

Opinion

ARE “UNLAWFUL COMBATANTS” PROTECTED UNDER INTERNATIONAL HUMANITARIAN LAW?

Xiao Mao*

ABSTRACT

This essay responds to the question whether there exists a legal black hole in international humanitarian law in which unlawful combatants may slip. The issue arose in the “war on terror” where the Bush Administration labelled some members of terrorist groups as “unlawful combatants” and denied the applicability of international humanitarian law to them. By analysing the origin of the term “unlawful combatants”, certain provisions in the Geneva Conventions as well as a case study on war on terror, this essay supports the idea that not only is there no such legal black hole with regards to the status of “unlawful combatants” in existing international humanitarian law, but denial of any protection to them may lead to very dangerous consequences.

Introduction

This essay responds to the question whether there exists a legal black hole in international humanitarian law (hereinafter “IHL”) in which unlawful combatants may slip.¹ The term “unlawful combatant” derived from *Ex parte Quirin*² and regained prominence in the early 21st century in the context of the so-called “war on terror”. It is defined as those who take part in hostilities without a right to do so and fail to satisfy the conditions of prisoners of war when falling into the hands of the enemy. It is argued by the Bush Administration³ and some commentators⁴ that besides civilians and combatants, there is a third status called “unlawful combatants” who fall into a legal black hole of international law and thus enjoy no protection thereunder. However, many others argue against this.⁵ By analysing the origin of the term,

* Xiao Mao, M. Sc. candidate at *Vrije Universiteit* Amsterdam; Research Associate at Public International Law and Policy Group, LLM (UCL, London), LLB (SJTU, Shanghai).

¹ It is noted that here that we only focus on law of international armed conflict (hereinafter “IAC”), as in law of non-international armed conflict (hereinafter “NIAC”), it is generally accepted that there exists no privilege to kill the enemy, thus no need to talk about “unlawful combatant” in international law governing NIAC.

² United States, *Ex Parte Quirin et al.*, 317 US 1 (1942).

³ *The ‘War on Terror’ Memos*, Bush Administration (2002), at: http://www.lawofwar.org/Torture_Memos_analysis.htm (accessed 15 March 2018).

⁴ R. R. Baxter, ‘So-Called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs’ *British Year Book of International Law* 1951- 28, p. 323; M. H. Hloffman. ‘Quelling Unlawful Belligerency: The Judicial Status and Treatment of Terrorists under the Laws of War’, *Israel Yearbook on Human Rights* 2002-31, p.168.

⁵ E.g. S. Borelli, ‘Casting Light on the Legal Black Hole: International law and Detentions Abroad in

certain provisions in the Geneva Conventions (hereinafter “GC”) as well as some state practice and cases in the context of war on terror, this essay supports the idea that not only is there no such legal black hole with regards to the status of “unlawful combatants” in existing international humanitarian law, but denial of any protection to them may lead to very dangerous consequences.

Some general matters on terminology should be clarified before analysing rules protecting “unlawful combatants”. In international armed conflicts, combatants refer to those who have a legal right to take part in hostilities, and accompanying such a privilege, they will be entitled prisoners of war (hereinafter “POW”) status upon capture and are immune from prosecution for participating in hostilities per se, while they can be prosecuted for conducts violating IHL. Generally speaking, they are members of armed forces (except medical and religious personnel). The conditions for combatants/POWs are set out in Article 4 of GC III and Article 43 of Additional Protocol I (hereinafter “AP I”).⁶ Civilians are defined negatively in IHL, they are individuals who do not belong to Article 4(1)(2)(3) and (6) of GC III and Article 43 of AP I.⁷ They do not have a right to fight (except the special circumstances of *levée en masse*⁸), and they are protected from direct attacks unless they take a direct part in hostilities.⁹ The notion of “unlawful combatants” does not appear in treaties. However, as the essay is going to demonstrate, there are at least some provisions in GC III and IV, AP I as well as customary law governing procedural and substantive rights of those who are labelled as “unlawful combatants” by the Bush Administration and some commentators.

In the following analysis, the essay will firstly articulate the legal rules governing protection of “unlawful combatants” before making a case study on “war on terror”. It concludes by arguing that there exists no legal black hole in international humanitarian law into which “unlawful combatants” might fall.

I. Addressing unlawful combatants under international humanitarian law

I.1. Origin of the “unlawful combatants”

To determine the status of “unlawful combatants” under IHL, it is necessary to analyse the origin of the concept. *Ex parte Quirin* distinguished between lawful combatants and unlawful combatants under law of war and stated that the latter are punishable for “acts that render

the “War on Terror”” *International Review of the Red Cross* 2005-87, p. 39; S. Zachary, ‘Between the Geneva Conventions: Where Does the Unlawful Combatant Belong’, *Israel Yearbook on Human Rights* 2005-38, p. 378.

⁶ Noteworthy, the requirements in GC III and AP I are different. Article 43 of AP I is considered a watered-down version of conditions of combatants/POWs compared to GC III. See 1977 Protocol additional to the Geneva Conventions of 12 August 1949, 1125 UNTS 3 (1977), Article 43; 1949 Geneva Convention Relative to the Protection of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 287 (1949), Article 4.

⁷ AP I, Article 50.

⁸ GC III, Article 4(A)(6). *Levée en masse* refers to the spontaneous uprising of the civilian population against an invading force. Article 4(A)(6) of the 1949 Geneva Convention III grants prisoner-of-war status to persons taking part in a *levée en masse* “provided they carry arms openly and respect the laws and customs of war”.

⁹ AP I, Article 51(3).

their belligerency unlawful”.¹⁰ The case was held during World War II by the US Military Tribunals over eight German Saboteurs in the United States. The decision reads in part that:

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. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants 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. 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 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.¹¹

Commentators who support the deprivation of protection of “unlawful combatants” can cite *Quirin* case to support their arguments.¹² However, one single case in a domestic jurisdiction is not enough to deduce the existence of a status in international law. In addition, *Quirin* case came before the universal ratification of GCs that replaced any prior interpretation of law of war. According to more recent cases, if an individual is not entitled to prisoner-of-war status under the GC III, he or she necessarily falls within the ambit of Convention IV as long as the Article 4 requirements are satisfied.¹³ The following sections will therefore examine the contemporary status based rules in IHL to see whether “unlawful combatants” are protected or not and what substantive rights they enjoy under IHL.

I.2. “Unlawful combatants” as covered by “protected persons” in article 4 of GC IV

The essay will then consider whether “unlawful combatants” fall within the personal scope of GC IV, i.e. whether they constitute “protected persons” defined by Article 4 of GC IV. The question will be analysed based on the treaty interpretation method of Article 31 of Vienna Convention on Law of Treaties and also by taking into account of some subsidiary means, i.e. preparatory works and academic writings.¹⁴

Article 4(1) specifies:

¹⁰ *Ex Parte Quirin*, *supra* note 2, pp. 30-1.

¹¹ *Ex Parte Quirin*, *supra* note 2, pp. 30-1.

¹² See e.g. Baxter, *supra* note 3. Though he does not agree with *Quirin* that unlawful combatants are punishable under international law for “acts that render their belligerency unlawful”.

¹³ *Prosecutor v. Delalic et al.*, Judgment, Case No. IT-96-21-T, T. Ch., 16 November 1998, para. 271.

¹⁴ 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31.

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Party of which they are not nationals.

This provision, if read in isolation, would be all-embracing, incorporating even members of armed forces as long as they are not nationals of a party to armed conflict in whose hands they find themselves.¹⁵ Article 4 then qualifies the definition by adding some exceptions:

Article 4(2) specifies two exceptions:

- (1) Nationals of a state which is not bound by the convention;
- (2) Nationals of a neutral state who find themselves in the territory of a belligerent state, and nationals of a co-belligerent state ... while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

Another exception is Article 4(4), i.e. those protected by GC I, II and III are not protected by this Convention.¹⁶

Thus, based on a textual interpretation of Article 4, protected persons include those who are not protected by GC I-III (thus also those who fail to satisfy the criteria of POW in GC III) except nationals of a state which is not party to the convention, nationals of the belligerent party in whose hands they are, nationals of a neutral state or co-belligerent state with normal diplomatic representation.

Based on the textual approach, the fact that some individuals are directly participating in hostilities (hereinafter “DPIH”) is not a ground precluding him or her from becoming a “protected person” under Article 4. In addition, Article 5 of GC IV uses the term “protected persons” to cover persons like “spy”, “saboteur”, “a person definitely suspected of or engaged in activities” (which are considered typical forms of DPIH). Further evidence in support of this argument could be drawn from Article 45(3) of AP I which contains an implicit confirmation that the personal scope of GC IV also covers “unlawful combatants”. Article 45(3) reads as follows:

Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Conventions shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such protection, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

¹⁵ J. Pictet (ed.), *ICRC Commentary on Convention (IV) relative to the Protection of Civilian Persons in Time of War*, ICRC 1958, p. 46, cited in K. Dörmann, “The Legal Situation of “Unlawful/Unprivileged Combatants”” *International Review of the Red Cross* 2003-85, p. 48.

¹⁶ Namely, the wounded and sick in armed forces in the field (as protected by GC I), the wounded, sick and shipwrecked members of armed forces at Sea (as protected by GC II) as well as prisoners of war (as protected by GC III) do not fall within the definition of “protected persons” under GC IV.

By stating in Article 45(3) “who does not benefit from more favourable treatment in accordance with the Fourth Conventions shall have the right at all times to the protection of Article 75 of this Protocol”, it implicitly confirms that the definition of “protected persons” in GC IV at least covers some of the “unlawful combatants” (if not all of them), otherwise, the expression mentioned would be meaningless and redundant. The second sentence of Article 45(3) also confirms that some unlawful combatants, especially those found in occupied territories, fall within the notion of “protected persons”, otherwise there is no need to limit the application of Article 5 of GC IV.

Further support of such interpretation can also be found in US Military Manual 1956 and UK Military Manual 1957, both of which explicitly confirm that protected persons include individuals taking direct part in hostilities though fail to satisfy the criteria of POWs.¹⁷

Also, preparatory works of GCs demonstrate that the phenomenon of unlawful combatants was actually envisaged by delegations participating the Diplomatic Conferences,¹⁸ it is therefore difficult to accept that they intended to exclude “unlawful combatants” from the scope of “protected persons”, contrary to the all-embracing wording of Article 4.

Thus, based on a textual interpretation of the notion of “protected persons” in Article 4 of GC III, it is hard to accept that IHL does not cover protection of any kind of “unlawful combatants”. To the extent unlawful combatants satisfy the requirements of “protected persons”, Part III of GC IV defines the material scope of protection of protected persons within the meaning of Article 4.

Section one of Part III of GC IV contains provisions common to the territories of parties and occupied territories.¹⁹ The following sections are special rules for territories of parties²⁰ and special rules for occupied territories.²¹ These sections are then followed by section IV on rules regulating treatment of internees.

The above rules are available to “unlawful combatants” provided that they fall within the definition of protected persons in Article 4. These protections may, however, according to Article 5 of GC IV, be subject to derogation in certain circumstances. The relevant paragraph in Article 5 reads:

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, ... such persons shall nevertheless be treated with humanity, and in

¹⁷ Dörmann, *supra* note 15, pp. 51-2.

¹⁸ *Idem*, 52-53.

¹⁹ e.g. prohibition of inhumane treatment, prohibition of corporal punishment and torture, prohibition from using protected persons as human shield, special protection of women, *etc.*

²⁰ e.g. restriction of the right to leave the territories, rules ensuring their practice of religion, employment, *etc.*

²¹ e.g. deportation and transfer, children, labour, *etc.*

case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Although some concepts in the article are not clearly defined, one reading of Article 5 is that it covers in particular some protection of those who take a direct part in hostilities without fulfilling the criteria of POW, i.e. unlawful combatants. The exact scope of rights that can be derogated may be controversial, but the bottom line is that at least two categories of rights are non-derogable, i.e. the right to humane treatment (and thus the prohibition of torture and ill-treatment) as well as the right to fair trial.²²

I.3. Do GCs Protect All “Unlawful Combatants”?

The question is, however, do GCs cover protection of every unlawful combatant wherever they are found? It may be argued by referring to the fact that Part III of GC IV only contains protection of protected persons on “territories of parties to the conflict” and “occupied territories”, while there exists a legal black-hole in relation to people captured in the “zone of operations”²³ (hereinafter “Baxter’s approach”). However, such an interpretation is unacceptable for two reasons.

Firstly, a broad interpretation of “occupation” (which goes beyond the requirement stipulated in Article 42 of Hague Regulation IV²⁴) is suggested to be taken in the context of protection of protected persons to cover those found in the “zone of operations” or “combat zones”.²⁵ Under the interpretation of Pictet, there shall be no loophole in GC IV, every person fulfilling the nationality requirement in Article 4 should be considered as a protected person wherever they are captured.²⁶ Admittedly, Pictet’s interpretation is not universally accepted. For example, the German Military Manual stated that occupied territories do not include combat zones.²⁷ However, even if we accept that Part III of GC IV does not cover persons captured in combat zone, this does not mean that they do not enjoy any protection by the GC IV. Actually, they still enjoy protection at least under some provisions of Part II of GC IV.²⁸

Secondly, Baxter’s approach also overlooks the fact that those captured in combat zone may later be transferred to occupied territories or territories of the party to armed conflict, or the combat zone may turn into occupied territories.²⁹ In such circumstances, they regain protection under Part III of GC IV, because Article 4 of GC IV protects “those who, *at a*

²² Dörmann, *supra* note 15, p. 66.

²³ Baxter, *supra* note 3, pp. 332-3.

²⁴ 1907 Hague Convention IV, 187 CTS 227, Art. 42.

²⁵ Pictet, *supra* note 15, p. 60; See also *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, ICRC 2012, pp. 24-25.

²⁶ *Ibid.*

²⁷ Dörmann, *supra* note 15, p. 62.

²⁸ *Idem*, p. 63.

²⁹ *Idem*, pp. 63-4.

given moment and in any manner whatsoever, find themselves ... in the hands of a party to the conflict or occupying power". Pictet's commentary also supports such an interpretation that determination of protected persons should not be based on the place where the persons are captured.³⁰

Even if, despite the analysis above, it is still accepted that GC IV carries a legal black hole in relation to persons captured in combat zone, as will be analysed below, the gap could be filled by customary international law as reflected in common Article 3 and Article 75 of AP I.

I.4. Minimum Guarantees

As mentioned, the minimum guarantee applicable to all persons in the power of a party to the conflict are defined in Article 75 of AP I, as generally considered to be customary international law, and also common article 3 which according to *Hamdan v. Rumsfeld* case, represents a minimum standard applicable both in IAC and NIAC.³¹ Read together with Article 45(3) of AP I, the articles ensure that no person in the hands of a party to IAC is outside of the law, including unlawful combatants (even if the interpretation of Baxter is adopted).

The minimum protection provided in Article 75 of AP I is supplementary to GC IV, which include, among others, judicial guarantees, protections in relation to treatment, arrest, detention and interment.

It is noted that the fact that unlawful combatants enjoy some sort of protection under GC IV and customary international law does not mean they are immune from prosecutions from unlawfully taking party in hostilities. They can be prosecuted for participating in hostilities (under domestic law) as well as for war crimes, provided that a right to fair trial required in GC IV and customary international law is guaranteed.

II. Case Study of War on Terror

A case study in which GCs are applied to the treatment of captives in Afghanistan war (i.e. soldiers of Taliban and Al Qaida) shows that "unlawful combatants" remain protected by IHL. However, it is sometimes difficult to determine which specific rule is applicable to different kinds of "unlawful combatants" belonging to different parties to an armed conflict.³²

As mentioned, Article 4 of GC III provides for the conditions of entitlement of prisoners of war. Unlawful combatants, by definition, fail to satisfy these conditions. However, this does not mean that all provisions in GC III do not apply to them.

³⁰ Pictet, *supra* note 15, p. 47.

³¹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

³² The fact that US is not a party to the Additional Protocol I and doubt regarding to what extent AP I represents customary international law make the analysis more complex. Thus, the governing regime in this context is limited to Geneva Conventions and customary international law while AP I is not addressed.

II.1. Analysis on “Taliban soldiers”

According to the US, Taliban soldiers captured during the Afghanistan war are unlawful combatants because they fail to satisfy the conditions of Article 4(A)(3) of GC III.³³ The position of the US would be based on the assumption that combatants under Article 4(A)(3) (on members of armed forces of unrecognised governments) must fulfil the four conditions under Article 4(A)(2) (on members of other militias and volunteer corps).³⁴ Some authors argue that these four conditions only apply to “other militias” and “volunteer corps”, and that there are no such requirements for regular armed forces.³⁵ Indeed, members of regular armed forces (regardless of whether they belong to a recognised government or not) are presumed to meet all the conditions of eligibility to prisoner of war of status in Article 4(A)(2). However, it follows from some cases (e.g. *Mohamed Ali* case of 1968)³⁶ and authors that this presumption can definitely be rebutted.³⁷ In the *Mohamed Ali* case, the Committee decided the appellant, though a member of armed forces, was not entitled prisoner of war status because at the time he committed sabotage he did not wear a uniform as required by Article 4(A)(2) of GC III. Since Taliban members failed to observe the conditions (e.g. they failed to wear a fixed distinctive sign), it is fair to argue that they may not be granted prisoner of war status.

Despite the above analysis, some authors argue that captives of Taliban members remain protected under GC III until their status is determined by tribunals established according to Article 5 of GC III.³⁸ An opposite argument would be that an Article 5 tribunal is only needed when there is doubt about the status.³⁹ As the US government said, there is no doubt as to the status of member of Taliban because of the President's determination that Taliban

³³ Art 4(A)(3) of GC III stipulates: “Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power.”

³⁴ Art 4(A)(2) of GC III stipulates: “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.”

³⁵ Borelli, *supra* note 5, p. 49.

³⁶ *Bin Haji Mohamed Ali and Another v. Public Prosecutor*, Judicial Committee of the Privy Council (U.K.), 29 July 1968, Appeal No. 20 of 1967. In this case, the Committee decided the appellant, though a member of armed forces, was not entitled prisoner of war status because at the time he committed sabotage he did not wear a uniform as required by Article 4(A)(2) of GC III.

³⁷ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn., CUP, 2016, p. 51.

³⁸ Borelli, *supra* note 5, p. 50.

³⁹ The second sentence of Article 5 GC III stipulates: “*should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*” [emphasis added]

detainees do not qualify as prisoners of war.⁴⁰ However, this position was rejected by Justice Souter in *Hamdi et al. v. Rumsfeld*, arguing that the President's determination with regards to the status of all the Taliban detainees is contrary to the military regulation adopted to implement the GCs which requires that the determination should be made on a case-by-case basis.⁴¹

II.2. Analysis on "Al Qaida soldiers"

The US also considered members of *Al Qaida* to be "unlawful combatants" without any protection under IHL but the reason is somewhat different from that for members of Taliban. As for *Al Qaida* soldiers, the US stated they are not protected by the GCs, because they are not a "high contracting party" to the Conventions.

Indeed, the analysis for Al-Qaida soldiers has to be somewhat different from that for Taliban soldiers, because the above-mentioned 4(A)(2) criteria of GC III is only applicable if Al-Qaida personnel belong to a party to an IAC in the Afghanistan war. The standard for "belonging to a party" is the "overall control" test in *Tadic*,⁴² but it is questionable whether Al-Qaida is under overall control of a party to the conflict, so the Article 4(A)(2) standard is not necessarily applicable. Thus, the approach in relation to determining the legal status of Al-Qaida soldiers would be more complex than that for Taliban soldiers. The US Supreme Court in *Hamdam v. Rumsfeld*, however, evaded the difficult questions, and opined that at least common Article 3 is applicable, as a minimum standard of protection provided in both IAC and NIAC, to captives during US conflict against *Al Qaida*.⁴³

The *Hamdam v. Rumsfeld* judgment may not provide a satisfactory answer to which IHL rules govern protection of "unlawful combatants", as it could be argued that the judicial decision should be considered as only limited to American domestic law and it is only limited to analysis of GC III rules.

Despite these difficulties in individual cases, the bottom line is that "unlawful combatant" is not a status separate from combatants and civilians. In an IAC, if a captive fails to satisfy the conditions for prisoners of war, he or she should be considered as a protected civilian. This is also confirmed by the commentary to the Geneva Conventions,⁴⁴ *Targeted Killing case*⁴⁵ and *Anonymous v. Israel case*.⁴⁶

⁴⁰ 'White House Fact Sheet on Status of Detainees at Guantanamo' (Feb. 7, 2002), cited in S. D. Murphy, 'Decision not to regard Persons Detained in Afghanistan as POWs', *American Journal of International Law* 2002-96, p. 478.

⁴¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Concurrence & Dissent In Part (David H. Souter).

⁴² *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, 15 July 1999, para. 97.

⁴³ *Hamdam v. Rumsfeld*, *supra* note 41.

⁴⁴ Commentary on Article 45, in Y. Sandoz, Ch. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff 1987, p. 1761.

⁴⁵ *The Public Committee Against Torture in Israel v The Government of Israel* (2006) HCJ 769/02, paras 26-28.

⁴⁶ *Anonymous v. The State of Israel* (2008) CA 6659/06, paras 11-14.

III. Conclusion

In conclusion, despite the attempt made by some states to deny protection of captives by labelling them as “unlawful combatants”, there is no gap in current international humanitarian law to allow for the existence of such a third category. By definition, unlawful combatants do not enjoy substantive protection of GC III. However, once someone taking direct part in hostilities falls into the hands of the enemy, the procedural guarantee under Article 5 of GC III would apply to determine whether they satisfy the criteria of lawful combatant on a case-by-case basis.⁴⁷ If they are determined to fail to satisfy the criteria in Article 4 of GC III, they will nonetheless be governed by GC IV or customary international law. If GC IV could not even protect them, then at least they are protected by the minimum standard in common Article 3 (considered by *Hamdan v. Rumsfeld* to be applicable both in IAC and NIAC) and Article 75 of AP I (as reflecting customary international law). Although they do not enjoy the same protection as other innocent civilians and may be prosecuted for participating in the hostilities, they still enjoy some minimum protection under international humanitarian law.

Besides the analysis on existing law, it is also not desirable to recognise the third status in humanitarian law. The risks in recognising the status are significant and should not be overlooked. The deprivation of protection under international law may incite the unlawful combatants to disregard laws of war and to fight as fiercely as possible. As pointed out by Ben Saul, if non-state groups found themselves deprived of any protection under international law, it is possible for them to fight as viciously as possible to avoid defeat and they are less likely to comply with international humanitarian law.⁴⁸

⁴⁷ *Hamdan v. Rumsfeld*, *supra* note 41.

⁴⁸ B. Saul, ‘Terrorism and International Humanitarian Law’ in B. Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar 2014, pp. 208-31.