

2002

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Recommended Citation

Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 Case W. Res. J. Int'l L. 227 (2002)

Available at: <https://scholarlycommons.law.case.edu/jil/vol34/iss2/9>

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**TERRORISTS ARE UNLAWFUL BELLIGERENTS, NOT UNLAWFUL
COMBATANTS: A DISTINCTION WITH IMPLICATIONS FOR THE FUTURE
OF INTERNATIONAL HUMANITARIAN LAW**

*Michael H. Hoffman **

Since September 11, 2001 the world has faced international legal challenges that are almost, but not quite, unprecedented in world history. Though non-state combatants are inevitably part of the equation during internal armed conflict, they have almost no place legally in the structure of interstate conflict. The unfolding legal dispute regarding captives held in Guantanamo Bay illuminates how difficult it is to get a fix on the place of non-state actors within the humanitarian law of international armed conflict. The situation of arms carriers belonging to non-state organizations, and carrying out transnational hostilities is examined here as a prototype legal case study in debate unfolding in the aftermath of the attacks on September 11th. Before examining issues that challenge the familiar framework of international humanitarian law (IHL), it's necessary to take a quick look at the existing structure and understand why it may need significant adaptation for the century ahead.

International humanitarian law is the body of rules and principles utilized to save lives and alleviate suffering during armed conflict. Within IHL, the four Geneva Conventions of 1949 and two Protocols Additional of 1977 are the key legal instruments utilized to determine the status of individuals during armed conflict, establish their protections, and identify places such as hospitals and civilian safety zones that are protected from attack. IHL is founded in a legal paradigm that makes a division between international and non-international armed conflict.

The full provisions of the Geneva Conventions apply during international armed conflicts. Such conflicts involve states, and their armed forces are legally authorized to engage in armed hostilities on behalf of their governments. Civilians are expected to stay out of the fight, and in return are protected from attack other than when they extend direct aid to military efforts (e.g. working in munitions plants.) The text found in article 3 of each of the Geneva Conventions (famously known as “common article 3”) provides a less comprehensive, summarized set of protections that apply during internal armed conflicts.

The International Committee of the Red Cross (ICRC) is authorized to visit prisoners of war and civilians detained by an enemy power during

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international armed conflicts. Likewise the ICRC has authority to provide assistance to civilians in war zones, and other impartial humanitarian organizations are also given some authority to assist with the latter activities during interstate belligerency. Authority in internal armed conflicts is more limited, but there is also a legal basis for the ICRC and other humanitarian organizations to provide assistance in such circumstances.

Combatants in interstate conflict—those engaged in armed hostilities and thus not entitled to protection from attack—are carefully delineated in the Geneva Conventions. Such groups include the organized armed forces, along with militias, volunteer corps and organized resistance movements that are commanded by persons responsible for their subordinates and conduct their operations in accordance with the laws and customs of war. When captured, these combatants are held as prisoners of war. They are not convicts, and may be detained only to keep them from resuming a role in the hostilities. They are not civil prisoners, their captivity is not a form of punishment, their captors must not mistreat them, and they are entitled to visits and assistance from the ICRC or a protecting power.

Dissidents who take up arms against the authorities in their own country act without privileged status. They have no legal authority to engage in belligerency and if captured are not prisoners of war. Provided legal proceedings meet internationally recognized standards, the state may hold, try and punish them; though Protocol II encourages the broadest possible amnesty for insurgents at the end of an internal armed conflict. If we attempt to define the status of non-state actors involved in the attacks of September 11th and their supporters, however, we quickly leave this existing framework behind and venture into uncharted legal terrain.

The term unlawful combatant has been used to identify members of al Qaeda detained at Guantanamo Bay, but this term represents a concept that doesn't quite fit the present situation. "Unlawful combatant" is terminology adopted in 1942 by the U.S. Supreme Court, in *Ex Parte Quirin*, to describe German saboteurs tried by military commission during World War II. While the term doesn't have a long lineage, there are equivalents from earlier generations such as "irregular combatants" and "marauders". These varied terms all represent attempts to capture a legal concept that emerged, in the nineteenth century, when states moved to control certain categories of combatants whose actions were prohibited under the rules of war.

Saboteurs, guerrillas¹ and spies were all banned under the rules of war and, upon capture, subject to execution. Their targets were not necessarily protected. In fact, they were likely targeting military installations, units or

¹ Protocol I to the Geneva Conventions now makes guerrilla warfare lawful in some circumstances. Spies and saboteurs are still unlawful combatants, and mercenaries are added in Protocol I as a new category of such combatants.

infrastructure, but the deceptive and secret (hence especially dangerous and vexing) methods employed were discouraged with threats of execution. None of this sheds much light on the law in relation to terrorism. First of all, terrorists are most likely going to target groups or sites that are protected under international humanitarian law. Second, even if they attack military personnel or installations, they do so without any lawful authority under international law. They do not constitute part of the armed forces of a state, and often attack in time of peace when even a state would have no lawful justification to attack a military site or object.

This was the situation on September 11, 2001. Had there been an armed conflict, either international or internal, these attacks would have constituted war crimes. However they did not take place during international armed conflict, and were carried out by an organization bereft of legal authority to use force or violence against anyone, under any circumstances. Furthermore, the attacks were aimed at a state and citizens other than those of the attackers which therefore removed them from any place within the framework of internal armed conflict. At the same time, the attacks resulted in death and destruction on a scale that has always been associated with warfare in the past, and those behind these attacks presented a security threat of such dimensions that the United States government found it necessary to employ military force in response.

There is no universally agreed upon definition for terrorism. However, one can be devised that covers the situation now before us. Terrorists as defined here are non-state actors whose activities, in time of peace, would qualify as armed interstate hostilities if the same were attributed to a state; or whose activities, during international armed conflict, center on deliberate targeting of protected persons or infrastructure.

Belligerency is a largely discarded term, once used to describe armed hostility between nations. Terrorists are not unlawful combatants. As explained, unlawful combatants operate during armed hostilities and usually against lawful military objectives. Terrorists often act in time of peace and, further, quite often against legally protected sites and persons. Thus they are more accurately described as unlawful belligerents.

There is compelling precedent for such a legal framework. During the eighteenth and nineteenth centuries, the navies of the United States and England launched numerous military expeditions against pirates, who posed an armed threat of such dimensions that only a military strategy could defeat them. When captured, however, pirates were not treated as prisoners of war but instead turned over to civil authorities for trial and punishment. That military means must be used to address some terrorist threats in the twenty-first century does not necessarily mean that the Geneva Conventions of 1949 and Protocols Additional of 1977 automatically apply in those circumstances.

This misfit between the characteristics of such groups and existing IHL presents a major legal challenge. No state could credibly claim that its

military operations ever take place in a complete IHL vacuum. In some form, these rules apply to any use of military force.² The situation becomes especially complicated after unlawful belligerents are taken into custody.

If they were prisoners of war, the Geneva Conventions would require their release at the end of the conflict. The Conventions would also provide that such captives have no obligation to reveal anything beyond their name, rank, date of birth, and military serial number. Such assumptions raise difficult questions, and may be difficult to apply, even by analogy, when captives are unlawful belligerents. Repatriation of prisoners of war under the Geneva Conventions implies that another state is vouching for their future peaceable behavior. But what if there is no state that can or will take them back and ensure their future conduct? Likewise, Geneva Convention-based limitations on interrogation are problematic if the prisoner is part of an organized, ongoing criminal conspiracy dedicated to mass murder.

In the midst of such quandaries, states cannot forget their obligation to implement civilized norms in their treatment of all captives. ICRC visits to the detention center in Guantanamo Bay are an essential component of any conflict-related humanitarian norms. But the process of implementing such norms has just begun. Though unlawful belligerents lack any privilege or authority under international law, and upon capture may find themselves facing legal proceedings, when states take up arms against them they must remain mindful of their obligations and establish an effective framework for application of international humanitarian law.

² See, e.g., U.S. Department of Defense Directive 5100.77, Para. 5.3 (Dec. 9, 1998). "The Heads of the DOD components shall: . . . Ensure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations."