'Unlawful Enemy Combatant': Status, Theory of Culpability, or Neither?

Mark David 'Max' Maxwell and Sean M. Watts *

Abstract

The Military Commissions Act of 2006 represents the United States' most recent effort to establish a forum to try detainees captured in its 'Global War on Terrorism'. This article briefly explores the Act's use of the term 'unlawful enemy combatant' to define both subject matter jurisdiction as well as the potential source of criminal liability. The article highlights the term's absence from the positive law of war as well as confusion over its legal significance in United States domestic law. Examining the relationship between status and protections under the law of war, the authors conclude the Act's use of the term 'unlawful enemy combatant' reflects legal convenience more than an objective assessment of the existing laws and customs of war.

1. Introduction

In the wake of 11 September 2001, the United States launched a war unique to its history: a war on terrorism. An issue central to this war has been, how the United States treats those implicated in these horrific terrorist attacks. As the most recent chapter in a continuing legal saga, Congress passed and the President signed into law the Military Commissions Act of 2006 (MCA).[1] Among other important and controversial developments, the MCA codified the legal status of so-called 'unlawful enemy combatants'. Coined previously in the slightly streamlined form of 'unlawful combatant' by the

* Lieutenant Colonel Maxwell is Staff Judge Advocate, U.S. Army Alaska. Major Sean Watts is Professor, International and Operational Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, VA. The authors would like to thank Professor Geoff Corn and Lieutenant Colonel Larry C. Burner for their assistance and thoughts. The views expressed are personal and not intended to represent views held by the Department of Defense. [mark.david.maxwell@us.army.mil]

1 Military Commissions Act of 2006, S.3930 109th Congress [to be codified at 10 U.S.C.A. Chapter 47A (2006)].

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US Supreme Court in 1942, the label has had little formal currency as a term of art in the law of war. An unlawful enemy combatant, as defined by the MCA, is 'a person who has engaged in hostilities or who has purposely and materially supported hostilities against the United States or its co-belligerents who is not a lawful combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)'.[2] This essay will first briefly examine the classes of persons identified in armed conflict under international law. Then, by way of a hypothetical scenario, the essay will discuss how an individual may be tried depending on his status and the legal character of the conflict. We conclude that the term 'unlawful enemy combatant', as defined by the MCA, is a term of convenience that mistakenly merges the separate and distinct questions of legal status on the one hand and belligerent culpability on the other.

2. Classes of Persons in Armed Conflict: Combatants and Civilians

The 1949 Geneva Conventions[3] and the first of the two 1977 Additional Protocols,[4] identify two classes of person during international armed conflict: civilians and combatants. The civilian class is defined in the negative: 'persons who are not members of the armed forces'.[5] This negative definition of civilian creates, of course, a bifurcation of potential classifications under the law of war. The remaining choice of 'combatant' includes only 'members of the armed forces of a Party to the conflict as well as members of militias of volunteer corps forming part of such armed forces'.[6] Members of other military organizations, such as a militia or volunteer corps, may also qualify as combatants if their groups: 1) operate under a responsible command structure; 2) wear a fixed distinctive sign; 3) carry their arms openly; and 4) comply with the laws of war.[7]

2 10 U.S.C.A. S 948a (2006). The same definition appears in FM 2–22.3 Human Intelligence Collector Operations, Headquarters, Department of the Army (September 2006), at 6-7–6-8.

3 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, *6 U.S.T. 3114*, *75* U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed forces at Sea, 12 August 1949, *6 U.S.T. 3217*, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, *6 U.S.T. 3316*, 75 U.N.T.S. 135 [hereinafter GPW] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *6 U.S.T. 3516*, 75 U.N.T.S. 287 [hereinafter GC].

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and the Relating of the Protection of Victims of International Armed Conflicts, 12 December 1977, 1125 U.N.T.S. 3 [hereafter Protocol I] and Protocol Additional to the Geneva Conventions of 12 August 1949, and the Relating of the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 U.N.T.S. 609.

5 Article 50, Protocol I. To define civilians, Art. 50 incorporates by negative reference Arts 4(A) 1, 2, 3 and 6 of the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War.

6 GPW, Art. 4 A(1).

7 *Id.*, at Art. 4 A(2)(a)–(d).

Persons deemed to be combatants are traditionally immune from criminal prosecution for war-like acts that comply with the laws and customs of war. That is, they receive combatant immunity. Civilians who take up arms, on the other hand, are not immune and accordingly may be criminally prosecuted for either engaging in conduct in violation of the laws and customs of war *or* for violation of the domestic laws of states. Combatant immunity, although an important right of lawful warriors, is not absolute. Combatants that commit war crimes, such as intentionally terrorizing civilians, may be prosecuted for breaches of the laws of war.[8] Article 102 of the Third Geneva Convention of 1949 clearly envisions such prosecution, mandating trial of prisoners of war by the same system the Detaining Power uses to try its own armed forces.[9] Traditionally, civilians taking up arms in international armed conflicts have faced trial for domestic crimes (e.g. murder) or war crimes (e.g. perfidy, a violation of the doctrine of distinction between civilians and combatants).[10]

3. The Term 'Unlawful Combatant'

Mainstream use of the term 'unlawful combatant' originated in 1942 with the US Supreme Court case of *Ex Parte Quirin*.[11] In *Quirin*, eight Nazi saboteurs who entered the United States during War World II challenged their detention and denial of prisoners of war protections. The Court held that:

> By universal agreement and practice, the law of war draws a distinction between . . . lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants . . . are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[12]

Although *Quirin* relied on the notion of 'unlawful combatant[cy]' as a basis of criminal liability, the term's meaning is blurred by its failure to appear in the positive law of war existing at the time of the case as well as in the current, treaty-based law of war. This is not to say that the law of war has been ignorant

8 *Id.*, at Art. 85.

9 *Id.*, at Art. 102. Article 102 of the 1949 POW Convention appeared nearly identically as Art. 62 of the 1929 POW Convention. In 1945, the United States tried General Tomoyuki Yamashita, a prisoner of war, by military commission. The US Supreme Court rejected Yamashita's argument that, pursuant to Art. 62, he deserved trial by the courts-martial system used to try members of the US armed forces. The Court reasoned that Art. 62 only applied to post-capture offences. In 2006, the Court revisited Art. 62's current incarnation in *Hamdan v. Rumsfeld*. Noting the addition of Art. 85 to the POW Convention, guaranteeing all POW benefits to prisoners subject to trial for pre-capture offences, the Court appeared to update *Yamashita's* reading of the Conventions; *Hamdan v. Rumsfeld*, 548 U.S. ___, 126 S. Ct. 2749, 2788–90, 165 L. Ed. 2d 723, 769–71, Slip Opinion 05–184, 54–56 (2006). It is important to note that in addition to trial by court-martial, US servicemembers may be tried by US federal and state courts, perhaps raising the possibility that POWs could be tried in these fora consistent with Art. 102.

10 See Protocol I, *supra* note 4, Art. 37.

11 317 U.S. 1 (1942).

12 *Id.*, at 30–31.

of civilian participation in hostilities. Indeed, the 1949 Geneva Conventions, though generally silent on the conduct of actual hostilities, deal squarely with civilians who engage in 'activities hostile to the security of the State' or even sabotage.[13] Years later, 1977 Additional Protocol I, dealing more directly with the conduct of hostilities, also anticipated hostile civilians, providing for the suspension of their protection from intentional targeting 'for such time as they take direct part in hostilities'.[14] Importantly, however, each of these major law of war treaties following *Quirin* declined to exclude hostile civilians from the class of civilians generally. Neither treaty, although clearly presented the opportunity, elected to create a third status or class of persons known as 'unlawful combatants'. Instead, both instruments reject divesting civilian status in favour of permitting temporary derogation of the protections associated with the civilian class.

Professor Dinstein, a legal scholar and a supporter of the term 'unlawful combatant',[15] posits that the US Supreme Court's decision in *Quirin* was partly incorrect because the Court confused status with culpability.[16] The Nazi saboteurs were rightly prosecuted for their unlawful belligerent acts, i.e. their culpability, but should not have been prosecuted for merely being unlawful combatants, i.e. their status. Thus, Dinstein emphasizes the invalidity of conflating the status issue — which deprived the defendants of any immunity for their belligerent acts — with the culpability issue, whereby the Court improperly converted the Nazi saboteurs' lack of combatant status into a violation of the law of war itself.

Regardless of the imprecision reflected in the *Quirin* decision, the Conventions and the Additional Protocol, according to Dinstein, have made the distinction between lawful and unlawful combatants only nominal in value.[17] In large measure, Dinstein argues, this is because 'the fulcrum of unlawful combatant is that the judicial proceedings may be conducted before regular domestic (civil or military) courts and, significantly, they may relate to acts other than those that divested the person of the status of lawful combatant'.[18]

4. The Meaning of 'Unlawful Enemy Combatant'

Other scholars have also observed that the significance of being given combatant status, and therefore combatant immunity as a prisoner of war,

13 GC, *supra* note 3, Art. 5.

14 Protocol I, *supra* note 4, Art. 51(3).

15 Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 29–33.

16 S. Zachary, 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?' 38 *Israel Law Review* (2005), at 386 (citing Y. Dinstein, *The Laws of War* (Tel-Aviv: Shoken, 1983), 96–7 [in Hebrew]).

17 Y. Dinstein, 'Unlawful Combatancy', 32 *Israel Yearbook on Human Rights* (2002), at 266.

18 Dinstein, *Conduct of Hostilities*, *supra* note 15, at 30.

has waned.[19] The due process guarantees for any criminal defendant, whether a civilian or combatant under the law of war — found primarily in common Article 3 of the Geneva Conventions, Article 75 of the Additional Protocol I, and the rulings of various international criminal tribunals — include a baseline of common and fundamental obligations.[20] Typically, these obligations include the right to counsel, the right to confront witnesses, and 'an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedures'.[21]

The proper consequence of law of war status determinations, however, should have little to do with rights (or lack thereof), but be limited to inapplicability of international law-derived immunity for acts and omissions associated with participation in an armed conflict. An example is helpful to establish this point. Assume that a Taliban fighter kills a US soldier in Afghanistan and is captured. If the conflict in Afghanistan is held to be international in scope, the options under a traditional analysis are relatively straightforward. If a competent tribunal pursuant to Article 5 of the Third Geneva Convention of 1949 determined the fighter was a prisoner of war by virtue of membership in an armed force or qualifying militia group, he would simultaneously be a combatant.[22] He could be tried for specific war crimes, but otherwise could not be tried merely for killing the combatant class of his enemy.[23] If an Article 5 tribunal determined the Taliban fighter was not a prisoner of war, and therefore also not a combatant, the only remaining classification under the law of war would be civilian. Lacking the combatant immunity of a lawful combatant, he might then be tried by Afghanistan for murder based on the territorial nexus to the offence or the nationality of the accused. Alternatively, based on the victim's nationality, international law would likely support prosecution by the United States under its domestic law.[24] Finally, if the US soldier were killed following capture or after being otherwise rendered *hors de combat*, the Taliban fighter might be subject to universal jurisdiction under the grave breaches regime of the Geneva Conventions.

Regardless of forum, one thing remains clear: the fundamental due process protections applicable to the Taliban fighter at trial remain largely constant regardless of civilian or combatant status. Thus only by removing the fighter entirely from the classification system of the existing positive law of war can one reasonably posit that he is not entitled to the fundamental due process

19 D. Jinks, 'The Declining Significance of POW Status', 45 *Harvard International Law Journal* (2004) 367.

20 *Id.*, at 409.

21 Protocol I, *supra* note 4, Art. 75(4).

22 GPW, Art. 5.

23 Uniform Code of Military Justice, 10 U.S.C. S 802 (9) (2005).

24 Extraterritorial application of US domestic criminal law is in a recent state of flux. The United States Patriot Act recently expanded the reach of criminal jurisdiction in cases of Special Maritime and Territorial Jurisdiction; 18 U.S.C. S 7. The War Crimes Act, amended by the MCA of 2006, also establishes select offences against the law of war triable in federal criminal courts; 18 U.S.C. S 2441.

guarantees of the law of war and simultaneously is criminally liable merely on the basis of his extra-conventional status. This is precisely the theory that was recently rejected by the US Supreme Court in *Hamdan v. Rumsfeld*.[25]

5. Unlawful Combatantcy as a Theory of Culpability

The *Quirin* Court likely confused status and culpability by announcing that the law of war 'criminalized' the status of unlawful combatants. Whether the Court's decision remains a valid expression of international law is debatable. If accepted, such a merging of status and liability seems only appropriate to international armed conflict. In such conflicts, criminalizing the status of unlawful combatants retains some logic. First, criminalizing the mere act of civilian participation in hostilities might substitute for the absence of legal norms regulating non-state actors' resort to force. The principal legal restriction on the resort to force, the *jus ad bellum*, operates exclusively between and upon States. Unlawful combatantcy, as a stand-alone offence, would operate more clearly on individuals and non-state actors as a deterrent. Additionally, such a norm would encourage compliance with the requirements to become a lawful combatant. Furthermore, including unlawful combatantcy as a criminal offence under the law of war appears to perpetuate states' monopoly on the legitimate use of force — an objective consistently pursued by states in their development of the law of war.

In the context of non-international armed conflict, however, such arguments fail. The law of war applicable to non-international armed conflict is underdeveloped to say the least. States have consistently rejected proposals for parity between the law of non-international armed conflict and the law of international armed conflict. Not surprisingly, with the exception of conceding only the most rudimentary obligations, States have preferred to regulate non-international armed conflict through their domestic legal systems. Personnel classifications, so integral to the law of international armed conflict, are found nowhere in the law of non-international armed conflict. The notion of lawful combatantcy itself is highly problematic in such conflicts. Accordingly, retaining a distinction between status and culpability in this realm is necessary to preserve the symmetry of the law: the lack of status as a lawful combatant is not itself a crime, but instead simply exposes the individual to domestic criminal sanctions for the acts and omissions he engaged in during the conflict.

Considered in this context, it is invalid to conclusively presume that the killing of a US soldier in the context of a non-international armed conflict is a violation of the law of war. Although such a killing may be an unjustified homicide in violation of applicable domestic law, it is not a 'war crime' unless

25 548 U.S. ___, 126 S. Ct. 2749, 165 L. Ed. 2d 723, Slip Opinion 05–184 (2006).

the manner of the killing transgresses the laws and customs of war applicable to such conflicts, principally Common Article 3.[26]

6. Conclusion

Creating the status of unlawful enemy combatant and characterizing such status as a presumptive war crime under the MCA may be necessary to provide a jurisdictional foundation for military commissions. It is unsupported, however, by the legal history of non-international armed conflict. The MCA employs unlawful enemy combatant status as a basis to 'internationalize' the criminal nature of acts or omissions that are distinctly domestic law violations. While there is no question that unlawful combatants may be subjected to criminal sanction by domestic tribunals for violations of the laws and customs of war, the MCA extends such culpability to virtually any action committed while operating in such a status.

As defined by the MCA, the term 'unlawful enemy combatant' comes dangerously close to merging status with culpability. This should be a cause of concern because within the war on terrorism the rule of law must be counted among the leading asymmetrical advantages enjoyed by the United States. Yet employment of this advantage by the United States requires an honest and robust examination of its own relationship with the existing framework of the law: to do less comes with a cost that is too high to pay.

26 D. Jinks, 'September 11 and the Laws of War', 28 *Yale Journal of International Law* (2003), at 42–44.