

INTERNATIONAL HUMANITARIAN LAW: THE STATUS OF UNLAWFUL COMBATANTS*

Abstract

The concept of combatancy has always been a fundamental issue under International Humanitarian Law, as it entails the right to attack the enemy and to enjoy prisoner of war status. This article discusses this concept as it relates to lawful and unlawful combatants in international armed conflicts focusing on the provisions of the Geneva Convention of 1949 (The Third Geneva Convention) and the provisions of the 1977 Protocol Additional to the Geneva Conventions (API) in determining what constitutes the status of a combatant under International Humanitarian Law (IHL), the protection accorded combatants as prisoners of war as well as the legal implication of a combatant status. The paper shall make viable recommendations where necessary as it relates to the applicable rules guiding combatancy. It will conclude that lawful combatants under IHL are protected under the Third Geneva Convention while unlawful combatants on the other hand are protected under the Fourth Geneva Convention of 1949 and that the categorization of spies, saboteurs, and mercenaries as unlawful combatants is not tenable, given the fact that acts of espionage, sabotage and mercenarism are lawful methods or means of war within the context of the Third Geneva Convention and API thereto.

Key words: *Combatancy, Lawful Combatants, Unlawful Combatants, Prisoners Of War, Mercenarism, Espionage*

1. Introduction

The concept of combatancy has throughout the history of organized warfare been an exclusionary concept.¹ Distinguishing between combatants and civilians has long represented an important aspect of warfare and has been recognized as the indispensable means by which humanitarian principles are infused into the rules governing conduct in war. Yet, the protection of participants in warfare under international humanitarian law remains characterized by a certain level of uncertainty as regards the codified provisions for combatants and civilians. Who qualifies as a combatant is a question that has plagued those seeking to establish a comprehensive normative regime governing participation in hostilities.² Acting on behalf of a state has constituted the primary means of attaining combatant status and therefore legitimate status. As a result, a significant number of participants in warfare do not meet the established criteria and are, consequently, considered ‘illegitimate’ or ‘unlawful’. This includes those fighting in international armed conflict as well as groups engaged in armed conflict not of an international character. The uncertain status of these ‘illegitimate’ warriors is evidenced by the variety of terms used to describe them.³ In 1949, the four Geneva Conventions⁴ and their two Additional Protocols of 1977⁵ enunciated the first comprehensive set of rules protecting combatants and non-combatants in international armed conflicts. The Protocols have not been widely ratified.⁶

* By **Keseme Philip ODUDU, LL.M, BL**, Lecturer, Department of Jurisprudence and International Law, Faculty of Law, University of Benin, Benin City, Nigeria; Email: keseme.odudu@gmail.com. Phone:+2348032340738; and **Ebitari Joshua ALLISON, LL.M, BL**, Legal Practitioner and Researcher, K. S. Sogo & Co., Opposite Nigerian Prisons Service, Yenagoa, Bayelsa State. Email:ejallison@ymail.com. Phone: +2347034662916

¹ K. Watkin ‘Warriors without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy’ (2005) 4 *Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Number 2* <<http://www.hpcrresearch.org/sites/default/files/publications/occasionalpaper2.pdf>> accessed September 2, 2016

² Ibid

³ These terms include but not limited to “belligerent”, “non-combatant”, “illegal combatant”, “enemy combatant”, “unprivileged belligerent”, and “unlawful belligerent”.

⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August, 1949.

⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June, 1977

⁶ The Protocols have not been ratified by, among others, the United States, Israel, Iran, Pakistan, Afghanistan, and Iraq

It is the general principle of international humanitarian law that every person in the power of the enemy must have some status under international law – that of either being a combatant or civilian.⁷ Combatants are persons who take direct part in the hostilities of an armed conflict in accordance with the rules of IHL applicable in armed conflict and upon capture qualify as prisoners of war under the Third Geneva Convention.⁸ They are not treated as criminals although they can be prosecuted for crimes committed both during and before the conflict.⁹ Civilians¹⁰ are protected from the dangers arising from military operations in armed conflicts and are not to be objects of an attack.¹¹ They enjoy this protection until such a time as they take active part in the hostilities of an armed conflict.¹²

2. Categories of Combatants

The first recognized category of combatants is members of the armed forces¹³ (with the exception of non-combatants such as military medical and religious personnel).¹⁴ The Third Geneva Convention included in its definition of combatant ‘organized resistance movements’ as forming part of the denomination ‘armed forces’. Thus, Convention and the Hague Regulation consider all members of the armed forces to be combatants and require militias and volunteer corps including organized resistance movements to comply with the four conditions in order for them to be considered combatants entitled

⁷ R Vark ‘The Status and Protection of Unlawful Combatants’ (2005) x *Juridica International* <http://www.juridicainternacional.eu/public/pdf/ji_2005_1_191.pdf> accessed September 2, 2016

⁸ By a broader definition, a prisoner of war includes guerrillas, civilians who take up arms against an enemy openly, or non-combatants associated with a military force. U.S National Archives and Records Administration (ARC Identifier 532560) <<http://www.britannica.com/topic/prisoner-of-war>. accessed January 19, 2017

⁹ K Watkin, ‘Combatants, Unprivileged Belligerents and Conflicts in the 21st Century’ (2003) *International Humanitarian Law Research Initiative* Background Paper prepared for the Informal High–Level Expert Meeting on the Re-affirmation and Development of International Humanitarian Law, Cambridge, January 27-29 <<http://www.hsph.harvard.edu/hpcr>> accessed September 4, 2016

¹⁰ The first limb of Article 50(1) of API 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 Geneva Convention and in Article 43 of this Protocol

¹¹ Article 51 of API makes a general provision for the protection of the civilian population and individual civilians against dangers arising from military operations.

¹² Article 51(3) of API provides: Civilians shall enjoy the protection afforded by this section, unless and for such a time as they take a direct part in hostilities

¹³ A Prisoner of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces

(2) Members of other militias and members of other volunteer corps including those of other organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for its subordinates;

(b) that of having a distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(6) 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 time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. See also the Article 1 and 2 of Hague Regulations of 1907 which provides that: 1.The laws, rights duties of war apply not only to armies but also to militias and volunteer corps fulfilling the following conditions:

1.To be commanded by a person responsible for his subordinates

2. To have a fixed and distinctive emblem recognizable at a distance

3. To carry arms openly

4. To conduct their operations in accordance with the laws and customs of war

5. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

¹⁴ Article 33 of the Third Geneva Convention of 12 August 1949 provides *inter alia*: Members of the medical personnel and chaplains while retained by the Detaining power with a view of assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present convention, and shall also be granted all facilities necessary to provide for the medical care of and religious ministrations to prisoners of war...

to prisoner of war status. The definition of combatant under the Third Geneva Convention is not different from that given under the API.¹⁵

It is noteworthy that API does not distinguish between the regular armed forces and other armed groups or units, but defines all armed groups and units which are under a command responsible to a party for the conduct of its subordinates as armed forces of that party.¹⁶

2.1. Status and Protection of Combatants

The defining feature of a combatant status is the right to participate directly in hostilities.¹⁷ Combatants have a license to kill, or wound enemy combatants and destroy other enemy military objectives. They may even cause incidental civilian casualties and collateral damages under certain circumstances.¹⁸ Due to their status, combatants are entitled to combat immunity.¹⁹ However, combat immunity is limited and does not extend to acts that transgress the rules of international humanitarian law applicable in situations of armed conflict.²⁰ When combatants are captured, they are entitled to prisoner of war status and thus benefit from the protection of the Third Geneva Convention and API. It must be noted that violations of international humanitarian law applicable in armed conflict themselves do not deprive combatants of their rights to be prisoners of war, except in certain limited cases. Even if this happens, these persons are given protection equivalent in all respect to those accorded prisoners of war.²¹ Part III of the Third Geneva Convention is dedicated to the general protection of prisoners of war who are in the hands of the Detaining Power²²

In contrast to combatants, civilians may not take direct part in hostilities, except in the relatively rare event of a *levee en masse*, where inhabitants of a non-occupied territory on the approach of the enemy spontaneously take up arms to resist the invading forces. Once captured, such inhabitants become prisoners of war. Civilians are entitled to the protection provided in the Fourth Geneva Convention and API. For the purpose of the protection accorded combatants as prisoners of war under the Third Geneva Convention, regard shall be had only on the paragraphs of Article 4 dealing with combatants as recognized under international armed conflicts.

3. Justification for the Categorization of Combatants

The idea that there are two categories of persons²³ in an armed conflict has always faced definitional challenges.²⁴ Terms such as ‘belligerent’, ‘non-combatant’, ‘illegal combatant’, ‘enemy combatant’,

¹⁵ Article 43(1) The armed forces of a Party to a conflict consists of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subjected to an internal disciplinary system which *inter alia* shall enforce compliance with the rules of international law applicable in armed conflicts. (2) Members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by article 33 of the Third Geneva Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

¹⁶ The definition of combatant given by the Third Geneva Convention and API express the same idea namely that all persons who fight in the name of a party to a conflict who belong to that party are combatants

¹⁷ Article 43 (2) of API

¹⁸ R Vark ‘The Status and Protection of Unlawful Combatants’ (n. 7) p. 192

¹⁹ Combat immunity is a common law doctrine that operates to exclude civil liability for negligence and deliberate damage to property or person committed by the armed forces during certain combat operations.

²⁰ R Vark ‘The Status and Protection of Unlawful Combatants’ (n. 7) p. 192

²¹ See Article 44 (2)-(5) of API

²² See generally Articles 12 – 16 of the Third Geneva Convention

²³ The two categories of persons recognized in an armed conflict are combatants and civilians. Combatants have the right to take direct part in the hostilities of war. They have the unique status of being prisoners of war upon capture. They are not to be treated as criminals. Civilians on the other hand also benefits from the protection associated with their status. The law of armed conflict generally provides that they are to be protected from the dangers of military operation arising from armed conflict and are not to be the object of an attack.

²⁴ The definitional challenge is perhaps most clearly evident in the term “non-combatant”. In 1911, that term included non-military inhabitants of a country who take no part in hostilities (civilians) and members of the armed forces such as orderlies, clerks, bandsmen, etc. whose participation was seen as “ancillary to that of the fighting men (military non-combatants).” The latter notion of a military “staff” non-combatant has since been eliminated. A more modern use of

‘unprivileged belligerent’ and ‘unlawful belligerent’ are found throughout the legal literature of international humanitarian law.²⁵ Their relevance is often impacted by changes in historical usage and reflects the difficulty that has arisen in attempting to categorize various persons found on the battlefield. One has to keep in mind that the concept of unlawful combatants is relevant in international armed conflicts because the law applicable to non-international armed conflicts does not foresee combatant status (thus, the issue of unlawful combatant does not arise).²⁶ This work has included a third category, namely, unlawful combatant to the traditional categorization of classes of participants in an international armed conflict. Thus, for the purpose of determining the protection to be accorded combatants who take direct part in the hostilities of an armed conflict, the term combatants is categorized into ‘lawful’ combatant and ‘unlawful’ combatants.

4. Lawful Combatants²⁷

Article 4 of the Third Geneva Convention makes provision for the categories of persons who qualify as lawful combatants in international armed conflicts. However, the article does not address directly the definition of the term ‘combatant’ but specifies the categories of persons who can be treated as prisoners of war, hence lawful combatants. For the purpose of this work, regard shall be had to those categories of persons entitled to prisoner of war status.

4.1 Members of Armed Forces

Article 4 of the Third Geneva Convention starts perhaps with the most obvious combatants in its statement as to the category of persons qualified as prisoners of war that is, members of the Armed Forces.²⁸ Members of the armed forces, who take direct part in the hostilities of war, when captured, are to be treated as prisoners of war and accordingly entitled to privileges under the law of armed conflict. They will not be put on trial but be released at the end of hostilities.²⁹

4.2 Other Groups and Militia

The Hague Regulations as well as the Third Geneva Convention mentioned other groups and militias or volunteer corps and organized resistance movement that could be considered as combatants and thus protected under the Third Geneva Convention as prisoners of war upon capture. They are therefore to fulfill the conditions set forth in the provisions in order to benefit from the protective status of a combatant.

the word appears to address non-combatants as persons who do not take part in hostilities; are not permitted to; or are incapable of doing so. For example, in the United States Annotated Supplement to The Commander’s Handbook on the Law of Naval Operation, non-combatant has been interpreted to be “individuals who do not form a part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts.” In that context, non-combatants would generally include the civilian population. However, the term also includes a more diverse mix of persons such as medical officers, corpsmen, chaplains, contractors, civilian war correspondents and armed forces personnel who are unable to engage in combat because of wounds, sickness, shipwreck or capture (i.e. Prisoners of War). Here, “non-combatant” is used in the context of those persons, civilian and military, who should not be targeted and not in the sense of the combatant/civilian distinction.

²⁵ The usage and meaning of the terms have always depended on historical developments but the idea behind them has never been clear.

²⁶ However, there is no rule of there is no rule that prohibits the government, during a non-international armed conflict from according the member of dissident armed groups both combatant and prisoner of war status. Article 3 common to the Four Geneva Conventions of 1949, which applies specifically to non-international armed conflict recommends that the government and other parties to the non-international armed conflict to conclude special agreement to apply all or part of the Geneva Conventions.

²⁷ A lawful combatant is a combatant who conducts warfare in accordance with the laws of war and upon capture qualifies as a prisoner of war under the Third Geneva Convention of 1949

²⁸ The expression armed forces refer ‘to all military personnel, whether they belong to the land, sea or air forces. See, the ICRC Commentary on the Geneva Conventions, Article 4 of the Third Geneva Convention <http://www.icrc.org> accessed September, 2016

²⁹ The same type of soldier a regular soldier in uniform may have committed war crimes, such as unwarranted attacks on civilians. If he is captured, he is entitled to prisoner of war status but will be tried, probably by a military tribunal, and, if guilty, punished.

4.3 *Levee En Masse*

The Third Geneva Convention attributes to these civilians who have taken arms out of a patriotic impulse, the status of prisoner of war and thus protected. In comparison with the conditions laid down for partisans, only three conditions are required for people taking up arms spontaneously in order for them to benefit from prisoner of war status.³⁰

5. Unlawful Combatants

The term unlawful combatant is not an independent legal concept. In the framework of 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.³¹ The term was first used by the US Supreme Court in 1942 in its decision in the *Ex Parte Quirin*³² 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 due 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.’ 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 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.’ Unlawful combatants became better known during the armed conflict in Afghanistan when the Bush administration announced its decision to classify the captured Taliban soldiers and al Qaeda fighters as unlawful combatants and as a consequence, to deny them prisoner of war status.³³ In the memorandum of February 7, 2002, (former) president of the United States of America, 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.’³⁴ 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.³⁵ Unlawful combatants are therefore either combatants who fail to follow the laws of war or civilians who take part directly in hostilities without being entitled to do so or doing so without meeting the conditions set forth in the Third Geneva convention.³⁶ They disregard in order to gain military advantage, the fundamental requirement that combatants distinguish themselves from civilians.³⁷ Ingrid Detter had stated that the most radical group between the extremes – of soldiers on the one hand and civilians on the other – are the ‘illegal’ or ‘unlawful’ combatants.³⁸ They are therefore not entitled to the protection accorded prisoners of war under the Third Geneva

³⁰ The country must not yet be occupied; arms must be carried openly; and the laws of war shall be respected.

³¹ V Bilkova ‘Talking about Unlawful Combatants? A Short and Concise Assessment of a Long and Multifaceted Debate’ <[³² US Supreme Court, *Ex Parte Quirin*, 317 US 1 \(1942\), para. 30 – 31](http://isndemo.atlasproject.eu/file>Chap2> accessed September 10, 2016</p>
</div>
<div data-bbox=)

³³ R Vark, ‘The Status and Protection of Unlawful Combatants’ (n.7) p 193

³⁴ The US former president George W Bush stated in the memorandum as follows: 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 and, therefore do not qualify as prisoners of war under article 4 of Geneva. I note that because Geneva does not apply to our conflicts with al Qaeda, al Qaeda detainees do not also qualify as prisoner of war. See paragraph 2(d) of former president George W. Bush Memorandum of February 7, 2002 on the subject Humane Treatment of Taliban and al Qaeda Detainees <[³⁵ Combatant privilege does not cover the commission of war crimes and other violations of international humanitarian law, for which combatants may be held responsible.](http://www.pegc.us/.../bush_memo_20020207...> accessed September 10, 2016</p>
</div>
<div data-bbox=)

³⁶ I Detter ‘The Law of War and Illegal Combatants’ (2007) 75 *The Washington Law Review* <http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/ingrid_detter.pdf accessed September 10, 2016

³⁷ Ibid

³⁸ Ibid

Convention. However, they can enjoy some protection under the Fourth Geneva Convention³⁹ as civilians since international humanitarian law only recognizes two categories of persons in armed conflicts – combatants on the one hand and civilians on the other hand. For the purpose of this work, examples of unlawful combatant would include spies, saboteurs, and mercenaries who, wearing civilians clothing infiltrates enemy territory to collect information or to destroy designated objects.⁴⁰

5.1. Spies

Spies have a special status under international law. They have the task to collect information from the adversary parties. By their task, spies obviously do not want to be recognized as belonging to another party in the conflict and as such they do not wear a uniform. In this way, they fail to distinguish themselves from the civilian population, one of the conditions for lawful combatancy.⁴¹ Spies are not lawful combatants and therefore not entitled to prisoner of war status.⁴² The act of espionage has been practiced by nations worldwide for centuries.⁴³ There is no international convention that addresses the legality of espionage in peacetime. This notwithstanding, states have adopted laws that punish the act of espionage, if it is against their states interest.⁴⁴ More interesting is the question whether espionage is allowed in times of war? Espionage is not prohibited by the international community as a fundamentally wrong activity. International humanitarian law even recognizes the well-established practice of employing spies. Although recognized by international humanitarian law, spies may be severely punished when they are captured by the enemy as provided in API. The idea of sending spies in war was permitted but when caught, spies were usually treated very harshly. They often were subjected to the death penalty. This position was confirmed by the Lieber Code.⁴⁵ According to the Lieber Code, a spy is a person who secretly seeks information with the intention of communicating it to the enemy. They were to be punished with death by hanging. Though, if a successful spy returned to his army and was captured afterwards, he would not be subject to punishment for his acts as a spy.⁴⁶ The first important indication of spies in armed conflicts in conventions can be found in The Hague Regulations of 1907. Accordingly, article 29 provides that a person is considered a spy when: ‘acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.’ Spies could be divided into two during armed conflicts. On the one hand, there are the military spies who belong to the armed forces and on the other hand, there are the civilian spies who belong to the civilian population. What they have in common is that, they try to gain military relevant information, act under false pretenses or secretly and mostly fail to distinguish themselves from the civilian population. Spies

³⁹ See article 45(3) of API which provides that: Any person who has taken part in hostilities, who is not entitled to prisoner of war status and who does not benefit from more favorable treatment in accordance with the Fourth Geneva Convention shall have the right at all times to the protection of Article 75 of this Protocol.

⁴⁰ In the war in Iraq, the Fedayeen fighters dressed in Civilian clothing and used civilians as human shields to protect themselves from attack. Another alarming form of unlawful combatants is civilians who have organized themselves as self-styled paramilitary fighters (not belonging to a party to the armed conflict). The best real-life examples would be Al Qaeda fighters who were not incorporated in the Taliban military units as part of the Taliban army forces according to Article 4 A(2) of the Third Geneva Convention (at least there was no evidence of such incorporation. G. H Aldrich, ‘The Taliban, Al Qaeda, and the Determination of Illegal Combatants’ (2002) 96 *American Journal of International Law* <<http://www.jstor.org/stable/3070684>> accessed November 27, 2016

⁴¹ I Dettner, ‘Symposium on the New Face of Armed Conflict: Enemy Combatants after *Hamdan v. Rumsfeld*: The Law of War and Illegal Combatants (2007) 75 *The George Washington Law Review* <<http://litigation-essentials.nexislexis.com/webcd/application=DocumentDisplay&crawlid=1&doctype>> accessed September 12, 2016

⁴² R Vark, ‘The Status of Unlawful Combatant’ (n.7) p 193; Article 46(1) of API provides thus: Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

⁴³ N Crowe, ‘A Short History of the Origins of Espionage’ 8 (2004) <<http://www.historytelevision.ca/archives/sexLiesSpies/spyOrigins>> accessed January 19, 2017.

⁴⁴ This is the consequence of one of the basic principles in international law, namely the territorial integrity and political independence of states.

⁴⁵ The Lieber Code of April 24, 1863 was an instruction signed by the then US President, Abraham Lincoln to the Union forces of the US during the American Civil War that dictated how soldiers should conduct themselves in wartime.

⁴⁶ S Chesterman ‘The Spy who came from the Cold War: Intelligence and International Law’ (2007) 27 *Michigan Journal of International Law* <<http://www.war.wick.ac.uk/.../v27n4-chesterman.pdf>> accessed January 20, 2017

may be prosecuted for espionage under the domestic laws applicable to their case. However, the Convention states that no spy shall be punished without trial.⁴⁷

Under the Fourth Geneva Convention, civilian spies do not lose their civilian status if they are detained during espionage. However, if military security requires so, they shall be regarded as having forfeited their rights of communication. They are to be treated humanely and in case of trial, be granted all fair and regular trials prescribed by the Convention.⁴⁸ From the provisions of the API dealing with spies, a member of the armed forces who gathers or attempts to gather information in the territory of an adverse party shall not be seen as a spy if he wears a uniform.⁴⁹ Secondly, spies who avoid capture and rejoin their forces cannot - if captured thereafter - be prosecuted for previous acts of espionage.⁵⁰ Again, an underground combatant who is a resident of the occupied territory and who observes military actions while engaging in legitimate activities cannot be seen as a spy because he uses the gathered information for the underground forces. However, if he acts clandestinely, he may be treated as a spy. Such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.⁵¹ Under API, the key element is wearing the uniform of a belligerent party. Whereas members of armed forces wearing the belligerent party's uniform while gathering information in enemy territory are not considered spies, members of armed forces wearing another uniform under the same circumstances may be treated as spies. Again, at the heart of the provision regarding spies under API is the term espionage, which means gathering or attempting to gather information. Article 46 is primarily intended to address spies in which gathering information is a critical component. Article 44(3) API does not require combatants to distinguish themselves constantly from civilians. They only have to distinguish themselves during an attack or in operations preparatory to an attack. Consequently, members of armed forces may enter enemy territory without wearing a uniform as long as they do not gather information and properly distinguish themselves from the civilian population. They are not engaged in acts of espionage and do not violate the principle of distinction.

Although spies are not protected under the Third Geneva Convention, they enjoy the protection of Article 75 of API. Civilian spies are granted the protection of the Fourth Geneva Convention if they meet the nationality criteria. If not, they can rely on Article 75 API that reflects customary international law. On the other hand, military spies do not fall under the scope of the Fourth Geneva Convention since the Convention is applicable only to civilians. This notwithstanding, military spies are granted the protection of Article 75, API.

5.2 Saboteurs

Saboteurs, like spies, also have a special status under international law. Saboteurs are given the mission to disrupt the actions of the enemy. As with spies, they do not want to be recognized as belonging to another party to the conflict so they do not wear uniforms thereby failing to distinguish themselves from the civilian population. Saboteurs are persons who destroy or damage material, works or installations that add to the efficiency of the enemy's armed forces. It actually covers all the destruction connected with warfare. Depending on the target and the method used, their acts are either lawful or unlawful. Like spies, saboteurs can be divided into two categories, namely, civilian and military saboteurs. Military saboteurs belong to the armed forces of states, whereas civilian saboteurs do not. If military saboteurs wear uniforms or distinguish themselves from the civilian population, they are to be treated as prisoners of war upon capture. If they fail to distinguish themselves, their status is not clear, but it seems that their position is similar to that of spies. Thus, if saboteurs are considered unlawful

⁴⁷ In the US Supreme Court, *Ex Parte Quirin (Supra)* the court stated that "the spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather information and communicate it to the enemy, or an enemy combatant who without uniforms comes secretly through the lines for the purpose of waging by destruction of life and property, are familiar examples of belligerents who are generally not deemed 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.

⁴⁸ See Article 5 of the Fourth Geneva Convention

⁴⁹ Article 46(2) of API

⁵⁰ Article 46(4) of API

⁵¹ Article 46(3) of API

combatants, they nevertheless enjoy protection since they do not act in a legal vacuum. In international armed conflicts, civilian saboteurs fall under the scope of the Fourth Geneva Convention if they meet the nationality criteria.⁵² However, their rights of communication can be suspended when saboteurs are detained in occupied territory and when military security requires so. They shall nonetheless be treated with humanity and shall not be deprived of their right of fair and regular trial.⁵³ If they fail to meet these conditions, they will enjoy the protection of Article 75 of API. Like military spies, military saboteurs cannot rely on the Fourth Geneva Convention, but they can rely on Article 75 of API.

5.3 Mercenaries

Another category of unlawful combatants are mercenaries. Article 47 of API provides for the definition and status of a mercenary.⁵⁴ Mercenaries in essence are persons who are hired to fight in wars and who do this solely for monetary or material gain. Mercenaries were used by states during the World War II and after then the use of mercenary troops became almost a habit during the many years that ravaged Africa. However, they do not only operate in Africa, they can be found in all over the world.⁵⁵ After the United Nations was founded in 1945, it prohibited the use of force.⁵⁶ It is believed that the provision upholds an obligation for states to prevent any act that could damage other states. In 1989 The UN General Assembly passed Resolution 44/34 of December 4, 1989.⁵⁷ The definition of mercenaries in the light of the Convention⁵⁸ is dual. First, it copies article 47 of API, the only difference is that mercenaries do not have to take direct part in the hostilities under the Convention. Whereas according to article 47 API, it is necessary mercenaries participate directly in the hostilities. Second, the definition is broadened to include certain categories of persons who are also regarded as mercenaries. The conditions for mercenarism as provided for in the Article 47 of the API are cumulative. If one of them is not fulfilled, the combatant will fall out of that category. Being qualified as a mercenary in IHL has straight forward consequence which is that, the mercenary shall not have the right to be a combatant or a prisoner of war and therefore not protected under the Third Geneva Convention.⁵⁹ Be that as it may, if they meet the nationality criteria set out in Article 5 of the Fourth Geneva Convention, they will be protected by the Convention. If on the other hand, they do not meet the nationality criteria, they may rely on Article 75 of API which provides for the fundamental guarantees in trials.

6. Argument

Whereas the focal point of this paper is the status of a combatant in international humanitarian law, there are emergent issues borne out of a contextual appraisal of the legal framework on the status of combatants and prisoners of war arising from acts of espionage, sabotage and mercenarism. First API creates a presumption of prisoner of war status in favor of any person who has taken a direct part in hostilities and falls into the power of an adverse party.⁶⁰ Such a party will therefore enjoy that status until such a time when his status is being determined by a court or tribunal of competent jurisdiction. It is in this light that the writer posits that the classification of combatants into lawful or unlawful for the

⁵²Article 4 of the Fourth Geneva Convention, V. Bilkova ‘Members of Private Military and/as Unlawful Combatants?’ (2009) 15 *Academic of European Law* <<http://www.cadmus.eui.eu/handle/1814/12955>> accessed January 19, 2017

⁵³ Article 5 of the Fourth Geneva Convention

⁵⁴ 1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is a person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does in fact take a direct part in the hostilities (c) is motivated to take part in the hostilities essentially by the desire for private gains and in fact is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party; (d) is neither a national a party to the conflict nor a resistant of territory controlled by the party to the conflict; (e) is not a member of the armed forces of a party to the conflict; and (f) has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces.

⁵⁵M Miccoli, ‘Mercenaries: ‘Unlawful Soldiers’ (2002) *SSRN Electronic Journal* <http://paper.ssrn.com/sol3/papers.cfm?abstract_id=279631> accessed January, 20 2017

⁵⁶ See article 2 of the United Nations Charter, 1945

⁵⁷International Convention against the Recruitment, Use, Financing and Training of Mercenaries <<http://www.un.org/documents/res>> accessed January 20, 2017

⁵⁸ Article 1 of the Convention

⁵⁹ Ingrid Deter ‘The Law of War and illegal combatants’ (n.38)

⁶⁰ See the second sentence of Article 5(2) Of the Third Geneva Convention.

purpose of denying the latter the protection of a prisoner of war holds no water under IHL. Second, a contextual appraisal of the totality of the four Geneva Conventions and the Additional thereto reveals one indubitable element, which is the responsibility of a party to armed conflict who engages in the act of espionage in favour of a party and against enemy forces. It is now statutorily settled beyond controversy that acts of espionage carried out by spies do not constitute a crime punishable and the perpetrator not liable unless, and only if, the same is caught in the act. It is this condition of punishment subject to being 'caught' that sparks the line of thought now being expressed here. It is the considered opinion and therefore vehement argument of the writer that, the act of espionage is not a crime against the laws of warfare under IHL. Espionage is (tacitly?) authorized by the extant legal framework of IHL in times of war. When an act is not given a definite prescription of a crime by statute, it will be illegal to otherwise attempt to ascribe one as such. This will be both unlawful and therefore unenforceable within the ambits of existing legal framework. In this context, it is submitted that acts of espionage can only be classified and treated as criminal and the perpetrator liable to trial and punishment upon a guilty verdict, if the same was caught in the act. In this context, it is immaterial that the person is a civilian or member of an armed force or group. It is also immaterial that such person is in uniform or not, albeit the rights to fair trial and humane treatment are guaranteed. The determining factor for the act of espionage being a crime and therefore punishable is 'being caught in the act'. So that, if a spy successfully rejoins its camp after spying on the enemy forces without being caught, there is no issue of wrong done and no punishment for the spy would therefore arise. In consequence of the foregoing, it is here submitted that a spy is not an unlawful combatant merely by being a spy. A spy can only be considered an unlawful combatant, and rightly so, if the same is caught in the act of espionage against the enemy. The scenario presented in *Ex Parte Quirin* is a perfect illustration of the argument of this writer. Bearing this in mind, can one rightly categorize spies as unlawful combatants? This writer thinks not so. It is accordingly submitted that a spy can only be rightly classified as unlawful combatant if caught in the act of espionage. Therefore, the difference between a spy and an unlawful combatant is the element of being caught in the act. Thus, until a spy is caught in the act of espionage, it is submitted, the same is a lawful combatant, not an unlawful combatant.

The third issue on point of contextual appraisal is the question whether human rights are not protected as guaranteed by conventional provisions on civilian protection in times of conflict? This paper is curious and raises the issue and argues that civilian populations are not protected and that human rights are not guaranteed in times of war as same is made subject to the legality of sabotage as a means of warfare. Under the respective Conventions, the act of sabotage is not criminal or unlawful. However, bearing in mind the distinction between lawful and unlawful sabotage, it is argued that the means used in an act of sabotage has not resulted in the prosecution and conviction of any saboteur on record. It therefore leaves the writer to hold that civilian populations are not protected from the consequences of sabotage. Further, human rights are undermined and made subject to the legality of sabotage as a means of war. When lives and property of civilians in war territories are constantly diminished and destroyed without restraint, can one say that there is protection of any sort? It is argued that the legal framework is bias against the protection of human rights and in favor of abuse.

A necessary implication of the approval of wanton destruction of basic social infrastructure as a strategy in war time is typical statement of bias and neglect of human rights and safety of civilian populations in times of war. A latest report on civilian casualty in military raid has it that none less than 10 civilians (women and children) have been killed in a US military raid in Yemen which also killed 30 Al-Qaeda militants. The raid was carried out in the Yakla district in the central province of Bayda.⁶¹ Cases of killings of civilian populations of this sort abound across the globe but what have been missing are corresponding reparations for these civilian victims, in spite of their guaranteed protocol and conventional rights to protection in times of conflict. This provides much credence to the paper's argument that civilian populations are not protected and human rights are not guaranteed in times of war. Obviously, they are subject to the legality of 'means of war'.

⁶¹Alleged US military raid in Yemen kills civilians and Al-Qaeda militants. <<http://google.com/newsstand/s/CBIw4livrTk>> accessed January 29, 2017.

Lastly, it is submitted that mercenaries could be spies or saboteurs, depending on the terms of engagement. If a mercenary is engaged by a party to an armed conflict for the purpose of destabilizing enemy infrastructure in order to weaken them to defeat, in first parlance such person is regarded a saboteur. On the other hand, a person engaged for the purpose of infiltrating enemy camps to obtain sensitive military information in favor of a warring party although not necessarily a combatant, such person is a spy but yet a mercenary. Thus, both spies and saboteurs could be mercenaries in the real context of the use of the term mercenary. This paper thus argues that as with spies and saboteurs, since international humanitarian law indulges the act of mercenarism in war, the same is not unlawful and mercenaries are not unlawful combatants unless they are caught.

7. Conclusion and Recommendations

In conclusion, this paper has sufficiently discussed the concept of combatant as it relates to unlawful combatants in international armed conflicts with specific focus on the provisions of the Third Geneva Convention and the Protocols Additional thereto. It has shown that even though unlawful combatants cannot enjoy the protection accorded prisoners of war, they can and are protected under the Fourth Geneva Convention and article 75 of API in the case of trial by a competent military tribunal for having violated the laws of war. The paper has also argued that the categorization of spies, saboteurs, and mercenaries as unlawful combatants is not tenable, given the fact that acts of espionage, sabotage and mercenarism are lawful methods or means of war within the context of the four Geneva Conventions and the Protocols Additional thereto. Means of war should be permissible subject to human rights and the need to protect civilian populations in times of war. Need for review of the categorization of unlawful combatants as saboteurs, spies and mercenaries are not necessarily unlawful combatants by the mere description as such. The paper has recommended far reaching options aimed at enhancing the legal framework on the status of unlawful combatants as well as the protection of civilian populations and human rights during war or other international armed conflict. It is believed that, with conscious adherence to the recommendations made herein, the horizon of IHL will be greatly advanced.