

Unlawful Combatancy

Concept

- No such clear-cut concept of an unlawful combatant in IHL.
- Assumed to be the opposite of lawful combatancy
- Lawful combatants
 - Article 4(A), Third Geneva Convention
 - Article 43, API

Article 4A, Third Geneva Convention

Article 4 - Prisoners of war

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

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Article 43, Additional Protocol I

Article 43 — Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Lawful Combatancy

- Entitlements of lawful combatants
 - Combatant immunity - protection from being prosecuted for acts committed during combat which are allowed under IHL.
 - Upon capture, must be afforded minimum protections guaranteed under the Third Geneva Convention as prisoners of war
 - Can be targeted by enemy combatants, and can target them as well.

'Unlawful' Combatancy

- Legal term of art coined by the US in the post-9/11 era.
- Creates a category of civilians who can be targeted in hostilities and denied prisoner-of-war status.
 - Civilians directly participating in hostilities
- Attempt to take advantage of loophole in IHL, i.e., target civilians who participate in conflicts, while not providing them the requisite protections guaranteed.

Flawed category

- ‘Unlawful’ combatants are still protected as civilians.
- Civilians ensured fundamental guarantees of human treatment under Article 75, API.
 - Protections include: non-discrimination, prohibition of torture and cruel, degrading and inhumane treatment, rights of detention and due process
- Thus, those who are not protected as combatants are automatically protected as civilians and guaranteed minimum protections under Article 75, API, even if DPIH.