Chapter 13

“Unlawful/Enemy Combatants:”
Interpretations and Consequences

Jelena Pejic*

Introduction
Following the heinous attacks of September 11, 2001, the term “unlawful combatant” was one of the key legal notions associated with the “war on terrorism”. Today – even though one cannot be sure exactly when and by whom the shift was made – the term “enemy combatant” seems to have become the preferred designation for persons involved in or associated with acts of terrorism. The first part of this article briefly examines the concepts of “combatant” and “unlawful combatant” under international humanitarian law. The second analyzes the idea of “enemy combatant” in the context of the “war on terrorism” with a view to suggesting a different legal reading of its elements. Ultimately, the analysis leads to the conclusion that the introduction of an “enemy combatant” designation would jeopardize the structure and rationale of existing international law rules governing the protection of persons.

I Combatant Status under International Humanitarian Law
The question of who is a combatant under international humanitarian law has been so extensively examined and debated that it is mentioned here only to lay the groundwork for the sections that follow. To begin with, the term “combatant”, as well as derivations such as “unlawful combatant”, “enemy combatant”, “unprivileged combatant” and “unprivileged belligerent”, are germane only to international armed conflict. While “combatant” is sometimes used when referring to non-international armed conflict, such usage is colloquial; as a matter of

* This paper was written in a personal capacity and does not necessarily reflect the views of the International Committee of the Red Cross (ICRC).

law, “combatant” status (or the concomitant prisoner of war status) does not exist in internal armed conflicts.¹

Combatants are persons who have the right to participate directly in hostilities.² The laws of war provide combatant status to members of the regular armed forces (except for medical personnel and chaplains). Certain irregular armed forces have the status under specified conditions.³ Apart from the right to participate directly in hostilities, combatants enjoy immunity upon capture from criminal prosecution for lawful acts of war, such as attacks against military objectives.

The corollary of combatant immunity is that captured combatants may be interned as prisoners of war until the end of active hostilities without any form of process.⁴ While prisoners of war may not be tried for lawful acts of war, they may be criminally prosecuted for war crimes or other criminal acts committed before or during internment. The Third Geneva Convention provides that trial will be in the same courts, using the same procedure, as for members of the armed forces of the Detaining Power.⁵ Even if acquitted, prisoners of war may be interned by the Detaining Power until the end of active hostilities.

In case of doubt about the status of a person who has committed a belligerent act, such person must upon capture be treated as prisoner of war until his or her status has been resolved by a “competent tribunal”.⁶ While there has recently been much misunderstanding about the role and procedure to be applied by “Article 5” tribunals, it is fairly clear that they were not envisaged as judicial bodies obliged to comply with fair trial guarantees. The purpose of these tribunals, usually established close to the battle zone, is to individually determine the status of captured belligerents, not to pronounce on their criminal guilt or innocence. As the Third Geneva Convention is silent on the procedures to be followed, procedural issues fall within the purview of the Detaining Power. The 1997 US military’s regulation on “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees” provides a good example of how article 5

---

¹ Persons who do not or no longer take an active part in hostilities in non-international armed conflict are covered by the rules of Article 3 common to the Geneva Conventions, of the Second Additional Protocol to the Geneva Conventions if ratified, of customary international humanitarian law and of human rights law. The texts of the 1949 Geneva Conventions and of their two Additional Protocols of 1977 is available at www.icrc.org.

² AP I, article 43 (2).

³ The conditions for combatant and prisoner of war status are provided for in GC III, article 4 and AP I, articles 43 and 44.

⁴ GC III, article 118. But see also articles 109-117 regarding the direct repatriation and accommodation in neutral countries of prisoners of war before the cessation of active hostilities.

⁵ GC III, article 102.

⁶ Ibid, article 5.