

Should Unlawful Combatants be Considered as Prisoners of War when Captured?

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Abstract

When an enemy combatant is captured or held captive, they are typically designated as a prisoner of war (POW), which grants them certain rights and protections under the Geneva Conventions. Even during the pre-trial detention phase, it is expected that the State or the capturing belligerent party treats the combatant humanely. However, a complication arises in distinguishing between "enemy combatants," a term that encompasses both "lawful" and "unlawful" combatants. While lawful combatants are automatically granted POW status, classifying unlawful combatants in a similar manner is generally discouraged. Consequently, captured combatants may be denied the rights afforded to POWs. Although the term "enemy combatant" lacks an official existence in the Geneva Conventions, it is commonly used in other texts and has become a subject of debate. Regrettably, this omission leaves those involved in illegal armed conflict vulnerable to cruel punishments and inhumane treatment while in enemy custody. This paper explores the discrimination between lawful and unlawful combatants,

questioning whether it is justifiable to withhold POW status or proper protection solely based on the absence of explicit mention in the Geneva Conventions.

Keywords

Geneva Convention, International Law, Law, Prisoner Law, Prisoner of War

Introduction

An enemy combatant is entitled to having protection under the Geneva Conventions as a prisoner of war (POW) if he/she is a lawful one.¹ It is no surprise that an international convention is protecting the rights of a combatant who has been identified as a lawful participant in armed conflicts. The question arises when a combatant does not come under the definition of a lawful combatant. Will a similar protection or status extend to a person who is identified as an unlawful combatant? What are the complexities to extending protection towards an unlawful enemy combatant? The problem begins with the issue of having no fixed definition of an unlawful combatant in the Geneva Conventions. A 'lawful enemy combatant' as a term has been given a number of criteria and the term is applied and well defined in international Law.² Unfortunately the 'unlawful enemy combatant' has not yet been defined by any international convention or instrument of public international law.³ The existence of the term is in legal literature or articles which does not serve as a solid ground for this term to be taken seriously.⁴ Such a non-existence of a definition has clearly created a loophole in extending protection to any person who has been captured as unlawful enemy combatant. While a lawful enemy combatant may receive POW status and enjoy the rights of protection under Geneva Convention, an unlawful combatant may have to face numerous torture or inhumane conditions upon being captured.⁵ To make matters more

¹ William Haynes, 'Enemy Combatants' (*Council on Foreign Relations*, 12 December 2002) <<http://www.cfr.org/international-law/enemy-combatants/p5312>> accessed 10 April 2017

² Knut Dörmann, 'The legal situation of "unlawful/unprivileged combatants"' [2003] 85(849) *International Review of the Red Cross* 46

³ Veronika Bilkova, 'Talking About Unlawful Combatants? A Short and Concise Assessment of a Long and Multifaceted Debate' [2009] 3(2) *Central European Journal of International and Security Studies* 38

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⁵ Yoram Dinstein, 'Unlawful Combatancy' [2003] 79(1) *International Law Studies* 154

complicated the term has only been defined by an act which was introduced by the United States. The *Military Commissions Act of 2006*, later amended as *Military Commissions Act of 2009* of the U.S. has created a definition of its own under its national law.⁶ The term was defined by George W. Bush government through this particular act and it does not have any existence in any international conventions.⁷ The Bush Government's ideology behind this was to keep those captured during the "war on terrorism" in detention for an indefinite period and constantly deny them the rights of POWs while labeling them as unlawful combatants.⁸ Although the 2009 amendment of the act brought some considerable changes in part of the act many other parts were kept unaltered.⁹

As a result, there remains a possibility of exploitation of this situation through committing heinous acts of brutality against humanity just based on the simple fact of declaring someone as an unlawful combatant.¹⁰ Moreover, there is no accountability on behalf of the enemy with power who have captured and tortured an enemy combatant who has failed to follow the code of war and once it has been proven.

Deconstructing the Term "Enemy Combatant"

In this case the categorization of the term "enemy combatant" has given rise to the issue at hand. The term 'enemy combatant' is applied towards both a lawful combatant and an unlawful participant of war or belligerent. Now a lawful combatant has followed all the codes and ethics of war, hence he/she is entitled to POW protection and has been given a definition under the Third Geneva Convention.¹¹ On the other hand, having been unable or unwilling to follow the codes, an enemy combatant may also be considered as unlawful or

⁶ 'Military Commissions Act of 2006: A Summary of the Law' (*Center for Constitutional Rights*, 17 October 2006) <http://ccrjustice.org/sites/default/files/assets/files/report_MCA.pdf> accessed 23 March 2017

⁷ *Ibid*

⁸ Miriam J Aukerman, War, crime, or war crime? interrogating the analogy between war and terror . in David K. Linnan (ed), *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues: A Guide to the Issues* (ABC-CLIO 2008)145

⁹ Yolanda C Rondon, 'The Military Commissions Act of 2009: Did Congress Get it Right?' [2012] (online)Student Appeal <<https://thestudentappeal.com/the-military-commissions-act-of-2009-did-congress-get-it-right-1920660c4830>> accessed 12 April 2017

¹⁰ Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004) 30

¹¹ Terry D Gill and Eliesvan Sliedregt, 'Guantánamo Bay: A Reflection on the Legal Status and Rights of 'Unlawful Enemy Combatants'' [2005] 1(1) Utrecht Law Review 33

illegal combatant but this is not a defined term.¹² In such case no protection which is written in black and white exclusively mentioned in the Geneva Convention regarding unlawful combatant is given to such person, because there is not any. As a result, the captured person may also be subjected to torture while in captivity. Such reluctance towards the rights of unlawful combatants has given rise to concerns.

Lawful Combatant

As we know by now, the basic differentiation that separates a lawful from an unlawful combatant is the fact that a lawful combatant follows the rules and ethics of war. The origin of the term was not so straightforward though. The first concept of the term and what amount to lawful combatant status came from the Lieber Code of 1863.¹³ Later on the First Geneva Convention of 1864 took the matter of lawful combatant in its domain but did not actually give any particular definition.¹⁴ The first effort to define specifically the term lawful combatant itself was during Brussels Conference in 1874.¹⁵ Although initially the definition was not adopted by any internationally binding instrument later on it was accepted by the Hague Regulations 1899 and 1907.¹⁶ Finally, the 1949 diplomatic conference is where lawful combatants saw a ray of hope and upon addition of supplementary categories in the Geneva Conventions the idea was cemented.¹⁷

Requirements concerning combatant status can be found in article 13(1) of *Geneva Convention for The Amelioration of The Condition of The Wounded and Sick in Armed Forces in The Field of 12 August 1949 (First Geneva Convention)* and *Geneva Convention for The Amelioration of The Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (Second Geneva Convention)*.¹⁸

The term is also mentioned very neatly in *the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention)*. Not only does it define the term but also lays down the rights and protection directed to him/her. To be more precise, it can be said that

¹² *Ibid*

¹³ Emily Crawford, Combatants. in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 124

¹⁴ *Ibid* 125

¹⁵ *Ibid*

¹⁶ *Ibid*

¹⁷ *Ibid*

¹⁸ *Ibid*

when a combatant receives POW status then he can be assumed to be a lawful combatant. Now how can it be determined whether a combatant is lawful or not? In order to answer that question, based on the analysis so far, one has to find out the ones to receive POWs status. Under article 4 of the Third Geneva Convention, a person who has fallen into the hands of enemy may be deemed to be a lawful combatant if he falls under the category mentioned below:

If he worked as an armed forces affiliate of the power against which the armed conflict is ongoing, that the individual who has been captured as a combatant is being commanded by a higher ranking official, that the individual had a distinctive sign or emblem due to being a member of armed forces and such emblem was identifiable, that the combatant was carrying arms openly and finally that combatant was actually following the rules and customs of war.¹⁹ Besides that a combatant who has been part of a regular armed forces and had acknowledged loyalty to a government may also fall under the category of a lawful combatant and be entitled to POW status.²⁰ As can be perceived from above, it is very clear and easier to distinguish a lawful combatant from an unlawful combatant.

Unlawful Combatant

Although no fixed definition is available in the Geneva Conventions, an unlawful combatant can be described as a person who is without the benefit of having a lawful combatant's advantages yet chooses to take active part in hostility.²¹ Unlawful combatant may include civilians, people associated with the armed forces, even the non-combatant members of armed forces who violating their protected class has taken up weapons to join in the hostility.²² However, the first use of the term can be traced back to a case from 1942 popularly known as the "Ex Parte Quirin case". In this case, eight men of German descent and US citizenship were trained in Germany to use explosives.²³ Four of them arrived in Long Island, New York via a submarine and after arriving there, they buried the German soldier uniform they were wearing in the ground.²⁴ They went on to carrying timing devices and

¹⁹ *Geneva Convention Relative to the Treatment of Prisoners of War, (adopted 12 August 1949, came into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) art 4*

²⁰ *Ibid*

²¹ Robert K Goldman and Brian D Tittmore, 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' [2002] *The American Society of International Law Task Force Papers* 4

²² *Ibid*

²³ *Ex Parte Quirin, 317 U.S. 1 (1942)*

²⁴ *Ibid*

explosives with them while wearing civilian clothes.²⁵ The other four similarly arrived to Florida via another submarine and buried their German Marine caps along with other materials they were carrying and proceeded as civilians.²⁶ Later on all the eight men were arrested and confessed on having instruction by the German authority to destroy the American war facilities in exchange of monetary benefits.²⁷ The court in its judgment regarding this case depicted a firm distinction between a lawful combatant and an unlawful combatant.²⁸ The distinction included that an unlawful combatant is subject to capture and detention, but unlike a lawful combatant, he/she is entitled to trial and punishment by military tribunals.²⁹ This distinction set out the path for a definition in the *Military Commissions Act of 2006* of the USA.

So far it is clear that a person not following the code of war is an unlawful combatant. Even if a lawful soldier in an international armed conflict situation, removes his uniform or any distinctive sign in order to engage in combat, he becomes an unlawful combatant and loses the status of POW upon being captured.³⁰ However, the term is not clearly defined neither in any of the Geneva Conventions nor in any other international conventions. As a result, it becomes difficult to determine the status of an unlawful combatant. Moreover, because of such negligence towards unlawful combatants it has become an alarming concern as it leaves the issue vulnerable to injustice. The only exact definition of the term can be found in *Military Commissions Act of 2006* of the United States of America which states as below:

“(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces); or(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.”³¹ The issue here is, very purpose of the Act and the definition was to categorize the Taliban and Al-Qaeda soldiers captured throughout the armed

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ *Ibid*

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ Gary D Solis, *The Law of Armed Conflict* (Cambridge University Press 2010) 221

³¹ *Military Commissions Act of 2006* (USA) S 948 a

conflict in Afghanistan as unlawful combatants.³² The idea behind this was to deny the captured combatants the status of POW and deny any rights in the process.³³ Later after the amendment in 2009 the term “unlawful combatant” was replaced with “unprivileged enemy belligerent.”³⁴ Such change has only alteration of the term maybe, but not any genuine upgrade.³⁵

Now one thing that can be seen from here is the fact that the very motive for defining the term was somewhat negative. The reason for calling it negative is because that it was defined to punish or detain the combatants and not for any other affirmative rationale. In International Law although the unlawful combatant term is not well defined and unprotected by the third Geneva Convention, once such individual has been captured, he/she may be protected under the Fourth Geneva Convention and Additional Protocol 1.³⁶ The combatant not deemed to be a lawful one, maybe considered as a civilian and get the protection as a civilian as well but that is not fully guaranteed.³⁷

Discriminating Issue between Lawful and Unlawful Combatants

‘Unlawful combatant’ as a term was invented mostly to distinguish between the civilian people and the combatants in an armed conflict situation.³⁸ The reason for such distinction can be identified as mechanism to provide distinctive protection to any combatant who has participated in the armed conflict and followed the rules of war.

A critical comparison between the protection available for the two combatants unveils the huge differentiation that exists in the matter of international armed conflict.

³² René Värk, ‘The Status and Protection of Unlawful Combatants’ [2005] 10 *Juridica International* 191

³³ *Ibid*

³⁴ Joanne Mariner, ‘A First Look at the Military Commissions Act of 2009, Part One’ (*Find Law*, 2009) <<http://supreme.findlaw.com/legal-commentary/a-first-look-at-the-military-commissions-act-of-2009-part-one.html>> accessed 11 April 2017

³⁵ *Ibid*

³⁶ Marco Sassoli, ‘Query: Is there a status of “unlawful combatant?”’ [2006] 80 *International Law Studies* operations 60

³⁷ *Ibid*

³⁸ Manooher Mofidi, and Amy E Eckert, ‘Unlawful Combatants or Prisoners of War: The Law and Politics of Labels’ [2003] 36(1) *Cornell International Law Journal* 2003 68-69

Protection to Lawful Combatants

A wide array of protection is provided to the POWs which lawful combatants obtain under the Third Geneva Convention. Some of the protections provided to a POW status holder lawful combatant are given below:

Under Article 12 of the Third Geneva Convention, the first and foremost protection that Prisoners of War receive, is that they become the responsibility of the state which has captured them.³⁹ Vital standards of treating lawful combatants also include provision of humane treatment under article 13,⁴⁰ which means any sort of act amounting to death or serious injury to the POWs while in custody is absolutely prohibited.⁴¹ Any physical mutilation or medical experimentation on the POWs is also exclusively prohibited under this article.⁴² Also no act of violence, intimidation or insult shall be directed towards them.⁴³ The POWs are to be respected and treated with honor during custody.⁴⁴ They are also entitled to free medical treatment from the state which has captured them.⁴⁵ Whoever is detaining the POWs, has to give equal treatment to every single one of them irrespective of race, sex and ethnicity according to this convention as well.⁴⁶ These were some general provisions regarding the manner to deal with the POWs. But the protection is far broader than this which gives detailed provisions which has to be followed from the beginning of keeping in captivity till the termination of it.

The additional protection given include the POWs' right of not being bound or forced to provide any information except for the name, surname, date of birth, rank etc.⁴⁷ Also POWs may be subjected to internment but are not to be held in a close confinement, unless it is a question of the prisoner's health.⁴⁸ Also it is permitted to free the prisoner on parole or promise as well.⁴⁹ To give a proper example of how detailed and carefully crafted provisions regarding a captured lawful combatant or POW are, this next articles can be used. In article 22 even the place of internment is described as well, which says that the place has to be on land and has to be maintained with proper hygiene

³⁹ *Geneva Convention Relative to the Treatment of Prisoners of War, (adopted 12 August 1949, came into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) Art 12*

⁴⁰ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 13

⁴¹ *Ibid*

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 14

⁴⁵ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 15

⁴⁶ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 16

⁴⁷ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 18

⁴⁸ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 21

⁴⁹ *Ibid*

and healthiness.⁵⁰The prisoners have to be quartered and has to be given conditions which are similar to the given condition to the forces.⁵¹The food ration supplied for the prisoners have to be sufficient and enough in quantity, the quality of the food is also to be maintained at all times.⁵² Another thing which is specifically mentioned in this article is that there should occur no loss of health or nutrition deficiency to the prisoners.⁵³ Adequate amount of clothing, underwear and footwear are also to be supplied to a POW.⁵⁴ The camps where the prisoners are kept also have to have canteens with available articles of necessity for everyday life.⁵⁵ The Convention also provides POWs with right to hygiene which the capturing state has to ensure by maintaining a clean and sanitary environment where the prisoners are kept.⁵⁶ Any kind of medical attention has also to be provided by the state which has captured the prisoner and camps must include a medical unit for the treatment of seriously ill prisoners.⁵⁷Although the prisoners are interned, they cannot be stripped off of their right to perform religious duties.⁵⁸ Prisoners under this convention are also allowed to send letters and cards outside while they are interned in the prison.⁵⁹ POWs are also entitled to the right of making any complaint regarding their condition of internment, to the authority or high ranking officer under whom they are being interned and held captive.⁶⁰ For penal sanctions and disciplinary measures the law that governs the execution of penalties against the prisoners, should be the same that governs the penal sanctions for the members of the armed forces of the state that is detaining the prisoners.⁶¹ The prisoner being a lawful combatant also gains rights to be tried in a military court and no other court where he might not have the defense.⁶² The prisoner may be tried in a civil court if the detaining country expressly permits to be done so.⁶³ After the hostility of war is over, the prisoners have to be released and sent back to their countries of origin when the captivity period ceases to exist.⁶⁴

⁵⁰ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 22

⁵¹ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 25

⁵² *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 26

⁵³ *Ibid*

⁵⁴ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 27

⁵⁵ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 28

⁵⁶ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 29

⁵⁷ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 30

⁵⁸ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 34

⁵⁹ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 71

⁶⁰ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 78

⁶¹ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 82

⁶² *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 84

⁶³ *Ibid*

⁶⁴ *Ibid* 75 UNTS 135 (Third Geneva Convention) Art 109

This was an overview of the protection, rights and treatment that a lawful combatant receives automatically, when captured by a detaining power. It can be perceived from the above discussion how carefully the convention was drafted from defining of who should be entitled to “POW” status to every single detail on the manner for treating such prisoner. Now when a lawful combatant has been captured, he may get all these rights but what happens when a person captured is not identified as a lawful combatant? What are the rights that person has is the burning question here.

Protection of Unlawful Combatant

Having the combatant status legitimizes the participation of the combatant in a war unless any war crime has been committed on that person’s behalf.⁶⁵ The issue however here, is the fact when a person is denied of the combatant status, because that is when the application of the term “unlawful combatant” starts to operate.⁶⁶ The reason for this is because the person is acting like a combatant but is not one and a person cannot act like both a civilian and a combatant at the same time.⁶⁷ As a result an unlawful combatant ends up losing the right of a combatant's privilege and the protection of the Third Geneva convention.⁶⁸ That is the reason when the issue regarding the protection of an unlawful combatant comes up, things appear to be much more complicated. Because the way a lawful combatant easily acquires rights to be protected under the Geneva Conventions, for an unlawful combatant achieving protection is far more complex.

The basic division between people in armed conflict is divided into two parts, either lawful combatants or civilians.⁶⁹ It is built around the concept of essential right of identification by the law and that no one should be deprived of it.⁷⁰ In between these two the grey area which is not defined properly is the concept of unlawful combatants.⁷¹

In case of international armed conflicts, providing protection to an unlawful combatant is like picking up bits and pieces from here and there.

⁶⁵ Emily Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (OUP Oxford 2010) 52

⁶⁶ *Ibid* 53

⁶⁷ *Ibid*

⁶⁸ *Ibid*

⁶⁹ Kenny Lannoy, ‘Unlawful/unprivileged combatant, armed conflict and international law in the 21st century: Slipping through the loopholes of the Geneva Conventions?’ (Master, Faculty of Law Ghent University 2009-2010) 24

⁷⁰ *Ibid* 25

⁷¹ *Ibid*

Due to having no separate provision exclusively directed towards them, it becomes tougher to decide on what ground they are to be protected. First of all, if it cannot be decided whether the person captured is a lawful or unlawful combatant, he/she has to receive the POW status until a competent court decides the matter, although the definition of a competent court is not given.⁷² The question pops up every now and often whether unlawful combatants should receive protection or not. The simple answer could have been that based on the Fourth Geneva Convention which states that every individual is entitled to protection who has discovered himself in the hands of the enemy.⁷³ However, it is not that simple because it is also mentioned in the same convention that if the person is captured by his/her own state, this protection will cease to exist because international humanitarian law does not interfere with the sovereignty of a state.⁷⁴ It means in order to acquire such safeguard an individual would have to meet the nationality criterion in the first place. Besides this, a State which is not party to the convention is also not bound to provide protection to the unlawful combatant under the provisions of the Fourth Geneva Convention.⁷⁵ In short, the protection under Fourth Geneva Convention may be applied towards some unlawful combatant but does not take into account all of them. Nonetheless if an individual does manage to get the protection of the Fourth Geneva Convention it is not an absolute guarantee.⁷⁶ One other thing to be remembered here is that the lawful combatants are not entitled to be prosecuted just for mere participation in the hostility, but when it comes to unlawful combatants, they can be prosecuted for the same reason.⁷⁷ The extent of protection regarding of the two classes of combatants is well apparent from this very fact.

In the event of non-international armed conflict, a combatant upon being captured does not have to be given the protection of a POW at all because countries are free to try their people under the existing judicial system and that applies to the case of unlawful combatants as well. The unlawful combatants may as well be prosecuted and punished under the judicial system but has to be given a fair trial.⁷⁸

Similar to the Third Geneva Convention, some of the protections given by the Fourth Geneva Convention also include the right to be treated with honor

⁷² *Ibid*

⁷³ *Ibid*

⁷⁴ *Ibid*

⁷⁵ *Ibid*

⁷⁶ *Ibid*

⁷⁷ *Ibid*

⁷⁸ *Ibid*

and dignity and with respect to their family and religious customs.⁷⁹ Proper food to the internees has to be supplied by the ones who have captured them.⁸⁰ The internees are also entitled to get necessary clothing items, which has to be provided by the state which has kept them interned.⁸¹ The State also has to provide them with medical attention whenever necessary and routine medical checkup has to be conducted as well.⁸² These are some of the rights to be given to the protected persons under the Fourth Geneva Convention and there are number of other rights as well. But these are not guaranteed rights to an unlawful combatant. A combatant who has failed to follow the rules of war may or may not be a protected person but there is no guarantee whether he will or will not receive it. Two reasons are responsible for this situation. Firstly, in defining a protected person the Fourth Geneva Convention explicitly mentions that, nationals of a State which is not a party to the Convention is not protected by it and even the nationals of a neutral state which has normal diplomatic ties with belligerent state is not deemed to be a protected person.⁸³ Secondly, if the State which has captured a combatant and has definite reason to believe that the person was engaged in activities hostile to the security of that state, the status and related rights of “protected person” may be stripped off of that combatant.⁸⁴ However the only protection that person may be left with is the protection of right to be treated humanely and the right to have a fair trial.⁸⁵ The Additional Protocol 1 to the Geneva Conventions further solidifies these rights by adding the provisions regarding thenon-discrimination based on race, gender, sex etc.⁸⁶

No matter whatsoever the protections guaranteed to a civilian or protected persons under the Fourth Geneva Convention are, one fact is clear that the unlawful combatants have no specified convention or any other source which may cement their rights in International Humanitarian Law instruments. The rights which are available are also subject to derogation in the case of an unlawful combatant which may prove to be prejudicial to that person at any point. As can be seen from the above discussion, it is much more complicated

⁷⁹ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (adopted 12 August 1949, came into force 21 October 1950) 75 UNTS 287 Art 27*

⁸⁰ *Ibid* 75 UNTS 287 (Fourth Geneva Convention) Art 89

⁸¹ *Ibid* 75 UNTS 287 (Fourth Geneva Convention) Art 90

⁸² *Ibid* 75 UNTS 287 (Fourth Geneva Convention) Art 91-92

⁸³ *Ibid* 75 UNTS 287 (Fourth Geneva Convention) Art 4

⁸⁴ *Ibid* 75 UNTS 287 (Fourth Geneva Convention) Art 5

⁸⁵ *Ibid*

⁸⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 2 December 1977 came into force on 7 December 1979) 1125 UNTS 3 Art 75

of an issue to deal with regarding unlawful combatants in international armed conflict situations.

Problem with the Military Commissions Act Definition of “*Unlawful Combatant*”

As discussed in the beginning of the paper the only official definition of the term “unlawful combatant” is given in the *Military Commissions Act of 2006* (USA) which was later altered into the term “Unprivileged Enemy Belligerent” by the 2009 amendment. While the definition for ‘lawful combatants’ that this Act provides is only loosely based on the definition provided in the Third Geneva Convention and was carefully crafted to deny the captured Taliban and Al-Qaeda combatants the POW status at any cost,⁸⁷ it is not hard to imagine that in defining the term ‘unlawful combatants’ what could have been the hidden agenda for the U.S. back at that time. The U.S. used this legal mechanism in order to overthrow two different governments; Taliban from Afghanistan and Saddam Hussain from Iraq.⁸⁸ However, the use of this very Acts deemed to be doubtful as it has created two counter notions, one being the fact that the USA was in war against the terrorist regimes, and the other being that of identifying the terrorists as unlawful combatants and denying them any protection by the laws of war during their detention.⁸⁹ The very creation of this Act seemed to be adverse because although the Geneva Convention declares that detainees are to be treated humanely and with a proper trial and the US had been previously a principal negotiator for it, the U.S. ultimately ditched the application of the Geneva Convention towards the captured terrorists.⁹⁰ So the U.S. Department of Justice proposed a new legal regime under which is more useful for capturing and detaining the “unlawful combatants” and in consequence the Bush government agreed to decline any right stated in the Geneva Conventions to the Al-Qaeda and Taliban detainees.⁹¹ This has led to the creation of the now known *Military Commissions Act*. In consequence, it has created a legal paradigm to systematically use torture, mistreatment, detention for indefinite period and cruel punishments.⁹²

⁸⁷ Allison M Danner, ‘Defining Unlawful Enemy Combatants: A Centripetal Story’ [2007] 43(1) *Texas International Law Journal* 5

⁸⁸ Leila Nadya Sadat, ‘A Presumption of Guilt: The Unlawful Enemy Combatant and the US War on Terror’ [2009] 37(4) *Denver Journal of International Law and Policy* 539

⁸⁹ *Ibid*

⁹⁰ *Ibid* 545

⁹¹ *Ibid*

⁹² *Ibid* 541

In consequence of the definition the U.S. gained the right to manipulate it in every possible way to treat the detainees that seemed right to the state.⁹³ It can be confirmed from the then Secretary of Defense Donald Rumsfeld who stated that the detainees captured during the “war against terror” were to be treated humanely but the U.S. was not under any obligation to do so.⁹⁴ Moreover this situation resulted into criminalizing an entire group of people while the “war on terror” was going on and created a massive inequality of conditions regarding belligerency.⁹⁵ The amendment of the Act was made in 2009 was due to the decision in *Hamdan v. Rumsfeld* where the court held that the previous version of this Act was improper, and decided that it was to be invalidated.⁹⁶ Despite this amendment the Act appears to be violating a major protection right and that is the “equal protection clause”.⁹⁷ So it can be seen here that the amendment could not change much regarding the provisions of unlawful combatant or in this case “*Unprivileged Enemy Belligerent*”.

A Need for a Proper Definition in International Humanitarian Law

The non-existence of a set definition and provision exclusively concerning the unlawful combatants has created somewhat confusing standards. However, A statement made by the International Committee of the Red Cross (ICRC) confirmed that the civilians who take part in hostility may be considered as unlawful and unprivileged combatants.⁹⁸ Nonetheless it mentioned that they might be treated under the Fourth Geneva Convention if the Nationality criteria was met.⁹⁹ Now the nationality criteria in the Fourth Geneva Convention being mostly concerned with the detainee civilians from a different nation, question remains what is the fate of the ones who are national of the detaining country?¹⁰⁰ On the other hand the same ICRC states that no one should be without protection and there is no gap between the Third and

⁹³ Derek Jinks, ‘The Declining Significance of POW Status’ [2004] 45(2) Harvard International Law Journal 370

⁹⁴ *Ibid*

⁹⁵ Tuğba Sarikaya Güler, “Unlawful” Enemy Combatants: An Exceptional CATEGORY With Unique Tensions’ [2016] 6(12) Human Rights Review 142

⁹⁶ Larkin Kittel, ‘Trying Terrorists: The Case For Expanding The Jurisdiction of Military Commissions To US Citizens’ [2013] 44(1) Georgetown Journal of International Law 788

⁹⁷ *Ibid*

⁹⁸ Ingrid Detter, ‘The Law of War and Illegal Combatants’ [2007] 75(5/6) The George Washington Law Review 1059

⁹⁹ *Ibid*

¹⁰⁰ *Ibid*

the Fourth Geneva Conventions.¹⁰¹ On a contradictory note, unlawful combatants are not able to secure protection from either the Third Geneva Convention or the Fourth Geneva Convention.¹⁰² The fact of no one being outside of protection also came up in the *Prosecutor v. Zejnil delalic Zdravko Mucic aka "Pavo" Hazim delic Esad landzo aka "Zenga"* case where court was of a similar view that upon meeting the nationality criteria a person may get protection in either of the conventions.¹⁰³

Thus, the field of confusion is created as there is such contradictory evidence present while determining the eligibility of the protection provided to unlawful combatants. Since there is no specific definition for an unlawful combatant available, the definition of combatant status have to be scrutinized first. The successful distinction of combatants and civilians is a crucial point to keep in mind while defining a combatant.¹⁰⁴ Another thing that also has to be taken into notice is the fact of when civilians lose their status of "protected person" because an unsuccessful distinction runs the risk of the law to be harmfully affected.¹⁰⁵ The confusion still however remains whether a civilian participating in hostility is an unlawful combatant, are part of the civilian status or have a whole different status?¹⁰⁶ These confusion has given rise to different views.¹⁰⁷ The downside of not having a particular definition of unlawful combatant is that the way they are to be treated has to be sorted out from the comparison with the already established standards regarding lawful combatants.¹⁰⁸ Therefore, the term needs to obtain an official standard to determine the status of unlawful combatants under the provisions of Geneva conventions and under IHL as well.

Conclusion

The situation regarding the protection of unlawful combatants remains uncertain. Although the question which was asked in the beginning of the paper regarding whether an unlawful combatant should be entitled to POW status has been answered with a negative remark, the confusion is still there

¹⁰¹ *Ibid* 1060

¹⁰² *Ibid*

¹⁰³ *Prosecutor v. Zejnil delalic Zdravko Mucic aka "Pavo" Hazim delic Esad landzo aka "Zenga" IT-96-21-T (16 November 1998)*

¹⁰⁴ Kenneth Watkin, 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' [2005] (2) Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series 9

¹⁰⁵ *Ibid*

¹⁰⁶ *Ibid*

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid*

regarding the protection of the unlawful combatant as any supporting convention provision on this particular term ceases to exist. It is very surprising that the way protection of lawful combatants is defined and has developed throughout history to come to the present form, such development has not taken place regarding unlawful combatants. As a result, when it comes to providing protection to them, different sources have to be consulted before coming to a decision. Moreover, as there is the scope of using domestic law to try these individuals, countries may invoke this right in a negative manner as can be seen from the example of the U.S. It has turned into an urge from a simple need to bring provisions regarding unlawful combatants in IHL or at least a proper definition so that the rules on treating them do not remain vague and unclear. To sum up, no person's right as a human being should remain undecided just because he/she has not followed the man-made guidance and methods of killing or warfare.

References

- 'Military Commissions Act of 2006: A Summary of the Law' (*Center for Constitutional Rights*, 17 October 2006) <http://ccrjustice.org/sites/default/files/assets/files/report_MCA.pdf> accessed 23 March 2017
- Aukerman M. J., War, crime, or war crime? interrogating the analogy between war and **terror**. in David K. Linnan (ed), *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues: A Guide to the Issues* (ABC-CLIO 2008)
- Bilkova V. 'Talking About Unlawful Combatants? A Short and Concise Assessment of a Long and Multifaceted Debate' [2009] 3(2) *Central European Journal of International and Security Studies* 38
- Condé H. V., *A Handbook of International Human Rights Terminology* (University of Nebraska Press 1999)
- Crawford E., Combatants. in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)
- Crawford E., *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (OUP Oxford 2010)
- Danner A. M. , 'Defining Unlawful Enemy Combatants: A Centripetal Story' [2007] 43(1) *Texas International Law Journal*
- Detter I., 'The Law of War and Illegal Combatants' [2007] 75(5/6) *The George Washington Law Review*
- Dinstein Y., 'Unlawful Combatancy' [2003] 79(1) *International Law Studies*

- Dinstein Y., *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004)
- Dörmann K., 'The legal situation of "unlawful/unprivileged combatants"' [2003] 85(849) *International Review of the Red Cross*
Ex Parte Quirin, 317 U.S. 1 (1942)
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (adopted 12 August 1949, came into force 21 October 1950) 75 UNTS 287
Geneva Convention Relative to the Treatment of Prisoners of War, (adopted 12 August 1949, came into force 21 October 1950) 75 UNTS 135
- Gill T. D. and Sliedregt E., 'Guantánamo Bay: A Reflection on the Legal Status and Rights of 'Unlawful Enemy Combatants' [2005] 1(1) *Utrecht Law Review*
- Goldman R. K. and Tittmore B. D., 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' [2002] *The American Society of International Law Task Force Papers*
- Güler T. S., '“Unlawful” Enemy Combatants: An Exceptional CATEGORY With Unique Tensions' [2016] 6(12) *Human Rights Review*
- Haynes W., 'Enemy Combatants' (*Council on Foreign Relations*, 12 December 2002) <<http://www.cfr.org/international-law/enemy-combatants/p5312>> accessed 10 April 2017
- Jinks D., 'The Declining Significance of POW Status' [2004] 45(2) *Harvard International Law Journal*
- Joanne Mariner, 'A First Look at the Military Commissions Act of 2009, Part One' (*Find Law*, 2009) <<http://supreme.findlaw.com/legal-commentary/a-first-look-at-the-military-commissions-act-of-2009-part-one.html>> accessed 11 April 2017
- Kittel L. 'Trying Terrorists: The Case for Expanding The Jurisdiction of Military Commissions To US Citizens' [2013] 44(1) *Georgetown Journal of International Law*
- Lannoy K., 'Unlawful/unprivileged combatant, armed conflict and international law in the 21st century: Slipping through the loopholes of the Geneva Conventions?' (Master, Faculty of Law Ghent University 2009-2010)
Military Commissions Act of 2006 (USA)
- Mofidi M. and Eckert A. E., 'Unlawful Combatants or Prisoners of War: The Law and Politics of Labels' [2003] 36(1) *Cornell International Law Journal* 2003
- Prosecutor v. ZejnildelalicZdravkoMucic aka "Pavo" HazimdelicEsadlandzo aka "Zenga"IT-96-21-T* (16 November 1998)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 2 December 1977 came into force on 7 December 1979) 1125 UNTS 3

- Rondon Y. C., 'The Military Commissions Act of 2009: Did Congress Get it Right?' [2012] (online) Student Appeal
<<https://thestudentappeal.com/the-military-commissions-act-of-2009-did-congress-get-it-right-1920660c4830>> accessed 12 April 2017
- Sadat L.N., 'A Presumption of Guilt: The Unlawful Enemy Combatant and the US War on Terror' [2009] 37(4) *Denver Journal of International Law and Policy*
- Sassoli M., 'Query: Is there a status of "unlawful combatant?"' [2006] 80 *International Law Studies* operations
- Solis G. D., *The Law of Armed Conflict* (Cambridge University Press 2010)
- Värk R., 'The Status and Protection of Unlawful Combatants' [2005] 10 *Juridica International*
- Watkin K., 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' [2005] (2) *Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series*

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