandestine forces. He would permit them to administer criminal justice over conduct in territory not under their control or over persons not within their custody, in certain circumstances.<sup>18</sup> After a trial *in absentia*, the convicted person could be attacked for the purpose of carrying out the sentence.<sup>19</sup> This result would be vigilante justice at its worst. It is not necessary to permit such proceedings in order to place clandestine forces on an equal footing with conventional forces. If there is no genuine necessity for potentially lethal proceedings so bereft of normal jurisdictional bases and of fundamental procedural safeguards, they certainly should not be condoned. *A fortiori*, they should not specifically be authorized.

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<sup>15</sup> See Protocol I, arts. 37 and 51(2), *supra* note 2. Professor Rodes' Draft Convention would make provisions such as those prohibiting perfidy and frightening of citizens applicable even to armed conflicts that are outside the express coverage of Protocol I. See Draft Convention, art. 1(2).

<sup>17</sup> Draft Convention, art. 6(1)(c).

<sup>18</sup> Draft Convention, art. 5.

<sup>19</sup> See Draft Convention, art. 3(1)(e).