

# Talking about Unlawful Combatants? A Short and Concise Assessment of a Long and Multifaceted Debate<sup>1</sup>

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In the memorandum of February 7, 2002, (former) US president George W. Bush qualified the members of the Taliban movement arrested in Afghanistan and detained at the US military base of Guantánamo Bay as “unlawful combatants”.<sup>3</sup> In the following months, the scope of this term was broadened to include, at first, detained members of the Al Qaeda terrorist organization, and, later, all the “other international terrorists around the world, and those who support such terrorists.”<sup>4</sup> Simultaneously, the US declared that unlawful combatants did not enjoy combatant privileges, which grants combatants the right to participate in hostilities without undergoing the risk of prosecution for such participation.<sup>5</sup> Moreover, once detained, they were, in the administration’s view, not entitled to either the status of prisoners-of-war (POW) (protected by the 1949 Geneva Convention III), or of civilians (protected by the 1949 Geneva Convention IV). They constitute an autonomous category of persons, who are excluded from international protection or covered by some minimal humanitarian standard.

This approach has been heavily criticized by other countries, international organizations, NGOs, and legal experts, who have questioned the appropriateness

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<sup>3</sup> “Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants /.../.” G. W. Bush, Memorandum *Humane Treatment of Taliban and al Qaeda Detainees*, 7 February 2002, par. 2 d).

<sup>4</sup> Dworkin, A. 2006. *Excerpts from Interview with Charles Allen, Deputy General Counsel for International Affairs, US Department of Defense*. [www.crimesofwar.org/onnews/news-pentagon-trans.html](http://www.crimesofwar.org/onnews/news-pentagon-trans.html) (accessed on August 28, 2006).

<sup>5</sup> Combatant privilege does not cover the commission of war crimes and other violations of international humanitarian law, for which combatants may be held responsible.

of the term, the purposes lying behind its use, as well as the legal uncertainties surrounding the status of, and the legal regime applicable to, detainees in the so-called ‘war on terror.’ Discord over these issues has given rise to an interesting and multifaceted debate, whose outcomes – and, in fact, whose very course – will certainly mark, and to a certain extent even determine, the future development of international humanitarian law (IHL). IHL is a branch of public international law specifically designed to protect victims of armed conflicts and to regulate the means and methods of warfare.<sup>6</sup> It is based on several fundamental principles, one of them being the principle of distinguishing between combatants and civilians. The concept of unlawful combatants challenges this distinction, and seeks to add yet another category of persons into the IHL regime and, consequently, jeopardizes the balance this regime has been traditionally based on.

Over the past years, the concept of unlawful combatants has been the focus of numerous articles, policy papers and books.<sup>7</sup> Most of these texts have primarily focused on the legal status of persons described as unlawful combatants, and on the rights and privileges such persons enjoy under current IHL. While not completely omitting discussion on these issues, this paper adopts a somewhat different, more original position. In addition to dealing with the concept of unlawful combatants as such, this work draws attention to the multifaceted debate that has recently (and in the past) accompanied its use. In doing so, it aims at advancing two main arguments: firstly, the debate, despite its alleged focus on one, central issue, is characterized by immense confusions, which manifest themselves in

<sup>6</sup> IHL applies, with some minor exceptions, solely in armed conflict, which has been recently defined as “a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”. ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 70.

<sup>7</sup> See, for instance, Aggelen, J. Van. 2005. A Response to John C. Yoo, “The Status of Soldiers and Terrorists under the Geneva Conventions”. *Chinese Journal of International Law* 4(1): 167–181; Aldrich, G. H. 2002. “The Taliban, Al Qaeda, and the Determination of Illegal Combatants.” *American Journal of International Law* 96: 891–898; Azubuike, L. 2003. “Status of Taliban and Al Qaeda Soldiers: Another Viewpoint.” *Connecticut Journal of International Law* 19(1): 127–154; Callen, J. 2003–2004. “Unlawful Combatants and the Geneva Conventions.” *Virginia Journal of International Law* 44: 1025–1072; Elsea, J. 2006. “Treatment of ‘Battlefield Detainees’ in the War on Terrorism.” *CRS Report for Congress*, p. 57; Goldman, R. K. and Tittmore, B. D. 2002. “Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law”, *ASIL Task Force Paper*, p. 60; Jinks, D. 2006. “The Applicability of the Geneva Conventions to the ‘Global War on Terrorism’”. *Virginia Journal of International Law* 46(1): 165–195; Kinsella, H. M. 2005. “Discourses of Difference. Civilians, Combatants, and Compliance with the Laws of War.” *Review of International Studies* 31: 163–185; MacDonald, A. 2002. “Defining the War on Terror and the Status of Detainees: comments on the Presentation of Judge George Aldrich.” *Humanitäres Völkerrecht* 15(4): 206–209; Sassoli, M. 2004. “The Status of Persons Held in Guntánamo Under International Humanitarian Law.” *Journal of International Criminal Justice* 2(1): 96–106; Yoo, J. C. and Ho, J. C. 2003. The Status of Terrorists. *Virginia Journal of International Law* 44(1): 207–228.

three spheres: a terminological, a conceptual, and a legal. These confusions turn the debate into a cacophonous chorus of mutually incompatible positions that often do not meet each other at the discursive or epistemological level. Secondly, these confusions – far from unwanted – play an integral role in contributing to becloud the true purpose of the recent use of the term. Never denoting an autonomous legal concept, the notion of unlawful combatants has, in the period after September 11, 2001, ceased to serve as the useful descriptive expression it used to be. Instead, it has become a political device, designed primarily to discredit political enemies and justify the lowering of legal guarantees granted to them. These arguments are further developed in the body of the text (below).

## Three Confusions Characterizing the Debate on Unlawful Combatants

As noted above, three main confusions currently characterize the debate on unlawful combatants these are: terminological, conceptual, and legal confusions.

### Terminological Confusion

The first confusion is of a terminological nature. It relates to the plurality of terms that are frequently used to label those persons (also) known as unlawful combatants. The circle of such terms includes, without being limited to, irregular combatants, enemy combatants, illegal belligerents, unlawful belligerents, irregular belligerents, unprivileged combatants, or the more traditional notions of francs-tireurs and maraudeurs.<sup>8</sup> The relationship between these various terms is far from clear. Some authors believe that these are largely identical in scope and content. For instance, Bialke claims that “an unlawful combatant is also referred to with identical meaning as an illegal combatant, unprivileged combatant, franc-tireur meaning ‘free-shooter’, unprivileged belligerent, dishonorable belligerent or unlawful belligerent”.<sup>9</sup> Yet, this opinion is not uniformly accepted and there are other authors, for whom important differences exist between various terms and no conflation is possible here.<sup>10</sup>

<sup>8</sup> “The uncertain status of these ‘illegitimate’ warriors is evidenced by the variety of terms used to describe them such as unlawful combatants, unprivileged belligerents, enemy combatants, terrorists or insurgents. Often these participants in conflict are referred to simply as criminals.” Watkin, Kenneth. 2005. *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*. Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series 2: 5.

<sup>9</sup> Bialke, J. P. 2004. “Al-Qaeda and Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict.” *Air Force Law Review*, available at: [www.findarticles.com/p/articles/mi\\_m6007/is\\_55/ai\\_n8585592/print](http://www.findarticles.com/p/articles/mi_m6007/is_55/ai_n8585592/print) (accessed on August, 24, 2006).

<sup>10</sup> Hoffman, M. H. 2002. Terrorists are Unlawful Belligerents, not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law, *Case Western Reserve Journal of International Law* 34(2): 227–230.

The practice of the US in the so-called ‘war on terror’ presents an interesting example of this terminological uncertainty as well as of some implications, such uncertainty may bear.<sup>11</sup> Whereas, in the aftermath of the terrorist attacks on September 11, 2001, US officials referred almost exclusively to unlawful combatants,<sup>12</sup> later, the use of the terms enemy combatants or unprivileged combatants became more common.<sup>13</sup> The shift in terminology caused practical problems: for instance, the US was prevented from prosecuting, in its military commissions, as ‘unlawful combatants,’ those persons who had previously been qualified as ‘enemy combatants’ by the Combatant Status Review Tribunal, established at the Guantánamo Bay prison facility in 2004.<sup>14</sup>

## Conceptual Confusion

The second confusion draws attention to the fact that neither the term unlawful combatants, nor any of the other notions used in the same context, are uniformly defined and, clearly, they *all* can, and in various contexts do, refer to three very different categories of persons.

The first category encompasses combatants using secret and/or deceiving operational methods of warfare in order to be indistinguishable from a civilian population. Such persons lose their combatant status and, if detained, do not become POWs and may be prosecuted for participation in hostilities. This category primarily deals with spies and military saboteurs. It is, at times, broadened to cover combatants deliberately disguising themselves in civilian clothes, irrespective of the purpose of doing so. This broadening risk blurring the line between unprivileged participation in hostilities and perfidy as an unlawful act committed by a privileged participant in hostilities.<sup>15</sup> In view of the above, it is not uniformly supported by the doctrine.

The first meaning of the term is the oldest or, more precisely, the original one. It is within this context that the term was first introduced into legal vocabulary by the US Supreme Court in its 1942 decision in the *Ex Parte*

<sup>11</sup> See also Sweeney, M. J. 2003. Detention at Guantanamo Bay, A Linguistic Challenge to Law. *Human Rights*: 15–17.

<sup>12</sup> “*They will be handled not as POWs, because they are not, but as ‘unlawful combatants.’*” Rumsfeld, D. H. 11 January 2002, cit. in D. Eberhard, *Rumsfeld Stands Pat On ‘Unlawful Combatants’*, News Max, 28 January 2002.

<sup>13</sup> Deputy Secretary of Defense, *Order Establishing Combatant Status Review Tribunal*, 7 July 2004.

<sup>14</sup> For more information, see *Combatant Status Review Tribunals, Factsheet*, available at <http://www.defenselink.mil/news/Oct2006/d20061017CSRT.pdf> (accessed on 12 September 2008).

<sup>15</sup> Acts of perfidy are defined by IHL as “*acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy: /.../ (c) the feigning of civilian, non-combatant status /.../*”. Article 37 par. 1 of 1977 Additional Protocol to the four Geneva Conventions of 1949.

*Quirin* case. The case concerned a group of eight German agents who, disguised in civilian clothes, penetrated the territory of the US in a submarine, with the purpose of committing acts of espionage and sabotage there. Arrested before committing any hostile act, the agents were brought to a military commission specifically constructed for this purpose by (then) President Franklin D. Roosevelt, and were sentenced to the death penalty. In its decision on the appeal, relating mainly to the issue of jurisdiction, the US Supreme Court stated that

“by universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.”<sup>16</sup>

The Court added that while the former “are subject to capture and detention as prisoners of war by opposing military forces,” the latter, including spies and saboteurs, 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.”<sup>17</sup>

The second category of persons described as unlawful combatants includes individuals who take a direct part in hostilities without being entitled to do so. Unlike spies and saboteurs, these individuals do not necessarily have to use secret and/or deceiving operational methods of warfare. They may even distinguish themselves from the civilian population. Yet, lacking the legal entitlement to participate in hostilities is sufficient to turn them into unlawful combatants. As in the previous case, those persons are not protected against attacks and, if detained, they do not have POW status, and may be prosecuted for participation in hostilities. This category comprises some elements of the civilian population (so-called civilians by day, fighters by night); mercenaries; and members of militias or guerrilla groups who do not fulfill all the four conditions of regular combatancy, namely: being part of a military hierarchy; wearing uniforms or other distinctive signs visible at a distance; carrying arms openly; and conducting military operations in accordance with the laws and customs of war.<sup>18</sup>

The second meaning of the term is also the most typical. It was introduced into the discourse in the post-WWII context and has remained there until now

<sup>16</sup> US Supreme Court, *Ex Parte Quirin*, 317 US 1 (1942), par. 30–31.

<sup>17</sup> *Ibid.* The Court also specified the groups of people covered by the term by saying that “*the spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals*”. *Ibid.*

<sup>18</sup> Article 4 par. A al. 2 of the Geneva Convention III Relative to the Treatment of Prisoners of War.

despite that neither the Geneva Conventions (1949), nor their two Additional Protocols (1977), contain any references to it.<sup>19</sup> Some even consider that this silence is deliberate, motivated by the desire “not to provide even negligible legitimacy to the existence of such elements of war” and by the fear that “the creation of an intermediate status would blur the basic dichotomy distinguishing civilians from combatants.”<sup>20</sup>

During the Cold War however, two other notions were more commonly used to label unlawful combatants according to this second meaning, namely ‘unprivileged belligerents’ and ‘irregular combatants.’ The former term, promoted by Baxter, covered persons taking direct part in hostilities without being entitled to do so, as well as spies and saboteurs, thus creating a larger category.<sup>21</sup> The latter term, which became popular in the decolonisation period (1960s and 1970s), served to describe members of national liberation movements. In the 1980s and 1990s, the notion of unlawful combatants became more popular again but, since the problematic was not the center of attention, no process of conceptual clarification occurred.

The third category of persons labeled as unlawful combatants includes all those who participate in the perpetration of terrorist offences as well as those lending them any form of support. This is the meaning in which the term has been used since September 11, 2001, not only by the US, but also by several other states, and an increasing number of experts.

Among states, the case of Israel is especially interesting, as it is the only country which has directly incorporated the term into its legal order. The Israeli *Incarceration of Unlawful Combatants Law*, adopted in 2003, and intent to “regulate the incarceration of unlawful combatants /.../ in a manner conforming with the obligations of the State of Israel under the provisions of international humanitarian law”<sup>22</sup> defines an unlawful combatant as

a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him.<sup>23</sup>

<sup>19</sup> See, for instance, the Nuremberg Tribunal, *The Hostages Case, Trials of War Criminals*, Washington: Government Printing Office 1950, where the term was used to characterise members of resistance movements.

<sup>20</sup> Zachary, S. 2005. Between the Geneva Conventions: Where Does the Unlawful Combatant Belong. *Israel Law Review* 38(1-2): 378–417.

<sup>21</sup> Baxter, R. R. 1951. So-Called ‘Unprivileged Bellegency’: Spies, Guerillas, and Saboteurs. *British Yearbook of International Law* 28: 323–345.

<sup>22</sup> *Incarceration of Unlawful Combatants Law*, S. H. 192, 2003 (Israel), par. 1.

<sup>23</sup> *Ibid.*, par. 2 al. 2.

While this provision still sticks to the classical IHL vocabulary, invoking the Geneva Convention and the POW status, it clearly illustrates the trend of using the term ‘unlawful combatants’ to describe, *en bloc*, practically all enemies of a particular state.

If compared, the three meanings allotted to the term ‘unlawful combatants’ reveal striking differences. Those differences contrast the first two meanings (unlawful combatants as non-distinguished combatants and as armed non-combatants) from the third one (unlawful combatants as all enemies in the ‘war on terror’). This occurs in two main areas. The first area has to do with underlying principles allegedly jeopardized by unlawful combatancy, while the two former concepts refer to the principle of distinction, the third focuses on the legitimacy of the fight itself. Thus, there is a true conceptual shift from the IHL regulation of *ius in bello* (law in war) to the just war regulation of *ius ad bellum* (law to wage war).

The second area relates to context and circumstances. The first two meanings given to the notion of unlawful combatants invokes the realities of classical armed conflicts. The third is connected with the so-called ‘war on terror’ declared after September 11, 2001. Yet, examining classical armed conflicts and the ‘war on terror’ shows disparity. For instance, there are no clear time and spacial limitations in the latter. Since terrorism is a global phenomenon that has accompanied history since records began, the fight against it is more similar to a cosmic struggle against an absolute and ineradicable evil rather than a ‘normal’ armed clash between states. Such a struggle is unfolding around the world and may persist until “the point at which there is no reasonable prospect of the resumption of hostilities,”<sup>24</sup> which may mean forever. Moreover, while classical armed conflicts confront (relatively) easily identifiable and distinguishable parties, the ‘war on terror’ is fought against an enemy that is largely invisible.

It is therefore possible to argue that there is a deep conceptual and contextual difference between the three interpretations given to the term unlawful combatants. The first and second interpretations (unlawful combatants as non-distinguished combatants and as armed non-combatants) belong to the traditional normative framework of IHL; the third one (unlawful combatants as all the enemies in the war on terror), on the contrary, breaks away from this framework, referring instead to a new *a-normative* reality that shares very few elements with the environment of classical armed conflicts. Reasons for the term’s transfer to such a different environment will be explored in the second part of this work.

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<sup>24</sup> Dworkin 2006, op. cit.

## Legal Confusion

The third confusion characterizing the debate on unlawful combatants is linked to the legal status of those labeled by the term, whichever of the three possible meanings is attributed to it. Several problems arise in this context. First, there is no agreement on whether unlawful combatants constitute an independent category *de iure*, or only a category *de facto* having a descriptive value at best. The first position is, for instance, supported by (former) Canadian Minister J. R. Wright who claimed that “detainees may have a variety of statuses under international law, including those of prisoners of war, unlawful combatants or civilians.”<sup>25</sup> The second position is reflected, among others, in an article by Zachary, who pretends that “the unlawful combatant /.../ is merely a descriptive phrase, not a legal one,” and “there is therefore no room for analogy between the POW and the unlawful combatant, for these terms do not exist in the same legal space.”<sup>26</sup>

Secondly, there is a dispute over the legal regime to be applied to unlawful combatants, provided they constitute an independent legal category. For some, Article 3 common to the four Geneva Conventions (1949) and/or Article 75 of Additional Protocol I (1977) are the most relevant provisions.<sup>27</sup> Both endow protected persons with only basic humanitarian guarantees, such as protection against murder, torture or hostage taking. The US Supreme Court in its 2006 *Hamdan v. Rumsfeld* decision embraced this approach, declaring that the detainees at the Guantánamo Bay Prison were covered by common Article 3.<sup>28</sup> Other institutions and authors are less specific in their views, referring vaguely to some general principles of the Geneva Convention, minimal standards of humane treatment or other ambiguous terms. This approach is well illustrated by Taft, who claims that only “certain minimal standards apply to the detention of the unprivileged belligerents.”<sup>29</sup> Finally, others consider that unlawful combatants are, from the standpoint of IHL, mere outlaws, deprived of any international protection and left to the discretion of the detaining power. Thus, in Dinstein’s words, “unlawful combatant /.../ is deprived of the protection of

<sup>25</sup> Cit. in Abbott, K. 2004. *Terrorists: Criminals, Combatants or ... ? : the Questions of Combatancy*. In *The Measure of International Law: Effectiveness, Fairness and Validity: Proceedings of the 31st Annual Conference of the Canadian Council on International Law, Ottawa, October 24–26, 2002*. Kluwer Law International, The Hague, p. 379.

<sup>26</sup> Zachary 2005, op. cit., p. 385.

<sup>27</sup> See, for instance, Fitzpatrick, J. 2003. Rendition and transfer in the war against terrorism: Guantánamo and beyond. *Loyola of Los Angeles International & Comparative Law Review* 25(3): 457–492.

<sup>28</sup> US Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld*, 29 June 2006.

<sup>29</sup> Taft, W. H. 2003. The Law of Armed Conflict After 9/11: Some Salient Features. *Yale Journal of International Law* 28: 319–323, p. 321.



international law /.../ and is left to be dealt with in accordance with enemy's domestic legal system."<sup>30</sup>

Third and finally, it is unsettled among experts whether the fact of being an unlawful combatant is, in itself, an illegal act for which the respective person may be prosecuted and punished, or whether illegality stems only from concrete acts of illegal warfare (eg. killing, or injuring enemy combatants or civilians) that such a person commits while taking a direct part in hostilities.<sup>31</sup> The former opinion finds support in the *Ex Parte Quirin* decision (1942), according to which "unlawful combatants are /.../ subject /.../ to the prosecution /.../ for acts that make their belligerence unlawful."<sup>32</sup> The latter opinion is defended by Baxter, who denies that "unprivileged belligerence is a violation of international law."<sup>33</sup>

The three confusions discussed above are closely related. The debate, in which different actors speak of varying categories of persons using different terms and having different legal concepts in mind, is confused. The following sections explains reasons for, and consequences of, this state of affairs and demonstrates that such confusions play an important role in obscuring the purpose the term 'unlawful combatants' has recently been used on the international level.

## Unlawful Combatants: The Purpose of the Terms' Usage

The term 'unlawful combatant' is not an independent legal concept. In the framework of classical IHL, it has served as a relatively useful descriptive expression, characterizing one of the factual phenomena frequently encountered in the course of armed conflicts, namely the lack of a clear distinction between combatants and civilians. Yet, its recent usage in the context of the so-called 'war on terror' has decreased its descriptive value, turning the term into a political device primarily serving to stigmatize and dehumanize certain groups of people in order to justify why a special legal regime must be applied to them. These concepts are further elaborated in the subsequent sections of this work.

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<sup>30</sup> Dinstein, Y. 1989. *The Distinction Between Unlawful Combatants and War Criminals*. In Dinstein, Y. (ed.). *International Law in Time of Perplexity, Essays in Honour of Shabtai Rosenne*. Martinus Nijhoff Publishers, Dordrecht/Boston/London, p. 105.

<sup>31</sup> See Kinsella, H. M. 2005. Discourses of Difference. Civilians, Combatants, and Compliance with the Laws of War. *Review of International Studies* 31: 163–185.

<sup>32</sup> *Ex Parte Quirin*, op. cit., pp. 31–32.

<sup>33</sup> Baxter 1951, op. cit., p. 344.

## Unlawful Combatants: A Legal Concept?

No source of IHL or public international law contains explicit references to unlawful combatants (or any equivalent term). The absence of the expression however, does not necessarily imply the absence of the concept, which may be present without a special denomination. In order to uncover the situation, an analysis of current sources of IHL must be undertaken. In this analysis, attention is paid to both IHL conventions and to customary rules of IHL collected, to a high degree, in the study on ‘Customary International Humanitarian Law,’ (2005) by the *International Committee of the Red Cross (ICRC)*.<sup>34</sup> Moreover, since issues of unlawful combatancy pervades both the Hague and Geneva systems of IHL, the two must be presented here so that the legal picture they represent are distinguished.

The Hague system of IHL is aimed at limiting the means and methods of lawful warfare and at regulating the situation on the battlefield level in general. Those present on a battlefield have traditionally been divided into two broad groups: combatants and civilians. The questions that naturally arise here are: whether these two legal categories are the only ones, or is there another category? (re: of unlawful combatants); and, whether such categories actually account for *all* people present on a battlefield, or are there some persons excluded from the IHL regulation that could be labeled as unlawful combatants?

Answers provided to the above questions vary considerably. Some, including the ICRC (and part of the doctrine), responds to them negatively, upholding the principles of dichotomy (reinforcing the existence of only two legal categories) and integrality (everyone is covered).<sup>35</sup> Others, including some judicial decisions (and another part of the doctrine), agree to the principle of integrality but have doubts about the dichotomy of the legal regulation.<sup>36</sup> Finally, others (among them several experts), approve of the principle of dichotomy but question that of integrality, claiming that some persons are simply left out of the regulation.<sup>37</sup>

Analysis of relevant sources of IHL reveals that, throughout history, the legal situation on the battlefield level has not been static but rather has undergone gradual changes. Some milestones in this evolution were; the adoption of the

<sup>34</sup> Henckaerts, J.-M., Doswald-Beck, L. (Eds.). 2005. *Customary International Humanitarian Law, Volume I: Rules, Volume II: Practice*. ICRC/Cambridge University Press, Cambridge.

<sup>35</sup> Dörmann, K. 2003. The legal situation of “unlawful/unprivileged combatants”. *International Review of the Red Cross* 85(849): 45–74.

<sup>36</sup> Hoffman, M. H. 2002/1. Quelling Unlawful Belligerency: The Juridical Status and Treatment of Terrorists Under the Laws of War. *Israel Yearbook on Human Rights* 31: 161–181.

<sup>37</sup> “Unlawful combatants /.../ enjoy no protection under international law.” Detter, I. 2000. *The Law of War*, 2<sup>nd</sup> Edition. Cambridge University Press, Cambridge, cit. in Rozenberg, J. *Opinion divided over status of ‘unlawful combatants’*, Telegraph, 17 January 2002.

first legal instruments regulating the conduct of warfare (*Lieber Code* of 1863, *Hague Regulation* of 1907 etc); the adoption of the four Geneva Conventions (1949) (mainly Geneva Convention III, indirectly defining the term combatant, and Geneva Convention IV, extending protection to civilians); and the adoption of Additional Protocol I (1977). While older sources left the questions of integrality and dichotomy partly unresolved, the more recent ones deal with them comprehensively.

In part IV – ensuring general protection of a civilian population against the effects of hostilities – of Additional Protocol I (1977), defines a civilian as “any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol” (Article 50 par. 1). The negative formulation of this definition, as well as its complex and comprehensive cover, reflected in the reference to ‘any person,’ show that the Protocol opts for an integral and dichotomist solution to the problem. Anyone present on a battlefield therefore must have a legal status, which means that the IHL legal regulation is based on the principle of integrality, displaying no gaps and leaving nobody outside of its normative framework. At the same time, everyone has to be either a member of armed forces, or a civilian, since the definition is clear that “apart from members of the armed forces, everybody physically present in a territory is a civilian.”<sup>38</sup>

Members of armed forces, with the exception of medical personnel and chaplains, are considered combatants with the right to participate in hostilities.<sup>39</sup> More specifically, this category includes: a) members of regular armed forces of a party to the conflict, including members of militias or volunteer corps forming part of such armed forces, regardless of whether the government or authority they profess allegiance to is recognized by the other party to the conflict; b) members of other militias and volunteer corps, including those of organized resistance movements, which belong to a party to the conflict, operate in or outside of their own territory, and fulfill the four conditions of regular combatancy; and c) participants in a *levée en masse*, i.e. “inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had

<sup>38</sup> Sandoz, Y., Swinarski, Ch., Zimmermann, B. B. (Eds.). 1987. *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. ICRC/Martinus Nijhoff Publishers, Geneva, p. 611, par. 1917.

<sup>39</sup> “Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.” Article 43 par. 2 of Protocol I. The armed forces consist of “all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party” (Article 43 par. 1 of Protocol I).

time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war” (Article 4 par. A al. 6 of the Geneva Convention III). Additional Protocol I, Article 4 par. 3, specifies that combatants do not lose their status, if they individually fail to distinguish themselves from civilians, when the nature of hostilities does not allow them to do so; provided they carry arms openly during each military engagement and any preparation thereto.

All other persons present on a battlefield, who do not fall into one of the groups described above and thus are not combatants (or medical personnel and chaplains), are civilians. Consequently, they enjoy civilian immunity and “shall not be the object of attack” (Additional Protocol I, Article 51 par. 3). This immunity however, applies only as long as they behave in accordance with their civilian status and do not take direct part in hostilities. In case they fail to observe that requirement, they lose, for the duration of their direct participation in hostilities, civilian immunity and may face deliberate attack. Yet, even then they maintain their civilian status; they can never be deprived of it (unless they become regular combatants or medical personnel and chaplains). It is necessary to add that while Additional Protocol I has not been ratified by nearly one fifth of existing states, including the US and Israel, the relevant provisions containing the definitions of civilians and members of armed forces are presently considered as part of customary IHL and, as such, are binding on the international community as a whole.<sup>40</sup>

Analysis has revealed that the Hague system of IHL has been, at least since the adoption of Additional Protocol I (1977), based on the principles of integrality, covering all persons present on a battlefield, and of moderated dichotomy, distinguishing two main legal statuses; of combatants and civilians, and adding the special group of medical personnel and chaplains to the former to compose a broader category of members of armed forces. The Hague system, thus, does not leave anyone present at the battlefield out of its legal regulation, nor does it provide space for the creation of another, half-civilian half-combatant status of unlawful combatant.

The Geneva system of IHL aims at protecting persons who do not, or no longer, take part in hostilities, namely: wounded, sick, shipwrecked, POWs and civilians, if those fall into the hands of the enemy. Protected persons are, again, divided into two expansive groups with distinct legal statuses: POWs and civilians. As in the previous case, questions arise as to whether, first, the two statuses are the only sets of persons detained by an enemy may have (or is there a third category of unlawful combatants) and, second, whether the regulation covers everyone falling into enemy hands (or are there some persons excluded from the regulation that could be labeled as unlawful combatants). The legal regulation of Geneva law being somewhat different from that of Hague law,

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<sup>40</sup> See rules 1-6 of the ICRC Study on Customary International Humanitarian Law.

and answers given to these questions do not necessarily have to be identical to those that are valid for the latter.

There is no consensus on such issues at the international level. Some actors, including the ICRC, part of the doctrine and military manuals of some countries, answer both of them in an affirmative way, claiming that “every person in enemy hands must have some status under international law: s/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.”<sup>41</sup> Others refute either the di(tri)chotomy of the regulation, or its integrality. The analysis of the relevant sources, encompassing the four Geneva Conventions (1949), Additional Protocol I (1977), and customary rules of IHL, shows that the legal regulation has undergone a long evolution and has changed its extent and content several times.

The four Geneva Conventions (1949) distinguish two categories of persons falling into the hands of the enemy, party to the conflict or the occupying power, namely POWs, protected by Geneva Convention III, and civilians, protected by Geneva Convention IV. POWs are regular combatants and some other persons accompanying armed forces, “who have fallen into the power of the enemy” (Geneva Convention III, Article 3 par. A); they enjoy immunity from prosecution for participation in hostilities, and are granted various privileges of Geneva Convention III. Civilians are primarily “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” (Geneva Convention IV, Article 4 al. 1).<sup>42</sup>

Since the two categories are not defined in a complementary manner some groups of detained persons may remain outside the scope of both. Such persons either have yet another specific status (medical personnel and chaplains, Geneva Convention I), are subject to a certain legal regime without having the respective status (persons treated as POWs without formally having that status, Geneva Convention III, Article 4 par. B), or had both their status and the legal regime applied to them undefined (civilians having the nationality of

<sup>41</sup> Pictet, J. S. (Ed.). 1994. *Commentary on the Geneva Conventions of 12 August 1949, Volume III*. ICRC, Geneva, p. 51. Compare: “If a person is determined /.../ not to fall within any of the categories listed in Article 4, GPW, he is not entitled to be treated as a prisoner of war. He is, however, a ‘protected person’ within the meaning of Article 4, GC /.../.” US Military Manual FM 27–10, *The Law of Land Warfare*, 1956, p. 41, par. 73.

<sup>42</sup> Some parts of Geneva Convention IV have a wider scope of application and cover “the whole of the populations of the countries in conflict” (Article 13 of Geneva Convention IV). These parts, however, contain only basic standards of humanitarian treatment and do not deal with specific questions, such as the detention regime.

those detaining them). The four Geneva Conventions are neither based on full integrality, nor on strict di(tri)chotomy.

The 1949 regulation has been substantively modified by Additional Protocol I (1977). The Protocol, firstly, contains a clearer definition – and partly redefinition – of the key notions of POWs and civilians. The former term is extended to include detained combatants who failed to distinguish themselves from civilians but carried arms openly (Article 44 par. 3), the second is enlarged by the abolishment of the nationality criterion.

Secondly, the Protocol confirmed the existence of persons who are neither entitled to POW status, nor benefit from more favorable treatment in accordance with Geneva Convention IV either because their protection has been limited (Geneva Convention IV, Article 5), or because they do not fall into the scope of Geneva Convention IV at all. These persons are newly granted, at the minimum, fundamental guarantees of human treatment anchored in Article 75 of the Protocol. The application of this provision to all detained persons not benefiting from more favorable treatment is confirmed by par. 7 al. b of Article 75, which claims that even “persons accused of war crimes or crimes against humanity /.../ shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.”

The Additional Protocol I therefore, brought the regulation of Geneva law to its integrality, filling gaps that had existed previously. At the same time the regulation has not become strictly di(tri)chotomist. It still classifies persons falling into the hands of the enemy into more than just two or three legal categories (persons having POW status, persons treated as POWs, persons having civilian status, medical personnel etc). Yet, again, none of those categories may be said to consist of ‘unlawful combatants,’ since those labeled by the term continue to have different legal statuses and legal regimes applied to them. Thus, the analysis has revealed that the Geneva system of IHL does not know an independent, autonomous category of ‘unlawful combatants’ either.

It is important to add that the so-called ‘war on terror’ has not changed this legal framework in any significant way. It could not have done so, at least so far, because of two main factors. The first consists of the plurality of meanings with which the term ‘unlawful combatants’ has been used over the past years. Even the two principal states promoting the term, the US and Israel, do not share the same understanding of who an unlawful combatant is. Since any rule of customary law needs to be based on uniform practice, the lack of uniform definition is a clear sign of the absence of any new rule. This claim is furthermore supported by the second factor, which has to do with the preponderant behavior of international actors. As mentioned, the existence of a legal category of unlawful combatants has officially been accepted by only a few states, while at the same time, being denied by many entities including most states, the ICRC,

NGOs, and experts. Since the creation of any new customary rule requires the representativeness of the practice and the accordant legal opinion (*opinio iuris*) of a substantive part of the international community, the absence of both of these elements shows that any new rule of international law on ‘unlawful combatants’ has not yet been established and it is highly disputable whether such a norm is emerging at all.

It is possible to conclude that current international humanitarian law (or more generally current international law) does not recognize unlawful combatants as an independent legal category, and the term thus does not denote any existing legal concept. The following section inquires into why, if this is the legal situation, the term is used on the international level at all?

### **‘Unlawful Combatant’: A Descriptive Expression or Political Device?**

Without denoting any autonomous legal concept under IHL, the term ‘unlawful combatants’ has traditionally served as a relatively useful descriptive expression, drawing attention to one of the factual phenomena encountered in the context of modern armed conflict. It has been used to characterize all those who, by either failing to distinguish themselves from the civilian population (re: being combatants), or by taking direct part in hostilities without being entitled to do so (re: being civilians), contribute to the blurring of the line between combatants and civilians, thus jeopardizing one of the main principles of IHL, the principle of distinction. While the two groups of unlawful combatants, including spies, saboteurs, other undistinguished combatants, or fighting civilians, do not have the same legal status – neither in the Hague nor in the Geneva systems of IHL –, their appearance on a battlefield gives rise to similar (or identical) practical problems, justifying the use of one common descriptive (extra-legal) notion for them all. This use however, makes sense only within the framework of classical IHL and only in respect of the first two categories of persons designed as unlawful combatants.

Yet, the recent utilization of the term in the context of the so-called ‘war on terror’ is still problematic. Having no legal meaning, the notion seems to be deprived of any descriptive value here as well. It does not refer to any uniform reality. As mentioned, even the approaches adopted by its two main proponents, the US and Israel, differ considerably: while the first uses the term to label anyone who presents a security threat to its interests, the second still refers to the traditional IHL framework, speaking about those having participated in hostilities and not being granted POW status. Furthermore, inconsistencies exist not only between the two countries’ utilizations of the notion, but also within them. For instance, US sources relating to terrorists do not describe any homogenous category of persons, the notion of terrorism being largely undefined, and those labeled by it have very little factual, and still less legal, features in common.

In fact, the only element that seems to be truly shared by unlawful combatants in the third, most recent meaning, is that some states view them as hostile persons, acting against their interests and, at the same time, lacking legitimacy to do so. Thus, the term becomes a synonym of a political actor who is deemed illegitimate and dangerous. Moreover, since it has negative connotations, its utilization, bringing about the stigmatization of the persons denoted by it, is aimed at justifying why special treatment, not corresponding to normal standards of humanity, must be accorded here. Consequently, the term serves as a political device, used by states for utilitarian purposes; to free their hands from legal constraints and enable them to treat their real or alleged enemies in a manner that seems appropriate under particular security circumstances.<sup>43</sup>

## Conclusion

The term ‘unlawful combatants,’ and its usage gives rise to many complicated legal, and factual, questions, which is one of the main reasons why it has stirred up such an interesting and multifaceted debate. This debate however, manifests serious confusions of terminological, conceptual, and juridical natures. As a result, different actors speak about different categories of persons using different notions and have different legal concepts in mind. These confusions obscure the fact that the term ‘unlawful combatants’ does not denote any autonomous legal concept, and while it has traditionally served as a relatively useful descriptive expression in the system of IHL, its recent utilization in the ‘war on terror’ has turned it into a political device aimed at justifying sub-standard treatment of allegedly illegitimate political enemies.

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<sup>43</sup> See Steyn, J. 2004. Guantanamo Bay: the legal black hole. *The International And Comparative Law Quarterly* 53(1): 1–15.