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MEMBERS OF PRIVATE MILITARY AND SECURITY COMPANIES  
AND/AS UNLAWFUL COMBATANTS

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## **Abstract**

The recent changes in the physiognomy of the battlefield have provoked intense discussions about the role and legal status of private military and security companies (PMSCs) and the relationship between them and some traditional, albeit recently redefined concepts, especially that of unlawful combatants. The term unlawful combatants, and other terms occasionally used in its stead, have gradually evolved to encompass three different categories of persons: combatants failing to distinguish themselves from civilians; persons taking a direct part in hostilities without being legally entitled to do so; and, in the post-September 11<sup>th</sup>, 2001, period, enemies in the “war on terror”. This factual categorization does not translate into a normative one, because persons from different categories, and sometimes even from the same category, do not have identical legal statuses and are subject to different sets of IHL norms. There is no obvious link between PMSCs and unlawful combatants. Some PMSCs’ members may fall into one of the three categories of unlawful combatants, but in view of PMSCs’ plurality, there is no pattern here. The concept of unlawful combatants therefore cannot truly enrich the discussion on private military and security companies, tending to introduce confusion rather than clarity.



VERONIKA BÍLKOVÁ\*

## 1. Introduction

In recent decades, the physiognomy of the battlefield, where modern armed conflicts take place, has undergone considerable changes. This change has pertained not only to arms, weapons and technology systems used to wage wars, but also, increasingly visibly, to actors taking direct or indirect part in hostilities or supporting by various means those who participate in warfare. Regular armies constituted on the basis of general conscription have been gradually replaced and/or complemented by professional troops sent in on behalf of states or inter- and even supranational organizations, as well as by private military and security companies (PMSCs) selling their “know-how” on a global “market with the death”. Warfare has in no way obviated the large-scale privatization process that globalization seems to bring; rather, it has begun to embrace it with increasing intensity and urgency.

Far from being a completely new phenomenon in human history, recent privatization of war nevertheless reveals certain characteristics that make it quite unique and in many ways unprecedented. First of all, PMSCs have come to assume a very large host of warfare functions, from mere food-supply or detention centers supervision up to full-scale battlefield engagement. Moreover, they have done so in quantitatively significant terms. For instance, in Iraq the PMSCs taken together make up the second largest contingent after the US troops, numbering up to 48,000 persons. In addition to their number, the level of organization of PMSCs has become impressive, with most companies having now a regular hierarchy and internal disciplinary structures. High mobility coupled with a worldwide purview of activity and a lack of any clear ideological rooting set conditions for their possible engagement in several distinct armed conflicts consecutively or even simultaneously. Finally, the political and legal framework in which PMSCs currently operate, has been also considerably different from that which existed at the period of their medieval or early-modern predecessors.

The emergence of new, private actors in contemporary armed conflicts evokes uneasy questions under international law and especially international humanitarian law (IHL). Those questions relate both to the PMSCs’ legal status and the rights and duties enjoyed by them and their individual members; and to the impact their presence at the battlefield has on the qualification of armed conflicts and the legal regime(s) applicable thereto.

Since some of these questions have been already extensively dealt with in other contributions to this project,<sup>1</sup> as well as in other sources, they may be left aside in this text.<sup>2</sup> The focus here is on one particular, highly controversial issue, namely the relationship between PMSCs and so-called unlawful combatants. While the latter term lacks a clear legal definition and is rightly criticized for its highly politicized and emotionalized nature, the commonality of its use in the post-September 11, 2001,

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<sup>1</sup> See, for instance, Ch. Lehnardt, *Individual Liability of Private Military Personnel under International Criminal Law*, EUI Working Paper AEL 2009/06; C. Ryngaert, *Litigating Abuses Committed by Private Military Companies*, EUI Working Paper AEL 2009/05; or M. Sossai, *Status of PMSC Personnel in the Laws of War: The Question of Direct Participation in Hostilities*, EUI Working Paper 2009/06, all texts are available at [http://priv-war.eu/?page\\_id=50](http://priv-war.eu/?page_id=50) (retrieved at 2 July 2009).

<sup>2</sup> L. Cameron, *International Humanitarian Law and the Regulation of Private Military Companies*, Conference „Non-State Actors as Standard Settlers: The Erosion of the Public-Private Divide“, Basel, Switzerland, February 8-9, 2007; L. Cameron, *Private military companies: their status under international humanitarian law and its impact on their regulation*, IRRC, Vol. 88, No. 863, September 2006, pp. 573-598; etc.

political and academic discourse renders it impossible merely to pass it by to discard it *ab initio* as legal nonsense or insubstantial rhetoric. Rather, a thorough analysis is required to see, whether this term, or more exactly the concept it attempts to embody, has any relevance under current IHL and what its pertinence might be in the debate on PMSCs.

The text consists of three sections. The first section concentrates on the term unlawful combatants, mapping its use throughout history and identifying several meanings it has acquired over time. The second section offers a legal analysis of how those denoted as unlawful combatants are qualified and treated under contemporary IHL. More specifically, it inquires into their respective status(es), rights and duties and whether they constitute a separate and autonomous legal category. Finally, the third section inquires into the relationship between PMSCs and unlawful combatants, asking first whether members of PMSCs could be in fact seen as unlawful combatants, and then seeking to elucidate the main challenges PMSCs could face while fighting against or detaining unlawful combatants.

## 2. Unlawful Combatants – Terms and Concepts

While most intensively used since the events of September 11, 2001, the term unlawful combatants should not be seen merely as a part of the “newspeak” introduced in the framework of the so-called war on terror. It has a longer history, dating back to the 1940s at least. Moreover, the concept it denotes – or rather the concepts, since there are definitely more than one – had been (under various denominations) known, discussed, and assessed as controversial even before that period, practically since the emergency of modern system of international humanitarian law. This plurality of terms and concepts make the debate on unlawful combatants somewhat confused and confusing, rendering it necessary to pay close attention to the evolution of terminology (1.1.), and of conceptual tools (1.2.) separately.

### A. *Plurality of Terms – Unlawful Combatants and Who Else?*

The term unlawful combatant was introduced into legal lexicon by the Supreme Court of the United States in its 1942 decision in the *Ex Parte Quirin* Case.<sup>3</sup> The case concerned a group of eight German agents who, disguised in civilian clothes, penetrated into the territory of the United States in a submarine, with the purpose of committing acts of espionage and sabotage. Arrested before proceeding to any hostile act, the agents were brought to a specifically constituted military commission by the then President Franklin Delano Roosevelt, and sentenced, mostly, to the death penalty.

In its decision on the appeal, discussing mainly the jurisdictional issues, 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>4</sup> It added, moreover, 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>5</sup> Finally, the Court sought to give examples of groups of persons 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*

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<sup>3</sup> US Supreme Court, *Ex Parte Quirin*, 317 US 1 (1942).

<sup>4</sup> *Ibid.*, par. 30-31.

<sup>5</sup> *Ibid.*



*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”*.<sup>6</sup>

Thus, in its first, original use, the term unlawful combatant was supposed to describe regular combatants who, by the use of secret and/or deceiving operational methods of warfare, intentionally fail to distinguish themselves from the civilian population, violating thus one of the fundamental principles of IHL, the distinction between combatants and civilians. This violation was considered so outrageous and dangerous that it automatically entailed the loss of the combatant's and, in the case of detention, prisoner-of-war's status to which the person would be entitled under normal circumstances. Such a loss opened the way to the application of national laws and, if deemed appropriate, to prosecution and punishment at the national level.

After World War II, the term unlawful combatant continued to be invoked for some time, but saw its scope slightly modified.<sup>7</sup> Moreover, other terms with identical or largely similar meaning came into use to complement and later on, during the Cold War, largely replace it. Already in the course of the 1946 Nuremberg Trial with Nazi War Criminals, the term unlawful combatant served to denote not only combatants failing to distinguish themselves from the civilian population, but also, and with increasing frequency, non-combatants, mainly civilians, who took part in hostilities without being entitled to do so. The broadening of the term's scope to encompass this latter category of persons was not completely illogical or unfounded, since by engaging directly in warfare, those armed civilians tended to shatter the barrier between combatants and civilians, seriously jeopardizing the distinction, and imperiling “true” civilians.

The period of the Cold War saw the term of unlawful combatants receding into the background and two other terms, unprivileged belligerents and irregular combatants, coming to the forefront. The first of the two was promoted by the US lawyer Richard R. Baxter, who introduced it in his well-known article published in the 1951 edition of the *British Yearbook of International Law*.<sup>8</sup> The term was intended to cover persons who take a direct part in hostilities without being entitled to do so as well as spies and saboteurs. The term irregular combatants, in turn, came to the forefront in the decolonization period of the 1960s and 1970s. It served primarily to describe members of various national liberation movements, who could, depending on the legal perspective, be viewed either as non-distinguished combatants, or as illegally fighting non-combatants. The broadening of the term's scope, moreover, made it analogous to some of the older notions used already in the course of the 19<sup>th</sup> and early 20<sup>th</sup> centuries, such as *francs-tireurs* or *maraudeurs*.<sup>9</sup> While the specific relationship between these

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<sup>6</sup> Ibid.

<sup>7</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 characterize members of resistance movements.

<sup>8</sup> R. R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, *British Yearbook of International Law*, Vol. 28, 1951, pp. 323-345.

<sup>9</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.“ K. Watkin, *Warriors Without Rights?, Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, No. 2, 2005, p. 5.

different terms remains disputed,<sup>10</sup> it is quite clear that they all overlap to a large extent, and can, due to the absence of any codified definitions, be used interchangeably.<sup>11</sup>

The term unlawful combatants knew a period of its renaissance in the post-Cold War period, and especially after the terrorist attacks of September 11, 2001. The US president George W. Bush invoked the term explicitly in his memorandum of February 7, 2002 to qualify the members of the Taliban movement arrested in Afghanistan and detained at the US military base at the Guantánamo Bay.<sup>12</sup> Several subsequent memoranda extended or rather modified the scope of the term still more radically, subsuming under it, 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>13</sup> Thus, the term unlawful combatant (or enemy combatant) was newly intended to serve as a generic term describing all the enemies in the so-called war on terror, whatever their particular conduct or status.

Unlike previous modifications of the term’s scope, this initiative, were it to succeed, would bring about a deep reconceptualization, shifting the attention from the question of distinction between combatants and civilians to that of legitimacy of the conflict itself, and moving away from the IHL regulation of the *ius in bello* (law regulating warfare) to the just war regulation of the *ius ad bellum* (law regulating war’s commencement). The moderation of the Bush administration’s position in his second term and, especially, the recent claim by President Barack Obama to abandon the terminology introduced by his predecessor, indicate that such a shift has not been accomplished and is probably not to occur in the nearest future.

## **B. Plurality of Concepts – Which Unlawful Combatants?**

The previous chapter has shown that throughout history, the term unlawful combatant, as well as other terms occasionally used in its stead (unprivileged belligerents, irregular combatants, etc.), have denoted at least three different categories of persons. The first consists of combatants who fail to distinguish themselves from the civilian population. This category may be further subdivided into, on the one hand, spies and military saboteurs, as particular and oft-invoked cases, and, on the other hand, other non-distinguished combatants, for instance special units operating in civilian clothes in the enemy’s territory.

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<sup>10</sup> See J. P. Bialke, *Al-Qaeda and Taliban unlawful combatant detainees, unlawful belligerency, and the international laws of armed conflict*, Air Force Law Review, spring 2004, [http://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) (retrieved at 24 August 2006), claiming 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*“. For an opposing view, see M. Hoffman, *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, Vol. 34, No. 2, 2002, pp. 227-230.

<sup>11</sup> The practice of the Bush administration presents a good example of this terminological plurality and uncertainty. While in the aftermath of the terrorist attacks of September 11, 2001, the US officials referred almost exclusively to “unlawful combatants”, later on, the utilization of “enemy combatants” or “unprivileged combatants” became more common. The change in the terminology even caused practical problems, the US being prevented from prosecuting in its military commissions as “unlawful combatants” the persons who had previously been designed as “enemy combatants” by the Combatant Status Review Tribunal, established on July 7, 2004 at the Guantánamo Bay.

<sup>12</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>13</sup> A. Dworkin, *Excerpts from Interview with Charles Allen, Deputy General Counsel for International Affairs, US Department of Defense*, 16 December 2002, <http://www.crimesofwar.org/onnews/news-pentagon-trans.html> (retrieved at 28 August 2006).

The second category includes individuals who directly participate in hostilities without being entitled to do so. Unlike spies and saboteurs, those individuals do not necessarily have to use secret and/or deceptive operational methods of warfare to qualify. They may even distinguish themselves from the civilian population but the mere fact that they lack the legal entitlement to participate in hostilities is sufficient to make their fighting illegal or rather unprivileged under IHL. The category encompasses three main groups, namely: members of militias or guerrilla groups who do not qualify as combatants, mercenaries, and some elements of the civilian population.

- Members of *militias* and guerrilla groups qualify as combatants, if they fulfill four criteria of regular, namely, they are commanded by a person responsible for his subordinates, wear uniforms or other distinctive signs visible at a distance, carry arms openly, and conduct military operations in accordance with the laws and customs of war.<sup>14</sup> If they fail in any of these requirements, their combatant privilege is forfeited and they become "unlawful combatants".
- *Mercenaries* are persons taking part in hostilities, who are neither nationals of a party to the conflict, nor members of its armed forces, and whose primary motivation for fighting is a financial.<sup>15</sup>
- *Civilians* are not supposed to take direct part in hostilities. Nonetheless, some of them do not respect this rule, and become actively engaged in fighting on a full- or part-time basis (so-called civilians by day, fighters by night).

The third category of unlawful combatants, the most controversial one, encompasses all the enemies fighting in the war on terror on the "wrong" side, that of terrorists. As already mentioned, the efforts to incorporate this category into the scope of the term are fresh and have met with considerable opposition. Nevertheless, the assiduity with which the term has been invoked by the Bush administration and the intensity of legal controversies to which it has given rise, make it impossible merely to disavow this use as preposterous and unimportant. The table below maps the use of the term in different periods of recent history.

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<sup>14</sup> Article 4 par. A al. 2 of the Geneva Convention III Relative to the Treatment of Prisoners of War.

<sup>15</sup> A more comprehensive definition of the term is contained in Article 47 of the Additional Protocol I to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted on 8 June 1977.

<b>TABLE 1. CATEGORIES OF PERSONS DENOTED AS UNLAWFUL COMBATANTS</b>				
	<i>Before 1942</i>	<i>Quirin</i>	<i>Cold War</i>	<i>After 2001</i>
Spies, saboteurs	XX	XX	X	X
Other non-distinguished combatants		X	X	X
Members of militias and guerrillas			XX	X
<i>Mercenaries</i>			X	X
<i>Armed civilians</i>			X	X
<i>Terrorists</i>				XX
XX – main use of the term, X – use of the term				

### 3. Legal Regimes Applicable to Unlawful Combatants under IHL

The determination of the legal status of any participants in armed conflicts, including so-called unlawful combatants, is the matter of international humanitarian law (IHL). It is a branch of public international law specifically designed to protect victims of armed conflicts and regulate means and methods of warfare. IHL applies, with some minor exceptions, solely in the time of 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*”.<sup>16</sup> The particularity of IHL consists in its imposition of legal obligations not only on states, but also on non-state parties to armed conflict (national liberation movements, armed opposition groups) and, in a more limited scope, on individuals.

IHL has two main branches: the Geneva law, mandating the protection of people who do not or no longer take part in hostilities, such as sick, wounded, shipwrecked, prisoners of war and civilians; and the Hague law, limiting the means and methods of warfare. The concept of unlawful combatant is primarily related to the latter branch, which builds upon the distinction between combatants and civilians in order to determine who is and who is not entitled to take part in hostilities. It has, nonetheless, its relevance in the Geneva law too. This law deals with the status of people *hors de combat*, including detainees. Since this status is to a large extent dependent upon a person’s behavior during the actual fighting, the two IHL branches are in reality intertwined, and the concept of unlawful combatant, while primarily stemming from the Hague law has also direct implications in the sphere of the Geneva law.

IHL applies to two types of armed conflicts: international armed conflicts, conceived of as “*a resort to armed force between States*”, and non-international or internal armed conflicts, i.e., “*protracted armed violence between governmental authorities and organised armed groups or between such*

<sup>16</sup> 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.

*groups within a State*". The status of combatant is, legally speaking, confined to the former type, granting its holders the right to fight and kill enemy combatants without the risk of being prosecuted for the mere participation in hostilities. As the concept of unlawful combatant complements that of combatant, it is also invoked mainly, if not exclusively, in the framework of international armed conflicts. This limitation is respected in the current text, which therefore focuses solely on the legal regulation of international armed conflicts.

None of the sources of IHL (and of international law in general) contains an explicit reference to unlawful combatants, nor to any other term used as a synonym.<sup>17</sup> The absence of the expression, however, does not necessarily mean the absence of the concept, which may theoretically be present without special nomenclature. In order to ascertain the situation, an analysis of current sources of IHL must be undertaken. In this analysis, attention is to be paid both to IHL conventions, especially the 1907 *Hague Convention IV* containing in its annex *Regulations concerning the Laws and Customs of War on Land*, the four 1949 *Geneva Conventions (GC)*, and the two 1977 *Additional Protocols (AP)* to the Geneva Convention; and to IHL customary rules recently collected in the 2005 ICRC study on *Customary International Humanitarian Law*.<sup>18</sup> The analysis is made separately for each of the categories of persons denoted as unlawful combatants, i.e., spies and saboteurs, other non-distinguished combatants, members of militias and guerrillas, mercenaries, armed civilians, and terrorists. The results of these separate analyses will allow not only for an identification of the specific legal regime applicable to each of the categories, but also to say, whether there is any autonomous concept of unlawful combatants under current IHL.

#### **A. Spies, Saboteurs**

Spies are person who "*acting clandestinely or on false pretences, /.../ obtain or endeavour to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party*".<sup>19</sup> They may belong to the armed forces of a Party to the conflict (military spies) or be part of the civilian population (civilian spies). What is common to all of them, is that they intend to gain militarily relevant information, act under false pretences or furtively, mostly failing to distinguish themselves from the civilian population. If detained while engaging in the acts of espionage, military spies do not enjoy PoW status. They may be prosecuted for the acts of espionage under national law of the detaining power, provided they will not be „*punished without previous trial*".<sup>20</sup> They also enjoy the fundamental guarantees granted by Article 75 of API. If military spies succeed in rejoining their army, they cannot, if captured later, no longer be held responsible for their previous acts of espionage, and have the right to PoW status. Civilian spies, if detained during espionage, do not lose their civilian status under the Geneva Convention IV but may, in cases where absolute military security so requires, „*be regarded as having forfeited rights of communication*".<sup>21</sup>

Saboteurs are persons, who carry out actions to „*destroy or damage material, works or installations, that by their nature or purpose add to the efficiency of the enemy's armed forces*".<sup>22</sup> In a broader sense, the term sabotage covers all the destruction connected with warfare. In a narrower, more

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<sup>17</sup> Some authors claim that this silence is deliberate and was motivated by the desire "not to provide even negligible legitimacy to the existence of such elements of war" and the fear that "the creation of an intermediate status would blur the basic dichotomy distinguishing civilians from combatants" (S. Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong*, *Israel Law Review*, Vol. 38, No. 1-2, 2005, pp. 386-387).

<sup>18</sup> J.-M. Henckaerts, L. Doswald-Beck (Eds.), *Customary International Humanitarian Law, Volume I: Rules, Volume II: Practice*, ICRC/Cambridge University Press, Cambridge, 2005.

<sup>19</sup> Article 29 of the 1907 Regulations concerning the Laws and Customs of War on Land.

<sup>20</sup> Article 30 of the 1907 Regulations concerning the Laws and Customs of War on Land.

<sup>21</sup> See Article 5 of the 1949 Geneva Convention IV.

<sup>22</sup> P. Verri, *Dictionary of the International Law of Armed Conflict*, ICRC, Geneva, 1992, p. 101.

conventional sense, it is confined to „*the work of individuals or small formations operating in enemy-controlled territory and taking advantage of clandestinity, surprise, and ruses of war*“.<sup>23</sup> Depending on the choice of target and means and methods of realization, acts of sabotage are either lawful, or unlawful. Saboteurs themselves may, again, belong to the military forces of a Party to the conflict (military saboteurs) or be part of the civilian population (civilian saboteurs). Military saboteurs, if they wear uniforms or otherwise distinguish themselves from the civilians, are considered combatants and, if detained, PoWs. Where they fail to distinguish themselves, their status is not completely clear but it seems that their position is similar to that of spies. Thus, even if they do not have the right to the PoW status and may be prosecuted for acts of sabotage, they nevertheless enjoy at least the basic guarantees of human treatment and of fair trial anchored in Article 75 of API. Civilian saboteurs are subject to the same legal regime as civilian spies, i.e., they are considered protected persons under the Geneva Convention IV but some of their rights may be restricted.

## **B. Other Non-distinguished Combatants**

Combatants are characterized in IHL as those who “*have the right to participate directly in hostilities*“.<sup>24</sup> It is thus a prescriptive as opposed to a descriptive clause, determining who may participate in hostilities, not who does do so. The term covers several groups of persons, namely

- a) members of regular armed forces of the party to the conflict, including members of militias or volunteer corps forming part of such armed forces, regardless of whether the government or authority to which they profess allegiance 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 their own territory, and fulfill the four conditions of regular combatancy (see below); and
- c) participants in the so-called *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 time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war*“.<sup>25</sup>

Combatants, with the exception of the participants in the *levée en masse*, must distinguish themselves from the civilian population. Additional Protocol I somewhat softened this requirement, stating 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.<sup>26</sup> This regulation, however, has not been uniformly accepted and several states, including the USA and Israel, continue to stick to the original requirement. There is no uniformity in state assessment of the position of non-distinguished combatants. For some, they maintain their combatant and, in the case of detention, PoW status but can be prosecuted for perfidy.<sup>27</sup> For others, they forfeit both statuses and can be held accountable even for the mere participation in hostilities. The first approach seems to be more logical, the crime of perfidy being explicitly previewed to cover situations of intentional feigning of civilian status. In all the cases,

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<sup>23</sup> Ibid.

<sup>24</sup> Article 43 par. 2 of API.

<sup>25</sup> Article 4 par. A al. 6 of Geneva Convention III.

<sup>26</sup> See Article 44 par. 3 of API.

<sup>27</sup> “*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 API.

nonetheless, non-distinguished combatants are entitled, as a minimum, to the basic guarantees of Article 75 of API.

### **C. *Members of Militias and Guerrillas***

This category partially overlaps with the previous one. In order to be considered combatants, members of militias and guerrillas must comply with four criteria of regular combatancy: they have to be commanded by a person responsible for his subordinates, wear uniforms or other distinctive insignia visible at a distance, carry arms openly, and conduct military operations in accordance with the laws and customs of war.<sup>28</sup> The second criterion, of distinction, was already discussed, and therefore at this point, attention is paid only to the situation, where the members of militias and guerrillas fall in any of the other three criteria. Most frequently, the failure concerns the obligation to abide by IHL norms. Two situations must be discussed here. If violations of IHL norms occur on a sporadic basis, militiamen and guerrillas do not lose their status of combatants/PoWs but, of course, can be prosecuted for their individual breaches of IHL. If, on the contrary, violations have a systematic character and seem to be typical of the group, members of this group do not meet the criteria of regular combatancy, and are to be seen as civilians. As such, they enjoy protection unless they take direct part in hostilities, and when detained, they have to be treated as protected persons under Geneva Convention IV.

### **D. *Mercenaries***

In order to be considered a mercenary, a person must meet six cumulative conditions. S/he must: a) be specially recruited locally or abroad in order to fight in an armed conflict; b) take a direct part in the hostilities; c) be motivated by the desire for private gain and be 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) be neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; e) not be a member of the armed forces of a Party to the conflict; and f) not have been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.<sup>29</sup> Mercenaries do not have the combatant and PoW status and can be held accountable for the mere participation in hostilities. There is some hesitation as to whether they should qualify as civilians protected under GC IV, or rather as persons protected solely under Article 75 of API. In any of these two cases, they clearly enjoy the right to at least minimal humanitarian treatment. It is important to add that, for the moment, IHL does not consider the mere fact of being a mercenary a distinct crime entailing individual criminal responsibility.<sup>30</sup>

### **E. *Armed Civilians***

Civilians are “*all persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse*“.<sup>31</sup> They enjoy immunity from attacks. This immunity, however, ceases, when and for such time as civilians become „armed civilians“, i.e., they take direct part in

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<sup>28</sup> See Article 1 of the 1907 Regulations concerning the Laws and Customs of War on Land.

<sup>29</sup> Article 47 of API.

<sup>30</sup> The situation is somewhat different under the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, adopted in 1989 (UN Doc. A/RES/44/34, 4 December 1989). This convention incites states to criminalize both mercenaries and those who recruit, use, finance or train them.

<sup>31</sup> ICRC, *Interpretive Guidance on the Notion of the Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009, p. 16.

hostilities. In its recently published study on the direct participation in hostilities, the ICRC defines this notion as involving acts which,

*a) must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), b) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and c) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).*<sup>32</sup>

When and for so long as civilians take a direct part in hostilities, they lose immunity from attacks and may be intentionally targeted. Moreover, if they are captured, they may be prosecuted for hostile acts they committed while taking direct part in hostilities, even when those hostile acts do not amount to any violations of IHL – the prosecution then takes place at the national, not international level. At the same time, even armed civilians taking direct part in hostilities are to be granted the status of protected persons under GC IV. The detaining power, nonetheless, maintains the possibility to limit the rights of such detained persons, if necessary, to protect its legitimate security interests.<sup>33</sup>

#### **F. Terrorists**

There is no independent legal status of “terrorists” under current IHL. While Geneva Conventions and their Additional Protocols speak about terror or terrorism in several contexts,<sup>34</sup> they use these terms to refer to particular breaches of IHL, not a manifestation or even a cause of autonomous status under this law. Many of those who have been labeled terrorists in the recent war on terror, have not committed the crime of terror or terrorism in the sense intended by IHL. Moreover, those people may – and often indeed do – have very different statuses under, and sometimes outside, IHL. Some of them, for instance the Taliban fighters in Afghanistan in 2001, qualify as “*members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power*” (Article 4 par. 3 of GC III). As such, they would be entitled to combatant and, in case of detention, PoW status. Others, for instance the Iraqi insurgents fighting against the US invasion, are either armed civilians, or guerrillas, depending on whether the four criteria of regular combatancy have been fulfilled. Finally, some of the persons killed or captured in the current war on terror would fall completely out of the scope of IHL, and remain subject to internal peacetime regulation of internal legal orders and to human rights standards.

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<sup>32</sup> Ibid., pp. 16-17.

<sup>33</sup> “Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.” Article 5 of GC IV.

<sup>34</sup> See Article of the 1949 Geneva Convention IV and Article 4, par. 2, al. d) of 1977 Additional Protocol II (terrorism), Article 51 par. 2 of API and Article 13, par. 2 of APII (terror).



<b>TABLE 2. LEGAL REGIME APPLICABLE TO PERSONS DENOTED AS UNLAWFUL COMBATANTS</b>		
	<i>On the Battlefield</i>	<i>In Detention</i>
<b>Spies, saboteurs</b>	Military spies/saboteurs: combatants	Military spies/saboteurs: Art. 75 API
	Civilian spies/saboteurs : civilians	Civilian spies/saboteurs : GC IV
<b>Other non-distinguished combatants</b>	Combatants	GC III (PoW)
<b>Members of militias and guerrillas</b>	Combatants or civilians	GC III (PoW) or GC IV
<b><i>Mercenaries</i></b>	Civilians	GC IV or Art. 75 API
<b><i>Armed civilians</i></b>	Civilians	GC IV
<b><i>Terrorists</i></b>	Various (combatants, civilians, not covered by IHL)	Various (GC III, GC IV, Human Rights, Onternal Laws)

The overview of legal regimes applicable to various categories of persons ranked among unlawful combatants reveals several facts. First, under the Hague system of IHL, i.e., in the battlefield situations, all the unlawful combatants belong either among combatants or among civilians. The former enjoy the combatant privilege, which means that they are entitled to engage in hostilities without undergoing the risk of the prosecution for this mere engagement. The latter enjoy civilian immunity, which protects them from intentional attacks for so long as they do not take a direct part in hostilities. Secondly, under the Geneva system of IHL, i.e., in case of detention, unlawful combatants are subject to several different legal regimes: some are to be treated as PoWs under GC III, others as civilians under GC IV, and still others are granted only a minimal humanitarian standard of Article 75 of API. Thirdly, in view of the two previous facts, there is clearly no gap in the IHL protection, nor any space left for the creation of yet another, special status of unlawful combatants. Those labeled as such do not form any autonomous legal category and the term in itself, therefore, has no normative, prescriptive value. At the most, it may serve as a descriptive tool, used to identify groups of persons that put the fundamental principle of distinction between combatants and civilians into jeopardy (groups 1-5 above).

#### 4. Unlawful Combatants and Private Military and Security Companies

With respect to private military and security companies, the concept of unlawful combatants gives rise to two main sets of questions. The first one deals with the status of and legal regime applicable to private military and security companies. It seeks to find out, whether members of PMSCs could be seen as unlawful combatants in any of the meanings of the term mentioned above. The second question concerns the challenges PMSCs might face while fighting against unlawful combatants or while detaining them.

##### A. *Members of PMSCs as Unlawful Combatants?*

Analogous to unlawful combatants, members of private military and security companies form an internally heterogeneous group. They belong to different organizations and engage in various activities that can but do not necessarily have to involve direct participation in hostilities. Several typologies of PMSCs have been so far suggested. For instance, P. Singer divides PMSCs into three “business sectors”: a) military provider firms that supply direct, tactical military assistance that can include serving in front-line combat, b) military consulting firms that provide strategic advice and training, and c) military support firms that provide logistics, maintenance and intelligence services to armed forces.<sup>35</sup> H. Wulf divides PMSCs, dependent on their functions, into six categories that include companies providing consulting, logistics and support, technical services, training, peacekeeping and humanitarian assistance, and combat forces.<sup>36</sup>

From the perspective of IHL, it is necessary to distinguish, among PMSCs, those whose members take a direct part in hostilities, from those whose members are present at the battlefield but perform other, non-combat functions. Easy to say, this distinction is however quite difficult to make in practice, taking into account the uncertainty still surrounding the notion of direct participation in hostilities, as well as the flexibility of PMSCs, which may in different phases of the armed conflict perform different functions. The first difficulty can be illustrated by such activities as the defensive use of force in protection of a certain object, whose nature (military or civilian objective) is not fully clear; intelligence activities; military training and advising; or rescue operations.<sup>37</sup> The second difficulty manifests itself, for instance, in Blackwater’s engagement in Iraq: originally hired to guard the Coalition Provisional Authority leaders, including the CPA head L. Paul Bremer, they later on, after four of them were killed in Fallujah, took part in a military operation against Fallujah’s insurgents, using overwhelming force.

In addition to the nature of functions that PMSCs exercise, several other factors are also important and must be taken into account, when determining the status of PMSCs members, the legal regime applicable to them and the relationship between them and unlawful combatants. These factors include, without being limited to, the formal link between PMSCs and the state using their services, the nationality of PMSCs members, or the motivation of the members to join PMSCs and to engage in a particular armed conflict. On the basis of all these factors, members of PMSCs can be classified into two main categories, further subdivided into subcategories.

The first category encompasses those, who do not take direct part in hostilities but are nonetheless present at the battlefield. These persons usually qualify as civilians. As such, they enjoy immunity from attack, and if detained, they must be treated as protected persons under GC IV. Their immunity from attack, however, does not grant them complete safety. Since, as the ICRC rightly claims, “*their activities or location may /.../ expose them to an increased risk of incidental death or injury even if*

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<sup>35</sup> See P. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, New York, 2003.

<sup>36</sup> Cit. in L. Cameron, *Private military companies*, op. cit. 2, p. 576 (footnote 11).

<sup>37</sup> For more details, see M. Sossai, op. cit. 1, pp. 11-16.

they do not take a direct part in hostilities“ ,<sup>38</sup> they can, while not intentionally targeted, quite easily become part of collateral damage.

Some of the members of PMSCs not engaging in actual fighting might not be seen as civilians but as persons accompanying armed forces.<sup>39</sup> In this case, they would keep their civilian status at the battlefield, albeit, again, with a higher risk of accidental targeting; yet if detained, they would become PoWs and would have to be treated as such. This qualification is conditioned by an “*authorization from the armed forces which they accompany*” (Article 4 A(4) of GC III), that should be evidenced by an identity card. If some doubt arises as to whether someone is a civilian or a person accompanying armed forces, the procedure previewed in Article 5 of GC III, including the determination of the status by a competent tribunal, must be followed.

The second category includes those PMSCs’ members, who take a direct part in hostilities. Such persons can, in principle, have three different statuses. First, if they engage in combat for private gain and are neither nationals of the state that hires them, nor integrated into its armed forces, they are *mercenaries*. As such, they have civilian status at the battlefield, and are subject to the guarantees of either GC IV or, as a minimum, Article 75 API, if detained. Since the cumulative conditions make it difficult to be a mercenary, few are likely to qualify.

Second, if members of PMSCs become integrated into the armed forces of a state that hires them or meet the four criteria of regular combatancy, they become *combatants*. In this position, they have the privilege lawfully to fight without running the risk of being prosecuted; and, if detained, they become PoWs, protected under GC III. Their integration into the armed forces of the state does not, however, seem very probable: it would simply go against the idea of outsourcing that motivates states to hire PMSCs. The equation of PMSCs with militias or guerrilla movements, to which the criteria of regular combatancy originally referred, is also problematic, since, as L. Cameron correctly contends, “*granting combatant status to security guards hired by an occupying power turns the purpose of Article 4A(2) on its head, for it was not intended to allow for the creation and use of private military forces by parties to a conflict, but rather to make room for resistance movements and provide them with an incentive to comply with international humanitarian law*“.<sup>40</sup> Thus, this category will most probably remain relatively limited as well.

Finally, if members of PMSCs take a direct part in hostilities but do not rank under any of the previous statuses, they are *armed civilians*. The status of such persons was described above. Here, it suffices to recall, that those persons remain civilians, both at the battlefield and in detention. Despite that, they are not protected against intentional targeting when, and for so long as, they engage in fight and, if seen as security threat for the detaining power, they can have some of their rights restrained. This category, in view of the limitations connected with combatant status and mercenarism, is certainly the most numerous, as part of the doctrine attests.<sup>41</sup>

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<sup>38</sup> ICRC, *Interpretive Guidance*, op. cit. 31, p. 16.

<sup>39</sup> Geneva Convention III in its Article 4 A(4) speaks more specifically about „ *Person who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.*“

<sup>40</sup> L. Cameron, *Private military companies*, op. cit. 2, p. 576

<sup>41</sup> “*In sum, it is unlikely that many of the growing numbers of private military companies we are witnessing can be legally regulated by existing international law on mercenaries, owing to the complex definition of that concept. Also, most will probably not satisfy the criteria to benefit from combatant status. The vast majority have the status of civilians under humanitarian law.*” L. Cameron, *Private military companies*, op. cit. 2, p. 594.

<b>TABLE 3. LEGAL REGULATION OF PMSC' MEMBERS UNDER IHL</b>		
	<i>Legal Status</i>	<i>Applicable Law</i>
<b><i>Non-Combat Functions</i></b>	Civilians	GC IV
	Persons accompanying armed forces	GC III
<b><i>Combat Functions</i></b>	Mercenaries	GC IV or Art. 75 API
	Combatants	GC III
	Armed Civilians	GC IV

This short analysis of the legal status of PMSCs' members has shown that there is no automatic link, still less an identity, between them and unlawful combatants. The notions cover persons with very different legal identity and, as such, are internally heterogeneous. This heterogeneity gives rise to some overlaps. For instance, those members of PMSCs, who take a direct part in hostilities, while, as the same time, not qualifying as combatants, would fit the understanding of unlawful combatants as promoted in the post-WWII period, i.e., they would be individuals who engage in combat without having a formal entitlement to do so. In some situations, PMSCs members could meet the definitions of military or civilian spies, saboteurs, or – provided how vague the term is – terrorists, but these scenarios seem rather rare and do not reveal any regular pattern.

All in all, in view of its disputed content, limited descriptive (and no normative) value, and only partial overlaps with PMSCs, the concept of unlawful combatants does not seem to bring any helpful elements to the debate on PMSCs. Far from clearing up this area, it would rather tend to make it fuzzier still. Simultaneously, taking into account the heterogeneity of PMSCs and the plurality of their legal statuses under IHL, PMSCs cannot be a suitable a new category of unlawful combatants. Thus, the two concepts do not have the potential to enrich each other in any substantive way.

### ***B. Members of PMSCs Fighting against or Detaining Unlawful Combatants?***

PMSCs can meet unlawful combatants not only in their own ranks, but also when fighting against enemy forces, or when detaining members of such forces. In such situations, they have to know how to treat them and what their status is. Table 2, presented above, indicates that the options open to PMSCs are somewhat different under the Hague system (the battlefield) and under the Geneva system (detention) of IHL.

Under the Hague law, the PMSCs must primarily distinguish between those “unlawful combatants” present at the battlefield who are combatants and those who qualify as civilians. In the latter case, moreover, they must look into whether particular “unlawful combatants” are merely present at the battlefield, or whether they take a direct part in hostilities. The answer to these questions determines whether, and eventually when, those persons can be intentionally targeted. As already mentioned several times, combatants can be intentionally targeted at any time, while civilians may be targets only if, and for so long as, they take a direct part in hostilities. Unintentional targeting, involving collateral damage, is permissible even outside the direct participation scenario, provided the principle of proportionality is respected.

Under the Geneva law, unlawful combatants are either PoWs, protected by GC III (other non-distinguished combatants, members of militias and guerrillas), or persons protected by GC IV (civilian spies and saboteurs, mercenaries, armed civilians) or by Article 75 API (military spies, military saboteurs, mercenaries). The distinction, involving more options, is more difficult to make. Yet, since PMSCs do not wage wars alone, solely assisting the state that has hired them, it does not seem probable that decisions to be made in this sphere would be left to the companies. Rather, the respective party to the conflict, to which the PMC provides its services, would assure this task, as is in fact its obligation under IHL.<sup>42</sup>

## **5. Conclusion**

There is no obvious link between unlawful combatants and PMSCs. Yet, when the two concepts are studied in detail, they reveal some similarities: both describe a certain reality existing at the battlefield, without giving a normative account thereof. The concept of unlawful combatants, in its classical, pre-9/11 understanding(s), draws attention to various practices violating the principle of distinction between combatants and civilians as one of the main principles of IHL. The concept of private military and security companies, on its turn, calls forth the phenomena of privatization of war and outsourcing of combat activities.

Neither of the two concepts, however, refers to a normatively uniform situation. Rather, each encapsulates a host of various heterogeneous actors, to whom different statuses and legal regimes apply both at the battlefield and in detention. Some members of private military and security companies could be characterized as unlawful combatants, others could not. Even those, who could, do not, however, necessarily share the same legal position. Thus, while the concepts of unlawful combatants and PMSCs may be somehow useful as descriptive tools in their leading to confusion rather than clarity into the interpretation of the current IHL regulation.

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<sup>42</sup> See, for instance, L. Boisson de Chazournes, L. Condorelli, *Common Article 1 of the Geneva Conventions revisited: protecting collective interests*, International review of the Red Cross, No. 837, March 2000, p. 67-87, available at: [www.icrc.org/Web/eng/siteeng0.nsf/iwpList367/CBCB2AE7846BD1E9C1256B66005E32F5](http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList367/CBCB2AE7846BD1E9C1256B66005E32F5), Vol. 82 No.837, pp.67-87.