The Legal Status of Terrorists from the Subject of International Relations to the field of International Humanitarian Law

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Abstract

The aim of the present paper is to analyze the legal status of terrorists depicting on various perspectives. Thus, the larger framework of analysis is provided both by the "global war on terrorism" and the plethora of academic communities discussing the topic and attempting to define the very phenomenon it generated. Defining terrorism as a concept has not reached a consensus, and, just as the motto says it, what one considers to be a terrorist, another admires and praises as a "freedom fighter". In light of the exhaustive work of scholars on what "terrorism" and "terrorists" are, the present paper aims to approach strictly the matter of the legal status of terrorists, not in an attempt to offer a definition, but rather to comprehend the inner mechanisms of the concept and the contemporary manners of tackling it. Thus, the paper shall have three main parts: a first one, dealing with the theoretical framework of analysis offered by the humanitarian law, followed by a debate on the common grounds on the topic offered by humanitarian law, human rights law and international criminal law and finally, a part that will be in fact, a case study, discussing the "illegal combatant" status of Taliban and Al-Qaeda members.

Key Words: terrorism, humanitarian law, prisoner of war status, civilian, protection

Motto:"One man's freedom fighter is another man'sterrorist."

1. Introduction

Terrorists are often qualified as maniacs, daredevils or just irresponsible destroyers of contemporary civilization. Although, generally, the international community addresses the consequences of terrorist acts, most of those responsible of such acts claim they had no option other than resorting to violence in order to make their voice heard and support their ideals (Whittaker, 2004, p.3).

David Whittaker (2004, p. 4) has drawn a difference between terrorists and the other types of fighters: terrorists target civilians, guerrilla forces target military personnel and bases, while freedom fighters engage in campaigns to set individuals free from dictatorship, oppression or foreign occupation.

The terrorist is seen as the "symbol of the necessary fight" (Marret, 2002, p.32). He is the one responsible for completing such an endeavor, the porte-parole of the group and the herald of the fight in which the terrorist group is engaged. Also, when attempting to define the terrorist as an offender, one needs to take into account the displayed goals and objectives, in the absence of which, such a definition would be sterile.

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Establishing the legal status of the terrorist is possible even in the case of an armed conflict between a terrorist organization and a state. A fair definition can influence the rights the respective nation has on capturing them, putting them to trial and sentencing them according to their offences. In this regard, it is highly important to differentiate them among two notions – "combatants" and "civilians". These two are elements of the definition that shall be further discussed in the following paragraphs. The OSCE Special Rapporteur for Guantanamo, Anne Marie Lizin acknowledged in her July 2006 report that the legal status of members belonging to terrorist international organizations is "surrounded by confusion" (Bellinger, 2007, p.878). Drawing on this pessimistic statement, the present paper shall investigate the components of the status, in order to better identify the difficulties in establishing a noteworthy and broadly accepted definition of the term "terrorism" and, implicitly, "terrorist".

2. The Theoretical Framework of Humanitarian Law

Defining a "terrorist", from a legal point of view, is most often done based on the lines drawn by the discipline of International Humanitarian Law. Thus, the United States of America considers the "Global War on Terror" to be an armed conflict, in which the law of war is to be applied, and the members of Al-Qaeda and the Taliban militias are viewed as unlawful combatants. As a result, they are not allowed to require or benefit from the protection of war prisoners, usually allotted by the Third Geneva Convention. On a doctrinaire level, the debate is focused on the meanings of the following two notions: "combatant" and "non-combatant".

Combatants are defined as those persons having "the right to commit acts of hostility (killings, destructions etc.) without encountering criminal liability for this (obviously, provided they obey the laws and customs of war)" (Lupulescu, 2009, pp. 69-70). Until the beginning of the 19th century, the distinction between combatants and non-combatants was clearly cut; however, the distinction tends to become blurred during Napoleon's wars against the Spanish, when civilians became more and more involved in guerrilla fighting. Initially, the "noncombatant" concept referred to civilians; at present, in certain war areas, civilians can hardly be absolved of any combatant quality.

From a theoretical point of view, the Geneva Conventions refer to two types of participants in an armed conflict – lawful combatants and civilians. Based on this, only lawful combatants can resort to the protection offered by the "prisoner of war" status, in short, POW. Those participating directly to hostilities, unless being lawful combatants, will automatically be considered civilians. In addition to this, when discussing the possibility to attack these categories during a military conflict, while legal combatants can be attacked both during hostilities and after, civilians can be attacked only during hostilities. As far as detaining them is concerned, civilians can only be detained out of security reasons, and released immediately, should these security reasons expire.

Article 43, section II of the 1977 Additional Protocol I, entitled "Combatant and prisoner of war status" enumerates the persons/groups of persons that can be considered combatants – "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" (Protocol Additional I). Even though at first sight, groups such as Al-Qaeda, Taliban militias, Hezbollah, Tamil Tigers, Hamas, etc., seem to be displaying some of the above-mentioned features, a closer look shows that such groups do not fill in the categories regulated by the Convention.

As far as unlawful combatants are concerned, these are noted to be spies, mercenaries and war criminals, and the regulating field is the same Additional Protocol I of 1977. In case of being captured, they are exempt from the prisoner-of-war status, and are criminally liable just like any other felon.

Based on this, one can conclude that the Geneva Conventions' system is lacking in sufficient regulations to be able to build a clear legal status for terrorists.

The United States Supreme Court established in a case from the 1940s, that: "by universal agreement and the practice of the laws of war, there is a clear distinction between armed forces and the peaceful populations of belligerent nations, and between lawful and unlawful combatants" (Yoo, 2004, p.138).

Customary law forbids the targeting of civilians and encourages combatants to avoid provoking unnecessary harm to civilians, during military operations. The same law also demands from combatants to be wearing distinctive marks that would differentiate them from civilians, to prevent the enemy from causing suffering to civilians. In exchange for this protection, civilians are forbidden to get involved in hostilities.

Al-Qaeda operates contrary to these provisions, by attempting to cross the fine line that is between the civilian and the combatant. Additionally, Al-Qaeda attacks civilian targets, with the express purpose of causing numerous civilian victims. Consequently, disrespecting the above-mentioned norms leads to these militants being considered unlawful combatants. The same is valid for the Taliban militias, which shall be demonstrated in the final pages of the present research.

Since, even in the early stages of this research, one can easily highlight the fact that Al-Qaeda and Taliban members are unlawful combatants, the authors will take the liberty to correlate this analysis with a theoretical analysis of the prisoner-of-war status, one they could have benefitted from, should they have been qualified as war combatants.

Article 4 (A) (1) of the Geneva Convention relative to the Treatment of Prisoners of War (Yoo& Ho, 2003, pp. 218-219), states that certain groups, militias, resistance movements belonging to one of the parties to the conflict are considered legal combatants and benefit from legal protection for acts committed during conflict (which would, in more peaceful conditions, be incriminated), provided they fulfill the following conditions:

- Are under the command and responsibility of a superior;
- Carry distinctive marks, which could be recognized from a distance;
- Carry their weapons visibly;
- Operate in agreement with the laws and customs of war.

In both cases mentioned above- Al-Qaeda and the Taliban militias, these features are not present, ergo, the representatives of these groups cannot be considered legal combatants and cannot benefit from the status of POW, should they be captured.

These provisions have been enhanced by article 44 (3) of the Additional Protocol 1(1977), which shows that "In order to promote the protection of the civilian population from the effects of hostilities, 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. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) During each military engagement, and (b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.". However, the Reagan Administration refused to ratify the Protocol, their motivation being that the article is deeply interpretable, and risking thus to be considered as "acknowledging and offering protection to terrorist groups in the name of ensuring progress of humanitarian law" (Yoo& Ho, 2003, p.227).

Nevertheless, Additional Protocol I of 1977 is highly debated upon, even now, as it bestows the combatant status to the members of national liberation movements, as well as privileges, such as the lack of obligation to wear distinctive marks and visible weapons, which leads to the fair questioning of the distinction between terrorists and these very members.

On the 18th of January 2002, the Justice Department elaborated a legal position highlighting the fact that the provisions of the Third Geneva Convention do not apply to the conflict with Al-Qaeda and that there were, at the time, sufficient reasons to refrain from applying these provisions to the Taliban detainees. The document was highly contested, as the Convention does not discriminate in this regard and applies to all prisoners, despite the nature of the conflict. A reply came from Alberto Gonzales, the legal counselor of President Bush, who claims that such privileges cannot be offered in the absence of a consensus on the matter between the text of the Convention and the domestic law, especially the domestic criminal law (Van Agellen, 2005, p. 170). Contrary to this, professor Jonathan Paust (Van Agellen, 2005)argues that such prisoners, be they members of Al-Qaeda or Taliban, should benefit from the provisions of the Geneva Conventions, based on the norms of international customary law.

In order to clarify the debate regarding whether such individuals, captured in combat, should receive the POW status, one needs to take into consideration the provisions of the Armed Conflict Manual, elaborated by the British Ministry of Defense, which states, in paragraph 8.22 that "in the event of a person being under the control of an adversary, but is not detained as a prisoner of war and is going to undergo trial for an act related to the hostilities, the respective person has the right to demand the POW status, and should it not be granted, to demand to have this matter settled in a judicial court" (British Ministry of Defense Manual of the Law of Armed Conflict).

Before proceeding with the analysis, the author considers it useful to further elaborate on the four elements that need to be fulfilled in order to establish the status of combatants. These four features have been mentioned, for the first time, in Article 1 of an Appendix to the Hague Convention of 1907. Thus, they became a part of customary law. Their presence among the provisions of Article 4 (A) of the Third Geneva Convention is meant thus to enhance the strength of customary law and not replace it. Moreover, although the Addition Protocol I had enlarged the area in which these four criteria should be applied, by specifying that there are moments, both before and during hostilities, in which they cannot be fulfilled, the rest of article 4 cannot be interpreted as applicable in the case of a militia such as the Taliban.

Article 5 of the Third Geneva Convention (1949) provides that those persons detained should benefit from the status and the advantages of the POW status, until a special court is assembled in order to decide upon their exact status, provided there are suspicions on their role and mission in the conflict. The article also provides two situations in which derogations from the POW status apply – individuals who are either foreigners or neutrals in occupied territory. Thus, it must be stated, once and for all that this article does not apply to those individuals who are being kept in enemy custody (Kantwill& Watts, 2004, p.730). In the present situation, article 5 cannot be interpreted as applying to terrorists/suspects of terrorist acts.

In the event in which a special court is established in order to determine whether a captured individual should receive the POW status or not, the respective court has to check the validity of article 5 in that situation as well as attempt to find answers to the following questions: did the detainee commit a hostile act? Is he/she a member of a legal armed group? Is he/she a legal combatant? (Jackson, 1987, p.23)

However, this is the theoretical aspect of applying the provisions of the Geneva Conventions. The practical matters differ, based on country and domestic law.

The case most relevant to the present research is that of the United States of America. Article II of the US Constitution[2] stipulates that the President is entitled to interpret treaties in order to apply them. Thus, the US President is free to interpret the Geneva Convention relative to the Treatment of Prisoners of War, both literally as well as in light of the existent intelligence on the Taliban operation in Afghanistan. Based on information and intelligence, the President can decide whether a special court needs to re-examine the detainees in order to establish their status accurately. A recent example in this regard is that of President George W. Bush Jr., who, based on the information received from the Defense Department, decided that detained individuals, who are members of Taliban militias, cannot benefit from the POW status, under any of the provisions of Article 4 (A) 1-3[3].

President Bush Jr. had thus the legal framework to rely on when establishing whether the Taliban militia members need to comply with all the four criteria in order to receive the legal combatant status, and, implicitly, to enjoy the protection given to prisoners of war based on the Third Geneva Convention.

This is of utmost importance, as an acknowledgement, from a legal point of view, of the present armed conflict, does not immediately offer the Al-Qaeda and Taliban militants the privileged status of legal combatant. On the contrary, since none of the groups complies with the four conditions mentioned above, and they have deliberately chosen not to respect the laws of armed conflict, they are to be seen as unlawful combatants.

However, despite establishing the conditions in which one can receive the prisoner of war status, our academic endeavor has not been completed and needs to be further correlated with the notion of "terrorist", as presented in the beginning of the paper.

In the "Public Committee Against Torture" decision, the Supreme Court of Israel settled upon a definition that states that a "terrorist" is a person who plans and participates directly to hostile activities, as well as those involved in similar, on-going activities. In another decision – "A. against the State of Israel", the same Court explained that members of a terrorist organization can be submitted to detention, even though they did not participate actively in hostilities, but there is valid proof they had a significant contribution to the development of the hostilities(Bradley, 2009, p.405).A mere interpretation of this decision shows that the active members of a terrorist organization are assimilated to the armed forces involved in a traditional armed conflict, but without benefitting later from the protection offered by the POW status. Further clarification is brought by professor Howard S. Levie, in his work "International Law: Prisoners of War in International Armed Conflict" (1977, p.36), who shows that, should a member of the armed forces be captured in the enemy's territory, while being engaged in an espionage and/or sabotage mission, he will receive the same treatment as a civilian captured in the same circumstances.

The same debate can be extended to the members of the Palestinian Authority, who have not, until recently, benefitted from any recognition as the military force of a state. To sum it up, in order to extend upon these individuals the benefits of the POW status, they need to comply with the four criteria established by Article 4 (A)(2).

3. Meeting Points between Humanitarian Law, Human Rights Law and International Criminal Law

In the absence of a united front in the definition and analysis of terrorism, an even larger dilemma is that of incriminating these individuals. An attempt to draw a solution is to send them back for trial to the state they are citizens of.

[2]*US Constitution*, http://www.usconstitution.net/const.html.
[3]*Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949*, http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf , p. 2.

This cannot always be considered a solution, as the implementation depends very much on the willingness of the state, as well as its capacity to act in this matter – in the case of Afghanistan, which has been mostly under the control of Taliban militias, bringing someone in front of a court under the charges of terrorism was mere utopia. Another solution would be extraditing the person suspected of having prejudiced the state. However, this is also difficult to put in practice, since states need to have extradition agreements in place, and should that be accomplished, the state holding the suspect should agree on extraditing him back to his country of citizenship.

To overcome the void of applying such measures, on August 27th, 1986, the US Congress passed legislation establishing the full territorial jurisdiction of the government with regard to acts of physical violence and killings of American citizens, provided the aim of such actions is coercion, intimidation or retaliation against the government or the civilian population. The advantage of this type of legislation resides in the fact that it offers the American government the possibility to bring to court all those detained worldwide for acts of terrorism against American citizens[4].

Authors such as Robert Cryer (2010, p.334) consider terrorism to be a transnational crime, due to the fact that, in spite of producing consequences both domestically and beyond national borders, it also affects fundamental values of the international community.

Terrorism is incriminated as a war crime in the statutes of both the International Criminal Tribunal for Rwanda as well as the Special Court for Sierra Leone. The statute of the Special Tribunal for Lebanon incriminates terrorism as a crime of domestic criminal law. Despite all these, the International Criminal Court does not encompass terrorism, either as a war crime or separately.

Scholars have often claimed that terrorism should be considered either a crime against humanity or a war crime and should thus be under the jurisdiction of the International Criminal Court (Cryer, p.351). In this regard they have shown that terrorism comprises several elements that would qualify it as a crime- acts or threats of violence against the civilians who do not participate in hostilities, with the utter intention of spreading terror among the civilian population (Cryer) . An example to such argumentation is the FARC case of the Special Court for Sierra Leone showing that the amputation of limbs of civilians who did not participate in the conflict has been performed with the mere goal of spreading terror (Cryer).

Before the International Criminal Court became operational, authors such as Hans Koechler (2002, p. 22) argued in favor of terrorism being a part of the Court's jurisdiction, along with the four other types of crimes: genocide, war crimes, crimes against humanity and aggression. However, this did not occur, but terrorism has been introduced in the jurisdiction of other international criminal courts, either by itself or as part of a larger concept.

As mentioned above, terrorism is incriminated by the Special Tribunal for Lebanon, but only under the domestic criminal law of the country, as specified by the Appeals Chamber of the Tribunal. Here are the elements of the crime of terrorism – "(i) an intentional act, whether or not constituting an offence under other provisions of the Criminal Code, aimed at spreading terror;
(ii) the use of a means "liable to create a public danger", such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents."[5]. In a later examination, the Appeals Chamber has shown that Lebanese courts have had a restrictive approach with regard to paragraph (ii) by only applying the crime to the means listed in the domestic criminal code (but the code is limited – for instance, it excludes attacks with guns).

[4] U.S.C. 2331(a),(c),(e);
[5] Special Tribunal for Lebanon, http://www.stl-tsl.org/en/media/press-releases/media-advisory-on-the-appeals-chamber-ruling-16th-february-2011.

Thus, the Appeals Chamber had to state that the list provided for by the Code is an illustrative rather than exhaustive one and therefore, the provisions of the code need to be interpreted by the Tribunal to a larger extent[6].

Authors such as Davida E. Kellogg claim that it is impossible to lead a global war on terrorism without stepping over the norms of the Geneva Conventions with the only control measure being the gravity of the infringement of these norms. Also, Kellogg points that it is difficult to apply these conventions generally, since they are to be applied only among states members to these international legal texts. Consequently, consolidating the text of the Conventions might seem useless for those states which disobey them. In the case of US investigations over persons detained under charges of terrorist acts, American authorities tend to respect the Conventions up to a certain extent (the exception being the 1977 Additional Protocol I), but have availed themselves of their provisions when it comes to imprisoning persons suspected to be terrorists, for an un-determined time, and in the absence of a proper court decision.

Should one consider the "global war on terrorism" to be a non-international armed conflict, terrorist acts are still forbidden under the provisions of article 13 (2) of the 1977 Additional Protocol II which forbids such an attack on civilian population: "the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited"[7].

When discussing the meeting points between the three domains of public international law, the author shall make direct references to the persons detained for acts of terrorism, in the prisons of Abu Ghraib, in Iraq and Guantanamo in Cuba. The detention of these individuals, especially in these much-disputed facilities (the abuses committed against prisoners in Abu Ghraib have ashamed the American administration, while Guantanamo is considered to be a no-man's land, where laws are inexistent), has been harshly criticized by both scholars and human rights activists, as their detention lacks a proper incrimination, but is scattered with abuses and violence.

As far as the persons detained in Abu Ghraib are concerned, researchers such as John Yoo (2004) claim that before discussing their status (POW, unlawful combatants, civilians involved in hostilities etc.), one needs to make a clear differentiation between the war in Iraq and the "global war on terror", as the two are not one and the same, but a larger presentation of the differences between the two shall be the object of another study. Many have been imprisoned after May 2003, when the end of the Iraqi crusade against Saddam Hussein, weapons of mass destruction and Al-Qaeda had been proclaimed. Those detained at the Abu Ghraib facility were prisoners of war, under the Third Geneva Convention, and should be protected from torture and inhuman treatments under article 17 of the respective Convention.

The situation is different when dealing with civilians suspected of having committed acts against international security. These civilians shall no longer be considered prisoners of war, but rather terrorists. Their status is regulated by article 5 of the Fourth Geneva Convention, which states that "Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favor of such individual person, be prejudicial to the security of such State"[8].

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[6] *Ibidem*;

[7] Art. 13 (2),28. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). (1977, 8th June). Retrieved at http://www.icrc.org/ihl/INTRO/475?OpenDocument .

[8] Convention (IV) relative to the Protection of Civilians in Time of War (1949, August 12th). Geneva. Retrieved at http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5.

Even though Afghanistan has adhered to the Geneva Conventions and the Talibans requested protection on this very basis, the fact that militants disrespect the laws and customs of war and kill civilians who are not involved in the conflict, will lead to them not benefitting from the Fourth Geneva Convention protection once captured. Most of those incarcerated in Abu-Ghraib are allegedly suspected of being terrorists and not prisoners of war.

The possibility of offering protection or the lack of protection of terrorists needs to be evaluated also from a human rights perspective, meaning that persons detained under the charges of being unlawful combatants, should benefit from all the guarantees that their human rights shall be protected accordingly.

In the event of armed conflict, international laws, as well as human rights law, apply on a competitive basis, and any state part of the conflict should respect the provisions of both. A real issue emerges when applying these two law regimes Al-Qaeda and Taliban militants detained in Iraq, Afghanistan and outside of conflict areas. The doctrine of humanitarian law has shown that insurgency is the lowest type of armed conflict in which the laws of war apply. In addition to this, a separate research needs to be conducted in order to establish whether the "global war on terror" is literally a conflict or just a metaphor (Van Agellen, 2005, p. 176). Until the status of the "global war on terrorism" is clarified, it should be an acknowledged fact that in the conflict between the United States on the one hand and the Al-Qaeda and the Taliban, on the other hand, the laws of war cannot be applied outside the territory of Afghanistan and Iraq.

According to authors such as Jonathan Tracy (p.16), although the United States of America are threatened by terrorist acts, these acts cannot be seen as grave enough to trigger the state of emergency that would justify the infringement of fundamental human rights, such as the right to a fair trial. In this regard, the Obama administration has taken a step ahead and closed down the Guantanamo Bay facility. However, the situation is still confused as most of the Al-Qaeda members have been caught after President Bush Jr. proclaimed the end of hostilities on May 1st 2003. The current imprisonment of these individuals can only be justified by a universal acknowledgement of the "global war on terror" as an on-going armed conflict. Until then, as Allan Rosas states in his treaty -"The Legal Status of Prisoners of War. A Study in International Humanitarian Law Applicable in Armed Conflicts", " the only efficient sanction against perfidious attacks of individuals disguised in civilians is to deprive them of the prisoner of war status"(Yoo, 2004, p. 137).

4. The status of "Unlawful combatants" of the Al-Qaeda and Taliban Militants

This part of the paper shall focus on terrorist groups whose members have been acknowledged as "unlawful combatants". It is here that we shall attempt to explain why they received this status and the reasons which exempt them from the POW status.

After 9/11, American authorities labeled Al-Qaeda militants as "unlawful combatants". This translates as follows: their members could be attacked and detained similarly to traditional combatants, but unlike these, they could not benefit from the protection offered by the POW status, that the latter would generally obtain in such circumstances (jurisdiction immunity for acts committed during the conflict).

The Al-Qaeda group is a non-state actor, which means that it cannot become a member to the Geneva Conventions System. Not being under the control of a national state, which would force them to respect the laws and customs of war, allows these militants to operate in a manner that could make it difficult to the researcher to distinguish between a combatant and a civilian. What is more, they attack civilian targets exclusively, with the express purpose of producing large numbers of casualties.

In the event of an armed conflict, while military forces operate within well-established units, bearing distinctive marks and visible weapons, terrorists, especially suicidal ones, operate by dressing as civilians and training in areas crowded with civilians(Denning, 2008) (such as Pakistan and Afghanistan, where terrorist cells are located within civilian communities, for better protection). Their presence among civilian communities endangers to a large degree these communities as the last years' drone attacks in Pakistan, Afghanistan and Yemen have shown. Thus, the most legitimate question arising from here is how to protect effectively these civilians when there are suspicions of terrorists living and plotting among them? A good answer to this question is still unavailable, but there are examples of how to tackle such situations, at least officially. On the 27th of November 2007, the "Tigers' Voice" Radio Station from Killinochi had been blown up. The radio station belonged to the Tamil Eelam Tigers, a separatist militant organization from Sri Lanka, but was operated by civilians (however, their exact status has not been determined yet). Since the target belonged to the Tamil Tigers, the attack was considered legitimate, but was severely criticized by the large number of civilian casualties (Denning, 2008).

The status of unlawful combatants has been regulated up to a point even by the Red Cross, as it became involved in the negotiation of the Fourth Geneva Convention, when it argued in favor of these unlawful combatants not to be given the same protection as civilians during combat. However, the Red Cross highlighted that no infringement should occur regarding their human rights, as specified later in Article 5 of the Convention[9]. This is the point in the analysis in which the reader must understand that at the time of the accomplishment of the Geneva Conventions, terrorism was not so well outlined as a threat, which explains its absence from the provisions. This complicates the present effort of giving them a legal status, but nevertheless, the researcher must refer to these texts, which are the foundation of humanitarian law, in his attempts to delineate a semblance of a status at least.

The text of the Fourth Geneva Convention, its preparatory works and the additional comments and recommendations from the Red Cross provide for a series of situations that would help categorize these individuals most accurately: Article 5(1) refers to those individuals captured within the territory of one of the parties to the conflict, while article 5 (2) refers to persons captured in occupied territory. As far as captured persons are concerned, should they not comply with the provisions of Article 5, their status is established based on the provisions of Article 4. However, with regard to the terrorists captured in Afghanistan, Article 5 is proficient enough.

But the exact wording of the Convention did not remove the seed of debate on how terrorists should be related to these provisions: should they benefit from them or not? John Yoo (2004) wrote in one of his articles that terrorists are deprived of such rights and protection because, by resorting to civilians as targets, they infringe on fundamental international norms. Authors such as Johannes van Agellen contradict the argumentation of John Yoo by claiming that the Taliban militias comply with the four conditions mentioned in article 4 (A) (2) of the Third Geneva Convention. Thus, according to Agellen(2005, p. 168), the Taliban wear distinctive marks – the turbans and the black scarfs, and operate under the authority of the Government – truth be said, at the time, the Afghani government recognized many of the militias and the paramilitary groups activating on the country's territory, among which were the Taliban. However, his interpretation over the text of the Convention is not sufficient enough to qualify these militants as "legal combatants". Several events come to support this final argument, but their bias stems from the fact that they originate in the Western side of the international community. CIA stated that Afghanistan does not have a national army, but rather an impressive number of military tribal factions, without a structure of organized command, in which regular soldiers report to a higher authority who bears responsibility for the acts of the troops.

[9] Convention (IV) relative to the Protection of Civilians in Time of War (1949, August 12th). Geneva. Retrieved at http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5.

Additionally, they lack a permanent and centralized communication infrastructure. The reality of the Afghani command chain is the following: various individuals self-proclaim themselves "commanders" and organize into armed groups that operate more or less legally.

Based on the information obtained by the Defense Department, these Taliban militias function in the shape of armed groups fighting for local, tribal or even personal interests. Moreover, the central position of such military organizations was taken by Al-Qaeda, a multinational terrorist organization, which exists and manifests independently from the state.

When the US forces began aerial attacks on Al-Qaeda and Taliban targets from Afghanistan, the distinction between the two became even harder to achieve, especially since Al-Qaeda was in charge with retaliation. Researchers have often wondered whether a state offering protection, intelligence and assistance to a terrorist group can build an effective relationship with the respective group. This can be thoroughly achieved, only in the event of mutual recognition. In the case of Afghanistan and the Taliban, this is possible, whereas in the case of Al-Qaeda and Iraq, the former refused to acknowledge the state as an equal partner and was constantly criticizing the leadership of Saddam Hussein and the mildness of the state's relations with the West and the Unites States in particular. Depicting on this and correlating it with the previous discussion, it is hard to claim that a terrorist group can be a part of an armed international conflict(Jackson, 1987, p.31). Also, the fact that at a specific moment in time, the Taliban militias unified in the fight against the American military present in the country, after 2002, does not automatically mean that they had a valid leader, at least a leader that would claim responsibility for his troops' actions, which should be the case for regular armed forces in combat.

The position of the Department of Defense[10] is enlightening to any further debate that could arise from statements similar to those of Agellen. According to specialists and gathered intelligence, the members of the Taliban militias would only occasionally wear such distinctive marks as the black scarfs. The daily apparel would be quite similar to that of any other civilian, while the visible weapon matter has been settled in a much simpler way. It is general knowledge that in Afghanistan, many people wear visible weapons - a reminiscence of the war with the Soviet Union back in the 1980s. However, their possession of a weapon enlarges even more the area of possible militants/ terrorists.

Even though some factions of government acknowledged the Taliban as national armed forces, they cannot be considered representative enough by the international community, since the Afghani armed forces ceased their existence in mid-90s, when the former president Mohammad Najibullah dissolved them. The disappearance of an official army led to the creation of rival armed groups, of which the Taliban proved to be the most powerful. However, in 2002, when the American troops entered the country, it was difficult to assess whether the Taliban were considered to be official armed troops or not.

It is a fact that not only the American doctrine and case law used the term of "unlawful combatants" for these individuals. In a 2006 decision of the Israeli Supreme Court regarding the killing of terrorist group members, who had committed attacks against Israel, the Court stated that even though there were no sufficient proofs on the existence of a separate category of "unlawful combatants" in international public law, this category is featured in Israeli domestic law. The individuals belonging to this category are, in fact, members of a sub-category of international humanitarian law (Bradley, 2009, p. 401), along with civilians. This means that the conditions of the detention of these persons need to be established. Curtis A. Bradley (2009, p.402)shows that the provisions of the Geneva Conventions are not in agreement with the reality of a conflict between a state and a terrorist organization. Based on the provisions of the Conventions, civilians can participate in an armed conflict, only for a limited amount of time, while terrorists do not take into account such restraints.

[10]US Defense Department, www.defense.gov.

Moreover, the time spent between several attacks must not be interpreted as a quitting the battle act, but rather as an interlude to prepare new attacks.

Since members of terrorist networks are not recognized either as prisoners of war, or civilians, there is the danger of their rights being abused during detention, in the absence of any legal protection. Charges brought to the American administration on the brutal manner of interrogation used in Guantanamo and Abu Ghraib stand witness to that.

US Defense Department Directive 5100.77[11] demands commanders to refer to all captured individuals as prisoners of war, unless a different status has been allotted to them by an appropriate court. However, representatives of the US government have shown that those captured and accused of being connected with Al-Qaeda and the Taliban should not benefit from the POW status, as this means that at the end of the conflict (presumably, at the end of the "global war on terror", should it be acknowledged as a conflict *per se*), they would be released. Given the charges brought against them, this would be highly unlikely.

When approaching the issue of unlawful combatants, authors such as Paul Kantwill and Sean Watts(2004, p.680) highlight the fact that American decision-makers have elaborated a category of persons called "extra-conventional persons", who participate in hostilities, but are not qualified to benefit from the protection offered by the Geneva Convention system. This needs to be perceived in conjunction with the fact that the analysis elaborated by the US Defense Department in 2002, entitled "Applying Treaties and Laws to Al-Qaeda and Taliban Detainees" showed that Al-Qaeda is a non-governmental terrorist organization and should not benefit from the Geneva Convention protection (Kantwill & Watts, p. 689). The same attempt has been made to justify why the Conventions should not apply to the case of Afghanistan either. The constitutional authority of the US President to sign treaties includes also the inherent right to suspend the provisions of a treaty based on a change of circumstances that affect the inner core of the treaty (Bybee, 2002). Although Afghanistan was a member to the Geneva Convention system, by becoming a failed state, under the control of several powerful groups, of which none is officially recognized by the state as a fair representative, any possible right to call for the protection offered by the Conventions to the captured Taliban has been lost.

If, in 2002, at the issuing of the directive, the Bush Jr. administration used the term "unlawful combatants" only in relation to the members of the Taliban militias, who had been detained under accusations of terrorism, later on, all individuals accused of terrorist acts would receive this denomination (Bilkova, 2009, p.29).

Veronika Bilkova (2009, pp.32-34) drew the analysis of the evolution of the concept of "terrorism", while investigating at the same time, the manner in which this evolution influenced the legal freedom of action against such perpetrators, within the United States of America. It all began with using the term of "unlawful combatant", followed by "enemy combatant" and ending with "unprivileged combatant". She began this analysis by referring to the Ex Parte Quirin decision of the US Supreme Court of 1942, establishing three groups of unlawful combatants:

- The first group comprises spies and saboteurs – they shall undergo trial in military courts, as their actions are illegal belligerent acts;
- The second group refers to individuals who, unlike the first one, participate directly to the hostilities, although they have no right to do so. They are easily separated from civilian population by wearing distinctive marks. This prompts them not to benefit from any protection from attack or POW status and can undergo trail and be sentenced for their acts;

[11]US Department of Defense Directive 5100-77, Retrieved at http://dspace.wrlc.org/doc/get/2041/63334/00095display.pdf.

- The third group refers to those participating in and supporting terrorist acts. It is upon the third group that the status of those detained in Guantanamo has been decided.

The term of "unlawful combatant" has been very much employed by many states in the aftermath of 9/11. But it was only one state that introduced it into its domestic criminal law – Israel. The Israeli authorities passed in 2003 the Law on the Incarceration of Unlawful Combatants and are the first to define the term as follows: "an unlawful combatant is a person who participated, either directly, or indirectly to hostile acts against Israel, or a member of a force committing hostile acts against Israel; in this regard, the conditions established by article 4 of the Third Geneva Convention of August 12th 1949, relative to prisoners of war and the granting of the prisoner of war status, in agreement with the international humanitarian law, does not apply to the respective individual" (Bilkova, p. 34).

In order to be rightfully considered a lawful combatant, the respective individual need to prove it has a *de facto* connection with the state he/she claims to be a citizen of. In the Kassem case, regarding the Palestine Liberation Organization, the Israeli Supreme Court settled that "those persons who do not belong to the very state they claim to be fighting for, shall not benefit from the prisoner of war status once captured (Jackson, p. 26).

5. Conclusions

The fact that, in 2007, the Foreign Affairs Commission of the House of Commons of the British Parliament requested the reviewing and the writing of an improved text of each of the Geneva Conventions, shows how insufficient these documents are, when confronted with current events. Moreover, the fact that the academic and legal dispute on the status of terrorists has not been clarified, even after having fought for 13 years in the "global war on terror" shows how obsolete these documents became. Despite being an acknowledged fact that international law does not develop on equal footing with the international community, and is thus unable to provide it with the appropriate legal framework, when necessary, it is of utmost importance to re-draw the main directions in the field of international humanitarian law.

Terrorism as a phenomenon did not appear on the occasion of 9/11, but those events pinned down the vulnerability of states when faced with such phenomena and the lack of sufficient and appropriate efforts to capture, trial and sentence those individuals proven to be terrorists. The fact that numerous persons, assumed to be terrorists have been detained after these attacks, without having a legal framework to justify both detention as well as interrogation and maybe even sentencing, shows the need to establish a set of viable legal norms regarding the status of these persons.

The American facility of Guantanamo Bay has been severely criticized for having established an *ad-hoc* treatment for those detained there. The fact that during their detention, their basic human rights have been abused (lengthy detention without a court decision in this regard, inhuman methods of interrogation etc.) prompted the UN High Commissioner for Human Rights to press for the establishment of a legal status for the captured terrorist that could become immediately applicable. Even so, the absence of a universal definition of the concept of "terrorist" prevents both academics and practitioners to reach the much-coveted legal status.

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