Volume: 9 Issue: 3 Month: 9, Year: 2026
P.P 294 - 311
مجلة البحوث القانونية والاقتصادية
JOURNAL OF LEGAL AND ECONOMIC RESEARCH

THE COMBATANT IN INTERNATIONAL HUMANITARIAN LAW

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Send Article Date: 10-05-2026	Date of acceptance of the article: 21-08-2026

Abstract:
This study aims to clarify the legal status of combatants under international humanitarian law. The latter distinguishes between two categories of combatants. The first category comprises persons to whom the status of lawful combatants is granted, namely, members of regular armed forces and members of quasi regular armed forces, who enjoy a set of legally guaranteed rights. The second category is denied, by international humanitarian law, a lawful character because of its nature and the objectives it seeks to achieve.
Keywords: regular forces, lawful combatant, mercenaries, spy, international humanitarian law

Introduction

The principal concern in the codification preceding the Geneva Conventions was the protection of combatants alone. There was no difficulty in distinguishing combatants, as they were identifiable by their military uniforms and carried their weapons openly. Hence, regular combatants alone enjoyed combatant status when armed conflicts were conducted solely between the regular forces of states. However, after the concept of war expanded to include all armed conflicts in which the regular forces of states participate alongside their irregular forces, it became necessary to broaden the concept of the combatant.

The first step towards determining a legal status for the combatant was the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field. This convention is regarded as the principal cradle of contemporary humanitarian law. The Hague Regulations of 1907 concerning the Laws and Customs of War on Land further provided that members of regular forces, as well as militia forces and volunteer corps,

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are deemed combatants, provided that they satisfy several essential conditions (Saadallah, 1993, p. 960).

The Hague Regulations concerning the Laws and Customs of War on Land also divided combatants into regular and irregular categories. Both the Geneva Convention of 1929 and the Third Geneva Convention of 1949, concerning prisoners of war, adopted the provisions of the Hague Regulations of 1907 regarding combatants. Change and renewal, however, came with Additional Protocol I of 1977.

During military operations, other categories of combatants may nevertheless appear bearing arms that international law presumes are directed towards protection but that may be used for attack when they are employed by categories that are not permitted, under either domestic law or international law, to possess weapons in the first place. International law has described such people as unlawful combatants, while domestic law describes them as mercenaries, spies, and the like.

All these different categories of combatants, whether lawful combatants (regular forces and irregular forces) or unlawful combatants, have been regulated by the rules of international humanitarian law in various international, regional, and national instruments, which set out their legal regimes and responsibilities in relation to hostilities during armed conflicts, whether international or internal.

In light of the above, the following research question is posed: What is the legal regime governing combatants under international humanitarian law?

To address this issue, this study examines lawful combatants in international humanitarian law (Section One), followed by unlawful combatants (Section Two).

1. The Lawful Combatant in International Humanitarian Law

International instruments governing international humanitarian law exhaustively identified the categories of lawful combatants, particularly the 1949 Geneva Convention. These include:

- Members of the armed forces of the parties to the conflict.
- Members of resistance movements provided that they respect certain conditions: that a responsible person commands them, carry arms, wear signs distinguishing them from a distance, and respect the laws and customs of war.
- Members of unrecognised regular forces.
- Persons accompany regular armed forces without belonging directly to them.
- Members of the civilian maritime, land, and air crews of the parties to the conflict.

- Members of the population who resist the advance of enemy forces provided that they carry arms openly and respect the laws and customs of war.

This was confirmed by the Hague Convention of 1907, within the Regulations concerning the Laws and Customs of War on Land. Article 1 defines belligerents as follows: the laws, rights, and duties of war apply not only to armies but also to militia and volunteer corps, fulfilling the following conditions:

- They must be commanded by a person responsible for subordinates.
- They must have a fixed, distinctive emblem recognizable at a distance.
- They must carry arms openly.
- They must conduct their operations in accordance with the laws and customs of war.

On the basis of the preceding texts, the categories of lawful combatants essentially consist of combatants within regular armed forces (Subsection One). The description of combatants also underwent fundamental development under Additional Protocol I to the Geneva Conventions, which broadened its concept by recognising members of liberation resistance movements, that is, combatants in liberation movements against colonialism, or what is known as irregular armed forces (Subsection Two).

1.1 Regular Armed Forces

The description of a regular combatant is applied to any person belonging to the regular armed forces of a state, that is, to the army of that state. Such persons are bound by a bond of allegiance to their original homeland and possess its own nationality. Most regular forces of states consist of land forces (first) and naval and air forces (second).

1.1.1 Land Forces

Land-armed forces consist of infantry, armoured corps, artillery, engineers, and communications units. These forces consist of an active army, a reserve army, and the national or republican guard. All of them possess the status of lawful combatants (Rouab, 2006, p. 57).

Since these combatants are not present alone on the battlefield, international law has granted the status of lawful combatant to other categories so that they may enjoy the same privileges if they fall into captivity. These include medical personnel, clergy, communications staff, cooks, and persons accompanying fighting forces to undertake commercial work or special duties, such as correspondents and journalists (Fleij, 2018, p. 64).

If any of these persons fall into captivity, international law requires that they be treated as prisoners of war and thus enjoy special protection. The purpose of detaining them is to prevent them from continuing to fight, thereby weakening enemy forces, and not to punish them or take revenge against them (Al-Far, n.d., p. 12).

The Geneva Conventions of 1949 provided special protection for doctors, their assistants, and clergy because of the difficulties associated with their humanitarian duties in the field.

1.1.2 Naval and Air Forces

Naval and air forces refer to members of the army who perform their duties in protecting the state's territorial waters and airspace. To that end, states possess naval and air fleets. Thus, a member of the army serving aboard a warship or military aircraft is a lawful combatant of the state.

International law defines a warship as follows: a vessel belonging to the armed forces of a state, bearing the external marks distinguishing warships of its nationality under the command of a naval officer in the service of that state and whose crew is subject to military disciplinary rules (San Remo Manual, 1994, Article 13(g)).

A military aircraft is any aircraft serving the armed forces units of a state, bearing the military markings of that state, commanded by a member of the armed forces, and whose crew is subject to military disciplinary rules (San Remo Manual, 1994, Article 13(j)).

For this reason, it may be concluded that describing a ship or aircraft as military requires the following:

- It must form part of the state's defense fleet.
- A state military officer must command it.
- It must have members of the army on board.
- It must bear the flag of the state and its military insignia.

Finally, it should be noted that police personnel do not fall within the categories of combatants mentioned above, as they are under a ministry other than the Ministry of Defence, usually the Ministry of the Interior. However, in times of war, the state may call upon them to participate in military operations, provided that the opposing state is notified so that they may benefit from the legal protection afforded to prisoners of war.

1.2 Irregular Forces

The principal concern in the codification preceding the Geneva Conventions was the protection of combatants alone. There was no difficulty in distinguishing combatants, as they were identifiable by their military uniforms and carried their weapons openly. Consequently, regular combatants alone enjoyed combatant status when armed conflicts were conducted solely between the regular forces of states. However, after the

concept of war expanded to include all armed conflicts in which the regular forces of states participate alongside their irregular forces, it became necessary to broaden the concept of the combatant.

Irregular combatants are those who bear arms side by side with regular armed forces and comply with the rules of military discipline to which regular forces are subject (Saadallah, 1997, p. 49). The rules of humanitarian law have identified these categories (first) and established several conditions that must be met for them to enjoy the protection of international humanitarian law (second).

1.2.1 Categories of Irregular Forces

In accordance with the rules of international humanitarian law, irregular forces include volunteer corps and militia members (A), the popular levée en masse (B), and a third category, namely, members of the armed resistance (C).

1.2.1.1 Volunteer Corps and Militia Members. Article 3 of the Third Geneva Convention of 1949 provided a description of a regular combatant upon army volunteers. By volunteers is meant civilians who are nationals of the state and who join the army of their own accord and by their own will to provide assistance and participate in military operations alongside members of the army. This may occur at the state's request when it has lost a large number of its combatants, that is, through voluntary recruitment.

Volunteers enjoy the same rights as regular combatants do, namely, the protection afforded to prisoners if they fall into captivity, provided that the following conditions are met (Al-Hiti, 2008, p. 140):

- They must be commanded by a person responsible for subordinates.
- They must bear a distinctive sign recognizable at a distance.
- They must comply with the laws and customs of war in their operations.

It should nevertheless be noted that volunteers, to enjoy this protection, must fight within the ranks of the armies of their own state. If, however, they volunteer in the armies of the enemy, they may be regarded as mercenaries, that is, irregular combatants who enjoy no protection whatsoever.

1.2.1.2 The Popular or Collective Levée en Masse. Professor Salah El-Din Amer defines the popular levée en masse as combat operations carried out by national elements who are not members of the regular armed forces, in defence of national or national collective interests against foreign forces, whether those elements operate within an organisation subject to the supervision and direction of a legal or de facto authority, or act on their own

initiative and whether they carry out such activity on the national territory or from bases outside that territory (Amer, 2001, pp. 40-41).

Article 4(A)(6) of the Third Geneva Convention provides for this situation as follows: inhabitants of nonoccupied territory who, on the approach of the enemy, spontaneously take up arms to resist invading forces, without having had time to form themselves into regular armed units, provided that they carry arms openly and respect the laws and customs of war.

Hence, the popular levée en masse is the spontaneous mobilisation of members of the population, or their mobilisation after being called upon by their state, to prevent their state from falling under invasion by a foreign state, that is, to prevent the continued advance of enemy forces within their territory. In this case, international law grants them the right to act to protect their state.

However, for this category to benefit from its status as regular combatants, the preceding conditions must be met, as in the case of volunteers, in addition to an essential condition: the territory must not yet have been occupied. The population must therefore grow to prevent invasion or occupation; otherwise, the situation is one of resistance to occupation, which is subject to special rules.

1.2.1.3 Members of the Armed Resistance. Members of the armed resistance, or partisans, are groups of individuals who carry out combat operations undertaken by national elements who are not members of the regular armed forces, in defence of national or national collective interests against foreign forces, whether such elements operate within an organisation subject to the supervision and direction of a legal or de facto authority, or who act on their own initiative and whether they carry out such activity on the national territory or outside it (Amer, 1976, pp. 40-41).

The Geneva Conference of 1949 examined the status of isolated resistance forces and decided that only collective resistance taking the form of an organised movement operating inside or outside occupied territory would benefit from treatment as prisoners of war, provided that its members conformed to the conditions laid down in the Hague Regulations of 1907 and in Article 4(A)(2) of the Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War.

After the Geneva Convention, the adoption of the two Additional Protocols expressed the desire to extend the protection of the law of armed conflict to members of the resistance in its broad sense in all circumstances by facilitating the conditions under which members of the resistance acquire the description of combatants (Amer, 1976, p. 424). Additional Protocol I of 1977 provides, in Articles 1(3) and (4), that it applies to the situations

referred to in common Article 2 of the Conventions. The situations referred to in the preceding paragraph include armed conflicts in which people are fighting against colonial domination, alien occupation, and racist regimes in the exercise of their right to self-determination, as enshrined in the Charter. Article 43 of the same Protocol also established equality between liberation organisations and the armed forces of states and established a comprehensive definition for them. It further required the armed forces of states and all liberation groups and organisations, from the very outset, to comply with the first and fourth conditions of the Hague Regulations of 1907 and the second and third conditions of the Third Geneva Convention of 1949. Individuals who wish to be treated as combatants and consequently as prisoners of war if they fall into enemy hands must comply with these conditions. Since these two conditions expose members of liberation movements to danger and liquidation, Article 44 of Protocol I of 1977 provides that combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack rather than by wearing a specific distinctive sign; they may distinguish themselves by any means they choose (Abu Taha, 2018, p. 22). Article 25 of Additional Protocol II of 1977 also provides that members of regular armed forces and other armed forces participating in a noninternational armed conflict must be treated as prisoners of war if they fall into enemy hands, provided that they meet the conditions prescribed under Article 4(A)(2) of the Third Geneva Convention of 1949 (Amer, 1976, p. 429).

1.2.2 Conditions Required for Irregular Combatants

After irregular combatants were granted combatant status and the protection that international humanitarian law affords to this category, Article 1 of the Hague Regulations of 1907 concerning the Laws and Customs of War on Land set out several conditions that this category must fulfil; these are the same conditions adopted by the Geneva Convention of 1949, which may be summarised in four conditions: the requirement of a responsible commander (A), the requirement of a distinctive sign (B), the requirement to carry arms openly (C), and the requirement to respect the laws and customs of war (D).

1.2.2.1 The Requirement of a Responsible Commander. This condition is readily fulfilled because it accords with the logic and nature of things. In every human gathering, there is someone who assumes command and direction, at least as a matter of fact (Hazem, 2002, p. 28). The importance of the requirement that irregular combatants be subject to a commander lies in the fact that the orders of commanders and superiors are, in most cases, consistent with what international humanitarian law requires (Hussein, n.d.,

p. 382). The commander must therefore possess competence, sound training, and extensive knowledge of the rules of international humanitarian law.

1.2.2.2 The Requirement of a Distinctive Sign. This requirement is a product of the military school in the Brussels and Hague Conferences and was formulated in the law of The Hague (Mohamed, 2010, p. 10).

With respect to this condition, one strand of scholarship considers the distinctive sign to be a visible sign from a distance and evidence that the person bearing it belongs to organised forces (Amer, 2001, p. 201). The rules of international humanitarian law did not determine the form, color, or size of the sign; rather, they left armed forces free to choose it. Examples of distinctive signs include the white cross in the form of two intersecting white bands, which first appeared in 1399 in a battle in which fighters from a region of Switzerland sought to distinguish themselves from the Austrians (Mohamed, 2010, p. 10).

1.2.2.3 The Requirement to Carry Arms Openly. This condition determines the identity of the irregular combatant. It is essential for distinguishing between combatants and preventing the combination of civilian and combatant status.

1.2.2.4 The Requirement to Respect the Laws and Customs of War. This condition is also among the most important conditions contained in the rules of international law. It must be met by all armed categories without exception because it is required by humanity to alleviate the scourges and effects of war.

2. The Unlawful Combatant in International Humanitarian Law

The term unlawful combatant first appeared in the wording of the Ex parte Quirin case in the United States during the Second World War (Al-Anzi, 2004, p. 32). Pierre-Richard Prosper then used it as Ambassador-at-Large for War Crimes Issues at the United States Department of State before the Legal Affairs Committee of Congress following the events of 11 September 2001. In the speech he delivered on 4 December 2001, he stated that the United States was in an unconventional war against an unconventional enemy to whom the rules of international humanitarian law did not apply and that persons who conduct hostile acts without being subject to organised command and without respecting the customs, traditions, and laws of war are unlawful combatants (Al-Anzi, 2004, p. 31).

This category of combatants includes several groups that do not enjoy legal protection under international humanitarian law. This study addresses the phenomenon of mercenaries (Subsection One) and spies (Subsection Two).

2.1 Mercenaries

The phenomenon of mercenaries has been known in human societies since ancient times. It constituted an important instrument of combat in wars and campaigns, whether before or after the emergence of states and regular armies. Its role developed considerably in the modern era, particularly after the emergence of national liberation movements, when colonialism increasingly relied on mercenaries to maintain its control over weak peoples and their resources (Al-Majdhoub, 2007, p. 866). To determine the position of the rules of international humanitarian law on the phenomenon of mercenaries, it is necessary to identify the nature of mercenaries (first) and then to address the prohibition of this phenomenon in the various legal texts relating to the rules of international humanitarian law (second).

2.1.1 The Concept of Mercenaries

To encompass the concept of mercenarism, this study first defines mercenaries (A) and then examines the history of the emergence and development of mercenarism (B).

2.1.1.1 History of the Emergence of Mercenaries. Mercenarism emerged in ancient times, when regular armies had not yet been formed. In the past, states relied upon mercenaries in their wars. The widespread use of mercenaries also characterised the Middle Ages. With the rise of the modern state and the formation of regular armies, some parties continued to use mercenaries. The Byzantine Empire recruited mercenary groups, the Almogavars, from an area on the northern border of Spain to assist it in fighting the Turks, and mercenaries played an important role in achieving victory over the Turks (Al-Shahwan, 2012, pp. 28-29).

This phenomenon also extends to the practices of medieval European warfare. Among its most important applications in that era were the great mercenary companies. The existence of this phenomenon did not end with the end of those ages; rather, it continued to be applied in the past through the condottieri of the Renaissance and the Swiss mercenaries (Al-Ankabi, 2010, p. 275).

The true history of mercenaries extends to the days preceding the French Revolution, specifically in 1789, when restaurants and hotels commonly displayed signs prohibiting entry to persons associated with mercenaries. The unacceptable and irresponsible conduct and practices of mercenaries made them reject elements in European societies in general (Al-Shahwan, 2012, p. 29).

Mercenaries began to reveal their true faces after the emergence of liberation and independence movements, as colonial states relied on them to suppress national resistance movements in colonies struggling for independence and freedom in Third World states, in general, and in Africa

in particular. After the fifth decade of this century, mercenaries participated in many armed conflicts. They fought in Kinshasa from 1962 to 1964 alongside Tshombe's forces, and they also fought in the civil war Angola witnessed in 1976, as well as in the Comoros in 1978, where they contributed to the overthrow of its government (Abu Taha, 2018, p. 24).

The phenomenon of mercenaries spread widely in the final third of the twentieth century to the extent that it became a phenomenon imposed on the reality of many states as a professional occupation attracting hundreds of thousands of people aspiring to wealth and wishing to satisfy their criminal tendencies, including adventurers, retired military or security personnel, and professional criminals from organised crime gangs pursuing material gain by any means, particularly from African states from which French or British colonialism had departed or from South American states (Al-Hamd, 2011, p. 3).

2.1.1.2 The Definition of Mercenaries. A mercenary is a person foreign to the parties to the conflict who is voluntarily recruited, without being assigned by their own state, to participate directly in hostilities on behalf of one of the parties to the conflict, despite the absence of any bond connecting that person to the party using them or to all the parties: neither a bond of nationality nor domicile or residence in the territory of any of them nor membership of the armed forces of the party that recruited them. Rather, the mercenary practices combat solely to perform combat missions in return for a substantial material benefit. For this reason, the material element, together with the voluntary, special, and external character of the undertaking that links the mercenary to the parties to the armed conflict, is among the most important characteristics distinguishing the definition of a mercenary (Al-Ankabi, 2010, p. 53).

Some define a mercenary as every person who is motivated essentially to take part in hostilities by the desire for private gain or every person who is neither a national of a party to the conflict nor a resident of territory controlled by one of the parties to the conflict or a member of the armed forces of a party to the conflict or sent on official duty by a state that is not a party to the conflict as a member of its armed forces (Al-Shahwan, 2012, p. 19).

With respect to the legal definition of mercenaries, there is no reference to mercenaries in any of the four Geneva Conventions of 1949. The first legal text to address the status of mercenaries was Additional Protocol I of 1977, relating to the protection of victims of armed conflicts.

Article 47(2) defines a mercenary as any person who:

- They are recruited locally or abroad to fight in an armed conflict.

- It does, in fact, take a direct part in hostilities.
- It is motivated to take part in hostilities essentially by the desire for private gain and, in fact, is 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.
- Neither a national of a party to the conflict nor a resident of territory is controlled by a party to the conflict.
- It is not a member of the armed forces of a party to the conflict.
- Has not been sent by a state that is not a party to the conflict on official duty as a member of its armed forces.

The credit for formulating this definition belongs to Nigeria, which suffered from the scourge of mercenaries during the civil war that occurred between 1967 and 1970. Its delegate at the International Humanitarian Conference held between 1974 and 1977 submitted a proposal to the Third Committee of the Conference to introduce Article 47 into the draft Protocol, clarifying the elements on which the definition of mercenaries is based (Al-Jundi, 1985, pp. 248-249).

This initiative, however, was the subject of controversy between Third World states and Western states during the third session. The controversy centred on two points (Abu Taha, 2018, p. 26):

First point: Third World states considered a foreigner who joined the armed forces of one of the belligerent states to be a mercenary, whereas Western states rejected this view if the state that admitted the foreigner presented that person as a soldier incorporated into its armed forces.

Second point: States of the Non-Aligned Movement considered that foreign experts and technicians serving in the armed forces of one of the belligerent states were mercenaries, whereas Western states took the opposite view. During the fourth session, however, the intensity of the controversy was reduced, and the Third Working Committee submitted Document 105, which the participating delegations approved. This document became Article 47 of Additional Protocol I, which provides that a mercenary shall not have the right to combatant or prisoner-of-war status.

The following are also not considered mercenaries:

1. If their state is neutral and has sent them to fight alongside the enemy, its action constitutes a violation of the rules of neutrality, and its state bears international responsibility for that violation. Such persons are not considered mercenaries.

2. If they are from an allied state and their state has sent them to fight alongside the enemy, they are not considered mercenaries so long as their

state sent them and that state bears international responsibility for its violation of the rules of alliance.

3. If a state expressed support for the enemy, even if it did not intervene directly but only indirectly in the fighting, or if they volunteered of their own accord, they were not considered mercenaries.

Notably, this definition is extremely narrow. It applies only to international armed conflicts and requires the cumulative fulfilment of six conditions. According to Article 47 of Additional Protocol I, the determination of mercenary status may be made only by a competent court in the detaining state.

2.1.2 The Prohibition of Mercenaries

Resorting to mercenaries has become widespread among states experiencing armed conflict. Such persons perform tasks assigned to them in various forms, such as carrying out operations, supplying belligerent forces with provisions and weapons, and protecting oil wells and mineral mines. This has generated reactions at various levels, prohibiting mercenaries.

2.1.2.1 The Prohibition of Mercenaries in International Humanitarian Law. The first legal text in international humanitarian law to refer to mercenaries was Article 47 of Additional Protocol I, mentioned above. However, what is noticeable about this provision is that it did not directly prohibit mercenaries but merely determined, in its first paragraph, the treatment to be accorded to them upon capture and defined them in its second paragraph.

Under international humanitarian law, being mercenary is not a specific crime. The same applies to the Statute of the International Criminal Court. If mercenaries are arrested, they do not have the right to enjoy prisoner-of-war status, although the detaining power may choose to treat them accordingly. They must always be treated humanely in accordance with the fundamental guarantees of international humanitarian law as defined in Article 75 of Additional Protocol I. They may not be prosecuted for being mercenaries unless the detaining state's national law contains provisions describing mercenarism as a specific crime.

Notably, the Sixth Committee of the United Nations General Assembly is preparing a draft universal treaty prohibiting the use of mercenaries. However, the work of this committee is progressing very slowly in this field, and it is unlikely that such a treaty will be prepared in the near future (Abu Taha, 2018, p. 27).

2.1.2.2 The Prohibition of Mercenaries in Public International Law. The definition and regulation of mercenarism are set out in two international conventions specifically concerned with mercenaries. The first is at the

United Nations level. The United Nations General Assembly issued several recommendations condemning mercenaries and strongly condemning their use against liberation movements to obstruct the principle of the right of people to self-determination. It regards the mercenary as a criminal and an outlaw who must be criminally punished. This was clarified by paragraph 8 of Recommendation No. 2465 of 1986, entitled "Preservation of the Independence of Peoples and Territories under Colonial Domination". Paragraph 5 of Recommendation No. 3103 also provided that the use of mercenaries by racist colonial regimes against liberation movements struggling to obtain their independence from colonial domination constitutes a crime.

Pursuant to the United Nations General Assembly Resolution A/RES/34/44, the United Nations adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries on 4 December 1989 (Al-Jundi, 1985, pp. 257-258). It entered into force on 20 October 2001, and by April 2015, 33 states had ratified it.

The second initiative occurred at the regional level through efforts made by the African continent to eliminate the phenomenon of mercenaries. This was embodied in the draft treaty prepared by a committee of legal experts appointed by the Organisation of African Unity, now the African Union, and approved by the African Summit Conference held in Libreville in 1977. By 1980, 14 states had signed the treaty, and 4 had ratified it. It was called the African Convention for the Elimination of Mercenarism in Africa. Article 6 sets out several duties with which states must comply (Abu Taha, 2018, p. 28):

1. Each African member state undertakes to prevent its nationals or foreign persons from engaging in mercenary activities from its territory.

2. Each member state undertakes to prevent the passage of mercenaries through its territory to the territory of another member state.

3. African states shall exchange information, directly and indirectly, concerning mercenary activities.

4. Each state has a duty to take the necessary legal measures to punish mercenaries if it does not extradite them to the state against which they were used.

Finally, it must be noted that the definition of mercenaries in the rules of public international law is the same as that in the rules of international humanitarian law. However, it expanded the scope of the definition, since the rules of public international law apply to both international and noninternational armed conflicts. In contrast, the definition in international humanitarian law is limited to international armed conflicts. Moreover, under the two conventions on mercenaries in public international law,

mercenarism is considered a crime. In contrast, in international humanitarian law, mercenarism is considered, in itself, a violation of the Geneva Conventions or Protocols.

2.2 Spies

Entering any war or battle against a party whose numbers and equipment are unknown is, from the outset, a losing battle. In this context, Napoleon Bonaparte stated that a commander who conducts a military operation without having information about it is a man who does not know his craft (Fleij, 2018, p. 70). Consequently, each party to a war seeks, as far as possible, to conceal its true capabilities and fighting capabilities while at the same time exerting the utmost effort to know the other party and to ascertain the reality of its fighting capabilities and plans. International custom has permitted the use of certain means to obtain information from the enemy on the battlefield, including espionage. As a result, the parties to an armed conflict may use spies to obtain important information in the conduct of military operations (Abu Haif, 1992, p. 815).

In view of the danger of espionage and its significant effect on changing the course of wars, the rules of international humanitarian law concern themselves with defining the concept of espionage (first) and depriving the person who engages in it of the protection prescribed for lawful combatants (second).

2.2.1 The Definition of a Spy

Espionage is an ancient practice recognised in the Lieber Code, the Brussels Declaration, and the Hague Regulations. It is defined as the process of collecting, or attempting to collect, information in a territory controlled by an adverse party by engaging in acts of deceit or deliberate concealment. The definition includes combatants who wear civilian clothing or the enemy's military uniform (Abu Taha, 2018, p. 29). It excludes, however, combatants who collect information while wearing their own uniform, that is, the uniform of their armed forces. If they fall into enemy hands, they are treated as prisoners of war. If, however, they wear enemy clothing or civilian clothing and fall into enemy hands, they are not considered combatants and are not treated as prisoners of war; they are deemed to be spies (Al-Far, n.d., p. 152).

The Hague Convention of 1907 concerning land warfare defined a spy as follows: a person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Therefore, soldiers who, without a disguise, enter the hostile army's zone of operations to obtain information are not considered spies.

Espionage is a dangerous mission in wartime; therefore, an ordinary person cannot undertake it. To practice espionage, the person must possess skills that make them distinctive, the most important of which are the following (Fleij, 2018, p. 71; Abu Taha, 2018, p. 30):

- The ability to work in arduous conditions.
- Skill in noticing minute details.
- Possession of a high level of security awareness.
- Tact and flexibility in thinking.
- Special military training to be able to act in difficult circumstances.
- The exertion of effort in obtaining information, whatever its source.
- Knowledge of the language of the area in which the person works.
- Avoidance of excessive ambition and anxiety.

2.2.2 The Penalty for Espionage

Article 30 of the Hague Regulations provides that a spy taken in the act shall not be punished without previous trial (Saadallah, 2002, p. 142). The International Covenant on Civil and Political Rights of 1966 also affirmed, in Article 4(2) and Article 6(2), that punishment may not be imposed upon a spy except after trial and the issuance of a final judgment establishing the charge against that person (Abu Taha, 2018, p. 30).

A spy also does not enjoy the protections afforded to lawful combatants, namely, treatment as a prisoner of war. This is what Article 46(1) of Additional Protocol I of 1977 states: if a member of the armed forces of a party to the conflict falls into the hands of the adverse party while engaging in espionage, that person shall not have the right to prisoner-of-war status and may be treated as a spy, notwithstanding any other provision of the Conventions.

A spy is also subject to special international rules in the event of capture, as follows (Fleij, 2018, pp. 71-72):

- If captured in flagrante delicto, a spy is not punished except after a fair trial.
- If a spy is captured after committing the acts, that person is not punished for prior acts of espionage.
- If one of the parties to the conflict is satisfied that there are conclusive suspicions that a person protected by the Conventions in the territory of that party is engaging in activity harmful to the security of the state, that person must be deprived of the rights and privileges granted by that convention.

- If a spy is arrested in occupied territory on a charge of espionage and enjoys the protection of the Conventions, that person may be deprived of the right to communicate.

Thus, the spy, like the mercenary, does not fall within the description of a lawful combatant and does not enjoy the privileges enjoyed by a lawful combatant if that person falls into the hands of the adversary. All forms of mercenarism and espionage in international conventions are prohibited acts punishable by law.

Conclusion

Through this study, entitled "The Legal Status of the Combatant in Accordance with the Rules of International Humanitarian Law", it became clear that international humanitarian law distinguishes between two categories of combatants. The first category is that of lawful combatants and consists of members of regular armed forces, who enjoy all the rights legally guaranteed in international instruments, as well as members of quasiregular armed forces, who enjoy a set of legally guaranteed rights if they meet certain conditions. The second category has been denied and stripped of lawful character under international humanitarian law because of its criminal nature and the unlawful objectives it seeks to achieve, such as the use of mercenaries, spies, and others.

On the basis of this study, several findings were reached:

- The precise definition of lawful and unlawful combatants in international and noninternational armed conflicts remains ambiguous.
- It is observed from the provisions concerning the rules of international humanitarian law that mercenaries and spies are not entitled to prisoner-of-war status. However, they retain the right to enjoy the fundamental guarantees provided for in Additional Protocol I. This matter is highly important because it aligns with the broader effort to expand the protection of international humanitarian law to include the widest possible categories of persons in armed conflicts.
- About mercenaries, it is clear that there are some important differences between international humanitarian law and the conventions specifically concerned with mercenaries. These differences essentially revolve around the fact that Additional Protocol I does not prohibit mercenary activity. Article 47 of Additional Protocol I deprives the mercenary of the legal status of combatant or prisoner of war. In contrast, the conventions concerning mercenaries criminalise their activities, as an individual who falls within the definition in Article 47(2) is not entitled to combatant status.
- Despite the efforts of the international community to limit the phenomena of espionage and mercenarism, they continue to exist,

particularly the phenomenon of mercenaries, which has begun to take the form of companies under various security and military designations.

On the basis of these findings, certain recommendations may be made with a view to ensuring greater protection for combatants in armed conflicts:

• It is necessary to define lawful and unlawful combatants precisely and to determine the categories of combatants and noncombatants accurately.

• It is necessary to establish international legal frameworks that adopt specific standards to restrict mercenary and espionage organisations through the enactment of a United Nations convention in this regard.

• It is necessary to create effective international cooperation to combat espionage and mercenarism at all levels, as they are organisations hostile to all peoples and must be eliminated.

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