Query: Is There a Status of “Unlawful Combatant?”

Marco Sassòli

Introduction

The argument of the United States administration that those individuals captured during the “global war on terror” are unlawful combatants not entitled to prisoner of war status may be summed up as follows. First, the United States is engaged in an international armed conflict—the “war on terrorism.” This is, second, one single worldwide international armed conflict against a non-State actor (al Qaeda) or perhaps also against a social and criminal phenomenon (terrorism). That armed conflict started—without the United States so characterizing it at that time—at some point in the 1990s and will continue until victory. Third, while the United States claims in this conflict all the prerogatives that international humanitarian law (IHL) applicable to international armed conflicts confers upon a party to such a conflict, in particular the right to detain enemy combatants without any judicial decision in Guantanamo; it denies these detainees the protections of most of that law by claiming that their detention is governed neither by the IHL rules applying to combatants nor by those applicable to civilians. Fifth, all those considered to be enemies in the “war on terrorism,” even those denied the benefit of IHL’s full protections, are not dealt with under domestic criminal legislation or under any other new or existing legislation, nor do they benefit from international...
human rights law. The US administration claims that their treatment is entirely and exclusively ruled by some mysterious rules of customary IHL.\(^4\)

In this paper I will address the approach of the US administration towards the persons held in the “war on terrorism” from the point of view of IHL. As always when IHL is applied, this implies, first, that the situation in which those persons are involved must be examined to determine whether it is an armed conflict and, if so, whether it is international or non-international in character. Second, for those persons who are covered by IHL, their status under IHL has to be determined.

**The Status of the “War on Terrorism” under International Humanitarian Law**

IHL is today largely codified in treaties, in particular the four 1949 Geneva Conventions\(^5\) and the two 1977 Additional Protocols.\(^6\) The United States is a party to the former, but not to the latter. It recognizes, however, Additional Protocol II as desirable or even as restating existing law, and most, but not all, provisions of Additional Protocol I as reflecting customary international law.

The four Geneva Conventions and Additional Protocol I apply to international armed conflicts. Article 2 common to the Geneva Conventions states that they “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Only States can be parties to the Geneva Conventions. Al Qaeda and terrorism are not States, therefore, the law of international armed conflict does not apply to a conflict between the United States, a State, and them. There is no indication that State practice and *opinio juris* go further and apply the law of international armed conflict to conflicts between States and some non-State actors. On the contrary, and in conformity with the basic construct of the Westphalian system, States have always distinguished between conflicts against one another, to which the whole of IHL applied, and other armed conflicts, to which they were never prepared to apply the same rules, but only more limited humanitarian rules. Even a conflict spreading over borders remained a non-international armed conflict. “[I]nternal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.”\(^7\)

If the aforementioned principles are applied to the “war on terrorism,” the law of international armed conflicts covered the conflict in Afghanistan, because it was directed against the Taliban, representing *de facto* government of that State. As for al Qaeda, where it is acting *de facto* under the global or effective direction or control of the Taliban, the conflict against al Qaeda may also be qualified as international.\(^8\) Such direction and control exists, however, only in Afghanistan and not elsewhere.
Each component of the “war on terrorism”—and every situation in which persons were arrested—has to be examined and its status determined separately. Until now, it was regretted that once there was an international element to a conflict on a given territory, the whole conflict could not, under consistent State practice, be classified as wholly international, but had to be split off into its components. Even less could a worldwide conflict be determined to be international simply because some of its components were international. No one claimed during the Cold War that the IHL of international armed conflicts applied to internal conflicts such as those in Greece, Angola, El Salvador, and Nicaragua, or even to political tensions and arrests in Germany, Italy or Latin America, simply because those were part of the Cold War, the “war against communism,” or because there were international armed conflicts between proxies of the two superpowers in the Near East, Korea, or Vietnam.

Components of the “war on terrorism” that do not qualify as international armed conflicts may be non-international armed conflicts covered by Article 3 common to the four Geneva Conventions and by Additional Protocol II. To fall under those provisions they must, however, be armed conflicts. Criteria permitting such classification are the intensity; number of active participants; number of victims; duration and protracted character of the violence; organization and discipline of the parties; capability to respect IHL; collective, open and coordinated character of the hostilities; direct involvement of governmental armed forces (as opposed to law enforcement agencies); and de facto authority by the non-State actor over potential victims.

Other situations are not armed conflicts at all. Additional Protocol II excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Terrorist actions by private groups have not customarily been viewed as creating armed conflicts. The United Kingdom stated when it ratified Additional Protocol I “that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.” The British and Spanish campaigns against the IRA (Irish Republican Army) and ETA (Euskadi ta Askatasuna) have not been treated as armed conflicts under IHL.

If IHL applies, each conflict has its own beginning and its own end. At the end of active hostilities in an international armed conflict, prisoners of war (not accused of or sentenced for a crime) must be repatriated. The detention, such as of Taliban fighters captured in Afghanistan, cannot be prolonged simply because in the Philippines or in Iraq the “war on terrorism” goes on.
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The Status of Persons Held in the “War on Terrorism” under International Humanitarian Law

Under the Law of International Armed Conflict
In international armed conflicts, there are two categories of “protected persons” that are subject to two very different legal regimes—combatants, who become prisoners of war protected by Geneva Convention III if they fall into the power of the enemy, and civilians protected by Geneva Convention IV when in enemy hands.

“Unlawful combatants?”
The US administration claims that the persons it holds in the “war on terrorism” are neither combatants nor civilians but “unlawful combatants.” President Bush himself made this argument concerning the status of Taliban fighters. Other administration officials extend it to members of al Qaeda and others qualified as “terrorists.” According to the text, context and goals of Geneva Conventions III and IV, however, no one can fall between the two conventions and therefore be protected by neither.

The first paragraph of Article 4 of Geneva Convention IV states as follows: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” According to the fourth paragraph of that article, persons protected by Geneva Convention III “shall not be considered as protected persons within the meaning of the present Convention.” This clearly indicates that anyone fulfilling the requirement for protected person status that is not protected by the Third Convention falls under the Fourth Convention. The Commentary published by the International Committee of the Red Cross (ICRC) provides:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.

The preparatory work for Article 4 confirms this interpretation. The ICRC had first suggested referring to “persons who take no active part in hostilities.” The XVIIth International Red Cross Conference criticized this phrasing because it did not “cover those who commit hostile acts whilst not being regular combatants,
such as saboteurs and franc-tireurs.” This problem was reported to the
Diplomatic Conference that was negotiating the four conventions, which then adopted the
present wording. Moreover, Article 5 of Geneva Convention IV allows for some
derogation from the protective regime of that Convention for persons engaged in
hostile activities. If such persons were not covered by the Convention, such a pro-
vision would not have been necessary.

From a humanitarian perspective, it is dangerous to revive such an easy escape
category for detaining powers as “unlawful combatants.” No one should fall outside
the law and in particular not outside the carefully built up protective system offered
by the Geneva Conventions. They are the minimum safety net in the profoundly in-
humane situation that is war, in which most of the other legal safeguards tend to dis-
appear. The US administration has declared that it treats all captured “terrorists”
humanely. First, such a vague commitment is not sufficient. The law covers even
those who commit the most horrible crimes; only this allows us to judge over them.
Second, other, less scrupulous States may take advantage of such a new loophole by,
for example, denying the protection of the conventions to US personnel.

In conclusion, all persons who are covered by the IHL of international armed
conflicts and fulfill the nationality requirements must perforce be either combat-
ants or civilians.

Combatants
Combatants are defined as members of the armed forces of a party to the interna-
tional armed conflict. The United States argues that the Taliban held in
Guantanamo, who are members of the armed forces of the de facto government of
Afghanistan, are not prisoners of war, because they “have not effectively distingui-
shed themselves from the civilian population of Afghanistan. Moreover, they
have not conducted their operations in accordance with the laws and customs of
war.” This allegation may astonish those who remember that during Operation
Enduring Freedom, the United States stressed that it attacked Taliban command
and control centers and did not complain that it was impossible to distinguish the
Taliban from civilians. If the allegation were true, the legal consequence would be
that the Taliban are indeed denied prisoner of war status if they are considered as
“members of other militias [or] . . . volunteer corps, including . . . resistance move-
ments,” but not if they are “members of the armed forces of a Party to the conflict.”
It is at least arguable that the Taliban belong to the latter category. For regular armed
forces, however, it would be dangerous to require respect for the laws of war as a
precondition for prisoner of war status. In all armed conflicts, the enemy is accused
of not complying with IHL, and such accusations are all too often accurate. If IHL
violations by regular armed forces were permitted to deprive all their members,
independently of their individual behavior, of prisoner of war status, that status could frequently not provide its protective effect. Historically, the United States never invoked such an argument concerning the German Wehrmacht, which cannot be considered to have regularly complied with the laws of war.

As for the al Qaeda members captured in Afghanistan, there may be justification to deny them prisoner of war status on two bases. First, al Qaeda was a separate entity that was distinct from the military forces of the enemy State in the international armed conflict, Afghanistan. Second, even if considered as an Afghan militia, it is highly doubtful whether al Qaeda complied with the requirements to distinguish itself from the civilian populace and conduct its operations in compliance with the law.24

In case of doubt as to whether persons who have committed a belligerent act are combatants, Geneva Convention III prescribes that they must be treated as prisoners of war “until such time as their status has been determined by a competent tribunal.”25 The United States established such tribunals in the Vietnam war and the 1991 Gulf War,26 but it argues that in the case of those detained in Guantanamo, there is no doubt that they are not entitled to prisoner of war status.27 If the applicability of the clause merely depended on whether the detaining power has doubts, the latter could always escape from its obligation, which would make the clause practically useless.28

If a person fallen into the power of the enemy is determined to be a combatant, he or she is a prisoner of war. Prisoners of war may be interned, not as a punishment, but to prevent them from rejoining the fighting. Therefore no individual decision needs to be taken in order to detain them. The mere fact that they are an enemy combatant is sufficient justification for their detention until the end of active hostilities in that conflict.29 Classification as a prisoner of war prevails, as lex specialis for combatants, over human rights law and domestic law requiring an individual judicial detention determination. While in detention, prisoners of war benefit however from the protections of Geneva Convention III, a detailed regime that ensures they are treated not only humanely, but also not as prison inmates,30 since they are not serving a sentence and have committed no unlawful act.

**Civilians**

During an international armed conflict, civilians who fulfill certain nationality requirements31 are protected if they fall into the hands of a belligerent and enemy, in this case Afghan, nationals are always protected. In an occupied territory, nationals of a third country other than an ally of the occupier are equally protected. On a party’s own territory, only neutral nationals are protected, and then only if they do not benefit from normal diplomatic protection.32 Protected civilians may not be

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detained, except under two circumstances. First, detention may be authorized under domestic legislation (or security legislation introduced by an occupying power) for the prosecution and punishment of criminal offenses (including direct participation in hostilities). Second, civilians may be interned for imperative security reasons, upon individual decision made in a regular procedure (which must include a right of appeal) prescribed by the belligerent concerned.35 Such civilians are civil internees whose treatment is governed by extremely detailed provisions of Geneva Convention IV and their cases must be reviewed every six months.34

Under any circumstances, civilians who fell into US hands in Afghanistan may not be held in Guantanamo, but only in Afghanistan. While combatants may be held as prisoners of war in every corner of the earth, civilians protected by Geneva Convention IV may indeed never be deported out of an occupied territory.35 Afghanistan was an occupied territory because it came under the control of the United States and its allies during an international armed conflict.

Surprisingly, and much to my relief, the Legal Adviser of the US State Department has admitted that “unlawful combatants” are protected by Geneva Convention IV.36 Nevertheless the US administration has not yet comprehended the practical consequences of this acknowledgement, as it still detains those persons in Guantanamo and denies them individual judicial or administrative determinations of the basis for their detention.

It may appear ironic to classify heavily armed “terrorists” captured in an international armed conflict who are not entitled to benefit from combatant and prisoner of war status as “civilians.” Borderline cases never correspond to the category’s paradigm of the individual who has taken no part in the hostilities. Nevertheless these persons fall within the parameters of the law. What is important is that “civilian status” does not produce absurd results. As “civilians,” unprivileged combatants may be attacked while they unlawfully participate in hostilities. After arrest, Geneva Convention IV does not bar their punishment for unlawful participation in hostilities; it even prescribes such punishment for war crimes. In addition, it permits administrative detention for imperative security reasons and for derogations from protected substantive rights of civilians within the territory of a State and from communication rights within occupied territory.37 Geneva Convention IV was not drafted by professional do-gooders or academics, but by experienced diplomats and military leaders who fully appreciated the necessity of concluding an agreement that addressed the security needs of a State confronted with dangerous people.

Some may find it shocking that unprivileged combatants classified as civilians have an advantage over captured lawful combatants in that the former are entitled to individual judicial or administrative status determinations, while the latter are
not. But combatants are normally easily identified and given prisoner of war status based on objective criteria. Additionally, members of a State’s military forces generally will acknowledge that they are in the armed forces. In contrast, the organizational membership and past behavior of an unprivileged combatant and the future threat he or she represents can only be determined individually.

Under the Law of Non-international Armed Conflicts
The international humanitarian law applicable to non-international armed conflicts does not provide for combatant or prisoner of war status, contains no other rules on the status of persons detained in connection with the conflict, nor details the circumstances under which civilians may be detained. The question as to whether “unlawful combatants” are combatants or civilians simply does not arise in non-international armed conflicts. In such conflicts, IHL cannot possibly be seen as providing a sufficient legal basis for detaining anyone. It simply provides for guarantees of humane treatment and, in prosecutions for criminal offenses, for certain judicial guarantees of independence and impartiality. Possible bases for arrest, detention or internment are entirely governed by domestic legislation and the human rights law requirement that no one be deprived of his or her liberty except on such grounds and in accordance with procedures as are established by law. In State practice too, governments confronted by non-international armed conflicts base arrests, detentions, and internment of rebels, including rebel fighters, either on domestic criminal law or on special security legislation introduced during the conflict. They never invoke the “law of war.”

Outside Armed Conflicts
IHL applies only to armed conflicts. It offers no protection to those held in connection with those components of the “war on terrorism” that do not meet the threshold of a non-international armed conflict. Because IHL has no application to conduct falling below this threshold, it certainly cannot provide a legal basis for detaining in Guantanamo or elsewhere those that engage in such conduct.

Conclusion
Meant as the branch of international law providing protection to all those affected by or involved in armed conflicts, IHL has become for the US administration a justification for denying such individuals and others detained under the rubric of the “war on terrorism” any of the protections provided by human rights law and US domestic legislation. However, while the United States thus invokes IHL, it is not ready to provide those detained the full benefit of this law. In effect, the US
administration argues that they are covered by no law except for those never defined and mysterious rules of customary IHL.

To properly apply IHL, every component of the “war on terrorism,” the circumstances of each individual’s arrest or capture, and the basis of each detention must be examined and classified separately. Many of those held in the “war on terrorism” do not fall within the parameters of persons covered by IHL. Others benefit from the fundamental guarantees of IHL applicable to non-international armed conflicts. Again, however, that law provides no legal basis for their detention, an issue dealt with by domestic law. Those persons who were captured in Afghanistan are protected by the IHL of international armed conflicts. Under that law, only those who are prisoners of war may be held in Guantanamo. Those who are not prisoners of war are civilians. As such, they may only be detained in Afghanistan and only after individual judicial or administrative determinations. I am convinced that the “war on terrorism” can be won—and victory may even be easier—if the carefully drafted standards of IHL are respected.

Notes

1. Professor Marco Sassòli is Professor of International Law at the University of Quebec in Montreal, Canada.
2. The Bush administration uses this phrase as well as the phrase “war on terror” to describe the campaign against terrorism. In this paper, I will use the phrase “war on terrorism.” It is intended to be synonymous with the terms used by the US administration.
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11. Additional Protocol II, supra note 6, art. 1.2.

12. “[A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism . . . are outside the scope of [IHL],” LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 56 (2d ed. 2000).


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18. The International Criminal Tribunal for the Former Yugoslavia (ICTY) replaces the nationality standard laid down in Article 4 by an allegiance standard. (See Prosecutor v. Tadic, supra note 8, ¶¶ 163–69 and our criticism Marco Sassoli & Laura Olson, Case Report, Judgment, The Prosecutor v. Đuško Tadić, Case No. IT-94-A, ICTY Appeals Chamber (July 15, 1999), 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 571, 576–77 (2000)).


21. Statement by the Press Secretary, supra note 15.


23. Geneva Convention III, supra note 5, art. 4.A, paras. (2) and (1) respectively.

24. For a detailed discussion, see Vierucci, supra note 3, at 392–95

25. Geneva Convention III, supra note 5, art. 5, para. 2.


28. Cf. United States v. Perchman, 32 U.S. 51, 69–70 (1833) (“It is one of the admitted rules of construction, that interpretations which lead to an absurdity, or render an act null, are to be avoided.”).

29. Geneva Convention III, supra note 5, arts. 21 and 118.

30. Id., art. 22, para. 1.

31. Supra note 18.

32. Geneva Convention IV, supra note 5, art. 4, para. 2.

33. Id., arts. 41–43 and 78.

34. Id., arts. 79–135.

35. Id., arts. 49 and 76.

36. Taft, supra note 3, at 324, refers to Article 64 of Geneva Convention IV, which is located in the part of the Convention covering protected civilians in occupied territories.

37. Geneva Convention IV, supra note 5, art. 5, paras. 1 and 2 respectively.