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“Unlawful/Unprivileged Combatants” in International armed conflict- Appraisal of the Protection Regime under gc III and gc IV2nd Year Law Student, Law Centre 2, Faculty of Law, University of Delhi (Delhi)
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Abstract: *International humanitarian law (IHL) does not explicitly classify unlawful combatants as a unique category, yet this does not exclude them from the protections afforded by the Geneva Conventions (GCs) and their Additional Protocols (APs). Unlawful combatants occupy a distinct status, apart from traditional combatants and civilians, and this paper argues for their recognition within IHL. The current paper examines the evolution and legal standing of unlawful belligerents under the Third and Fourth Geneva Conventions. It provides an analysis of the minimum protections that should be extended to such individuals, regardless of whether the conflict is international or non-international in nature. The paper underscores that even those categorized as unlawful combatants are entitled to certain fundamental guarantees, rooted in customary international law, which cannot be disregarded. By exploring the scope of protections available to unlawful combatants, the paper highlights the importance of upholding the principle of distinction, which is central to IHL. Even without formal recognition as combatants, unlawful belligerents should still receive certain basic rights and safeguards, consistent with the overarching humanitarian principles of IHL. This analysis contributes to a broader understanding of how the international legal framework can evolve to ensure that all persons, regardless of their status, are granted protection in times of armed conflict. Recognizing unlawful combatants within IHL thus bridges a significant legal gap, reaffirming the commitment to humanitarian principles that form the foundation of international humanitarian law.*

Key words: Unlawful Belligerents, Third and Fourth Geneva Conventions, Protection Regime

Introduction: The Geneva Conventions are the foundational pillars of international humanitarian law (IHL) in the context of armed conflicts. They guarantee the dignity and rights of those who are affected by violent upheavals. The III and IV Geneva Conventions, which were ratified in 1949, provide victims of both international and non-international armed conflicts with comprehensive protections. Through these shows, fundamental rules are laid out to administer the treatment of regular people, detainees of war, and other non-soldiers in the midst of the bedlam of fighting. The III Geneva Show basically centers around the therapy of detainees of war, underscoring altruistic therapy, security against viciousness, and arrangements for fundamental necessities like clinical consideration and correspondence. It sets clear guidelines for their detention, ensuring adherence to basic human rights principles even in the midst of hostilities. On the other hand, the IV Geneva Convention extends protection to civilians, outlining their rights and entitlements during conflicts and protracted situations. It prohibits acts of violence and discrimination against civilians and emphasizes the duty of occupying powers to ensure their safety and well-being. Hence, understanding the intricacies of the protection regime under these conventions is crucial for upholding humanitarian standards amidst the chaos of armed conflicts.

Article 44 (3) of Additional Protocol I (AP I) lays down “the principles of distinction between civilians and combatants in armed conflicts, which is the cornerstone of IHL and is a cardinal and well-established international legal principle. It mandates the combatants to distinguish themselves and prohibits attacking civilians and civilian objects. Notably, no individual is born a combatant but a civilian first. Geneva Conventions (GCs) III and IV broadly extend the protective measure to prisoners of war and civilians. “Unlawful combatants” lay in the gray zone in between civilians and combatants. These groups of people are found only in non-international armed conflicts, as “lawful combatants” are recognised under international armed conflict”. They



are also referred to as unlawful belligerents, unprivileged combatants, insurgents and numerous other synonymous terms. Their classification remains somewhat ambiguous since the specific terminology is not explicitly defined within the Geneva Convention but rather inferred from other provisions contained therein. The international protection regime under humanitarian law is extended to everyone, as they have a fundamental right to be recognised by law under the GCs and Additional Protocols (APs). This protection also extends to unlawful/unprivileged belligerents.

This research aims to delve into the nuances of these conventions, analyzing how and if the protection regime under GC III and GC IV can be extended to mitigate the impact of warfare on unlawful combatants. The first section explains how the idea of illegal combatants came to be and how they are different from civilians and combatants. The second part entails an appraisal of the protective measures under GC III and GC IV and whether they cover in their purview the protection of unlawful combatants. The third part primarily deals with specific groups such as mercenaries, spies and saboteurs and how their status has to be taken into perspective. The defensive measures for subjects under helpful regulation can be induced from standard global legitimate standards, worldwide philanthropic regulation and worldwide common liberties regulation. The explanation of the protection regime in accordance with international humanitarian law is the primary focus of the research paper. The international human rights framework has a different definition of this kind of protection, which is outside the scope of the research.

PART I: IMPROVEMENT OF THE IDEA OF 'UNLAWFUL COMBATANTS'- “In the 21st century, the debate regarding the status of unlawful belligerents was triggered after the US administration declined to grant prisoners of war status to Al Qaeda and Taliban after the 2001 terrorist attack on US soil and the invasion of Afghanistan by armed forces belonging to the US and its allies”. The “history of unlawful combatancy can be traced back to the American Civil War, the Franco-Prussian war and significant historical wars of that time, when the concept significantly depended on historical developments. It has existed since the inception of laws of war. However, in the Ex Parte Quirin case, the US Supreme Court held for the first time that ‘unlawful combatants’ can’t be granted prisoners of war status”. It can be observed that the distinction between lawful and unlawful combatancy fundamentally arose from the existing distinction between civilians and combatants. The discourse on unlawful combatants would be incomplete without establishing a foundation for delineating between civilians and combatants regarding their protection.

The origin of lawful combatancy can be traced back to Roman law. According to the law of negotiation and diplomacy (*jus fetaile*), no individual could be entitled to engage in hostilities with the public enemy without taking the military oath. The legal implications of privileged combatancy were affirmed in the Lieber Code of 1863 and codified in laws of war under the Hague Conventions of 1899 and 1907. “Combatant immunity was also extended to the lawful combatants, where they could not be prosecuted for their lawful actions during the proclamation of laws of war. Combatants include regular members of the armed forces and militia groups, not a part of the armed forces, that fulfill the following conditions”:

1. Existence of a chain of command among the group member,
2. Distinctive emblem,
3. displaying open arms, and
4. Follow the rules of international armed conflict law.

The actions of these combatants, which are lawful during the proclamation of war laws, could be construed as unlawful during times of peace. As per GC III, in case they fall into the hands of the army and are held captive, they would be accorded prisoners of war status, and such protection under IHL would be extended to them. The dissidents and organized groups under non-international law are treated as ordinary criminals when held captive. However, the basic level of human treatment is extended to them under Common Article 3 in the GCs. The lack of combatant



status for such NIAC belligerents does not imply that it is not their duty to protect civilians or civilian objects and not distinguish themselves from the civilian population. A combatant can either withdraw from hostility by gaining the status of a civilian or hors de combat. “According to Article 43 of AP I, every combatant that is captured by the enemy state is deemed to be a prisoner of war. Hence, if an individual does not truly define and showcase status to the enemy state, there’s a possibility that the enemy state will adopt a narrower interpretation of combatants, giving them more autonomy to decide their status”.

The idea of recognizing civilian status was embedded in the 1907 Hague Regulations, and this was reflected in GC IV. Article 50 of AP I lays down the definition of civilians, which states that a person who is not a combatant is a civilian. It also assumes that in case there’s any conflict regarding the status of combatants and civilians, primacy will be given to civilian status. According to “Article 48 of AP I, the basic rule for protection of civilian populations and civilian objects is the principle of distinction between combatants and civilians. The armed forces must accordingly direct their operations and objectives with due care in allegiance to this intransgressible principle. Article 51 of AP I laid down the mandate for armed forces to protect civilians, recognizing the need to have military objectives not within the proximity of civilian populations or objects. The armed forces must also not carry out disproportionate attacks that can result in the expected injury of civilians. However, it can be very difficult to formulate this assessment as there are various subjective elements at play here”.

As per Article 58 of AP I, both parties to the conflict must not resort to using civilians as human shields, and civilians must also not take part in hostilities. Civilians will not attain the status of combatants if they take part in hostilities and retain their civilian status. Hence, “the prisoners of war protection regime under GC III will not be extended to such civilians. Common Article 3 of the GCs extends protection to civilians in non-international armed conflicts. In the Nicaragua case, Common Article 3 was given the status of customary international law and ought to apply in both IAC and NIAC. The ICTY further held that the principle of civilian protection, as recognised in the ICJ advisory opinion case (1996) , is a customary international law principle. Article 4 of GC III grants prisoners of war status to those civilians who are employed by the armed forces and accompany them, and this status is retained even when they are held captive”.

After thoroughly examining the statuses of combatants and civilians, which assist in gauging the status of unlawful combatants, let us now assess whether the protection framework outlined in GC III and IV could be applicable to them.

PART II: APPRAISAL OF INTERNATIONAL PROTECTION REGIME UNDER GENEVA CONVENTIONS THIRD AND FOURTH - Before delving into the status of unlawful combatants in the GCs and APs, it’s critical to understand how IHL has distinguished between international armed conflicts (IAC) and non-international armed conflicts (NIAC).

According to “Common Article 2 of the GCs, international armed conflict involves the declaration of war or other armed conflicts between two or more contracting parties, even if the state of war is not recognised by one of the parties. There is no principle of reciprocity in the IAC. Hence, the states must accept and apply the provisions of the war laws. Non-bound states have to respect the provisions regarded as customary international law and must inform the International Committee of the Red Cross about their intentions. The ICTY also laid down the definition of international armed conflict as an armed conflict where the states choose to resort to armed force. No protection is granted to unlawful combatants under GC III because the protection regime under GC III only extends to those who are qualified for prisoner-of-war status. However, Article 1 of AP I, which talks about the Martens Clause, i.e., the principles of humanity and the dictates of public conscience, has attained customary humanitarian law status that has become very effectively



functional to address legal vacuums during wartime”. Every individual has a basic, fundamental right to recognition before the law.

NIAC is defined under “Common Article 3 and AP II. Even though no combatant status is granted under NIAC, the human rights framework must be considered while assessing the status of an individual, whether they are a combatant or a civilian. Common Article 3, which has attained the customary international law status, talks about armed conflict or hostilities taking place between governmental armed forces and non-governmental armed forces or within such groups. The hostilities must be of a minimum level of severity, and the collective character of the non-governmental armed forces must be organized, have a command structure, and have the ability to sustain military operations. AP II narrows down the definition of non-governmental armed groups by inserting the criteria of having effective territorial control. AP II is also extended to only state armed forces, dissident armed forces or other organised forces, whereas Common Article 3 applies to non-state armed groups”. The other organised forces can be of four types:

1. Civilians participating in hostilities
2. Irregular forces such as guerrillas, resistance movements, etc.
3. Those who fail to uphold the principle of distinction under article 44 (3) of AP I, and
4. Those who fail to fulfill lawful combatant criteria under IAC.

Along with Common Article 3, additional Protocol II must be developed and added. Because it cannot alter the current application of Common Article 3, AP II is not applicable to NIAC conflicts in general. Interestingly, “the blurred lines regarding the status of unlawful combatants place the protection of civilian populations and civilian objects at risk as they are able to escape the consequences of unlawful behaviour during the conduct of the hostilities. Hence, an individual can’t be both a combatant and a civilian at the same time during armed conflicts. Such individuals will lose the privileges flowing from lawful combatant status. In NIAC, an individual does not have claims to lawful combatancy, due to which their right to prisoner of war status is forfeit, and the government can capture the rebels and subject them to trial for their violent attacks under their national legislation”. Nevertheless, the AP II preamble reaffirms the Martens clause, which implies that in cases where unlawful combatants are detained and punished, they must be prosecuted within the contours of the law.

Notably, an individual won’t receive protection under GC IV if they are already receiving protection under the other three conventions as lawful combatants. According to the ICTY, nationals of a state would be qualified as protected persons in case the captors, of the same nationality, had assimilated into the enemy state. Article 5 of the GC IV grants the rights and privileges of protected persons to spies and saboteurs. However, under this article, if a protected person is engaged in active hostile activities threatening the security of the state, they will not be granted this protection. Further, the rights of such spies and saboteurs will be suspended if need be for military security. But there are two non derogable rights of unlawful combatants- right to humane treatment and a fair trial. “Article 45 (3) of AP I reaffirms protection under Article 75 of AP I in case the person who has taken part in hostilities is neither a lawful combatant nor someone who is entitled to take part in such hostilities. Hence, GC IV does apply to certain categories of unlawful combatants. Nevertheless, in order to receive protection under GC IV, the individual must fulfill the nationality criteria as mentioned in Article 4, and in the event that an unlawful combatant is able to prove so, they will be extended such protection”.

In the Delaie case, it was held that an individual will either be protected under GC III or GC IV and that there is no gap between the two. If they are not protected under GC III, then after fulfilling national criteria, the individual can avail themselves of protection under GC IV. The minimum guarantees or supplementary protection, as mentioned in Article 75 of AP I, do not apply national criteria in order to extend protection. Rather, the advantages of security can be profited of



in the event that three circumstances are satisfied: the individual should be helpless before involved with a contention; They must be impacted by an armed conflict or territory occupation; they must not take advantage of the favorable treatment that is guaranteed by other GCs and AP I. In this manner, the derogations mentioned under Article 5 of GC IV are neutralized by these minimum guarantees. In order to prosecute unlawful combatants for their direct participation in hostilities, there must be existing national legislation providing for such prosecution. Unlawful combatants are different from war criminals, as the latter are tried for serious violations under international law, whereas the former only lose their lawful combatancy status and are tried for offences punishable under the domestic legal regime.

PART III: PROTECTION STATUS OF SPIES, SABOTEURS AND MERCENARIES UNDER INTERNATIONAL HUMANITARIAN LAW- There are four conditions laid down for those to qualify as lawful combatants, i.e., military command structure, control over territory, carrying arms openly, and conduct in accordance with IHL. It's important for the combatant to uphold the principle of distinction and distinguish themselves from civilians for identification. Article 44(3) of AP I lowers the standards of lawful combatancy by negating the requirement of a fixed distinctive sign. Yet, it's imperative that, to protect civilians and minimise destruction, the combatant follow the principle of proportionality and not cause any superfluous damage. "Article 4(A)(3) of GC III grants the status of PoW to the members of those armed forces who are not professing allegiance to the detaining power. Article 75 of AP I, a customary international humanitarian law principle, will always extend protection to those not covered under the GCs and falling outside the scope of it". According to Vark, there are two types of unlawful combatants, namely:

1. Those who operate in enemy's home or occupied territory, referred to as spies and saboteurs.
2. Those who are not entitled to take part in hostilities but still do so without distinguishing themselves while operating directly on the battlefield, i.e., mercenaries.

SPIES -While no international treaty explicitly addresses the legality of espionage in times of peace, nations are expected to uphold the territorial integrity and political sovereignty of others. According to Groitus, spies are deemed permissible in times of war and, if captured, are often subjected to severe and inhumane treatment. The Lieber Code defines spies as individuals who clandestinely seek information to convey it to an enemy state. Similarly, Article 29 of the Hague Regulations of 1907 defines a spy as someone who acts covertly or under false pretenses to obtain military intelligence from a belligerent, with the intention of passing it on to the enemy state. However, in Article 5 of GC IV, civilian spies will not lose their civilian status if they are engaged in espionage. According to Article 46 of AP I, which deals with spies, a member of the armed forces participating in the conflict who falls into the hands of the enemy will lose their status as a prisoner of war and be treated as a spy. If a member of the armed forces is able to distinguish themselves from civilians in the enemy state and cannot be prosecuted for previous acts of espionage, they will be considered a lawful combatant. The part should act in a secret way purposely to draw in any obligation for arraignment. However, the member of the armed forces will not lose their PoW status if they do not rejoin the armed forces, do not reside in the occupied territory, or continue to commit espionage. Notably, a distinction has to be made between military and civilian spies because the latter will be accorded protection under GC IV if they fulfill the nationality criteria. However, spies also enjoy protection under Article 75 of AP I. Even though spies are recognised in IAC only, minimal protection will be extended to them in NIAC, as Common Article 3 extends to everyone involved in the armed conflict.

SABOTEURS- Saboteurs destroy and damage physical infrastructural capabilities of the enemy armed forces in order to weaken their military operations. The legality of their actions will be determined on the basis of the target decided and means adopted to cause such damage. Military



saboteurs are different from civilian saboteurs as former has to consistently uphold the principle of distinction in order to protect the civilians. They will lose their PoW status if do not distinguish themselves and will be treated as unlawful combatants. Civilian saboteurs are extended protection under GC IV if they are able to meet the nationality criteria. Military saboteurs will get minimum protection under Article 75 of AP I. Just like spies, saboteurs find their mention in IAC only but they will also enjoy some protection under common article 3 in NIAC.

MERCENARIES- The first international efforts to recognize the role of mercenaries were made in the mercenary trials in Angola in 1976, where the Draft Luanda Convention primarily dealt with mercenaries on a regional and international level. In 1977, the OAU adopted the Convention for the elimination of mercenaryism in Africa. African nations consistently opposed the enlistment and instruction of mercenaries, as numerous were utilized during the 1950s and 1960s to suppress decolonization efforts and impede the pursuit of self-determination in newly liberated states. However, Article 47 of AP I recognizes the unlawful combatancy status of mercenaries and states that no mercenary can get PoW status. There is no criminalization of the acts carried out by such mercenaries under AP I. They participate directly in the hostilities at both local and international level, as they are recruited locally or abroad for this purpose. The article highlights that the primary motive of a mercenary can be material compensation or private gain. Mercenaries are neither nationals of the party to the conflict nor residents of a controlled territory of the party to the conflict, and they are also not part of their armed forces. According to “Article 1 of the mercenary convention, the definition of a mercenary is comparatively broader as compared to the definition under Article 47. Along with the conditions under Article 47, a mercenary may also be hired to overthrow the government, undermine constitutional order or threaten the territorial integrity of the state”. This convention is to be applied without prejudice during armed conflicts under humanitarian law.

Similarly, like mercenaries, “there are private military contractors and companies whose primary motive is to be involved in armed conflicts for private gain. They will receive the status of lawful combatants under Article 4(A)(1) of GC III and Article 43 of AP I if they have direct membership in the armed forces of the party to the conflict. However, this would ultimately defeat the purpose of avoiding responsibility by the state, which is the core reason why states hire private military contractors. Hence, as long as they don’t take a direct part in the hostilities and only accompany the party to the conflict, they will be protected under Article 4(A)(4) of GC III”. Nevertheless, if the state is hiring civilian contractors to participate in direct hostilities by including them as part of the armed forces, they will be treated as unlawful combatants.

CONCLUSION- Unlawful combatants are not dealt with distinctively under international humanitarian law. However, through the above elaborate discussion, we can conclude that this does not hamper their ability to enjoy protection under the provisions of GCs and APs. They are the third distinct category of people who must be recognised in IHL, other than combatants and civilians. This grey area does not work in a legal vacuum. The unprivileged belligerents must uphold the principle of distinction while engaging in espionage acts in order to claim PoW status. Unlawful combatants do not enjoy protection under GC III because they do not fulfill the criteria of lawful combatancy. However, they do enjoy some protection under GC IV if they fulfill the nationality criteria. If a member of the armed forces doesn’t fulfill the nationality criteria, then the minimum guarantees as spelled under Article 75 of AP I would come into play. Similarly, common article 3 has also attained the customary principle status where the minimum protection is guaranteed to everyone, in both IAC and NIAC. These articles have attained the status of customary law and must be followed by all states, whether or not they are parties to the GCs or APs. Yet, it must be noted that unlawful combatants can be prosecuted for participating in hostilities.



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