

Chapter 3

A summary of the current situation regarding combatant status in IHL

Suitable Quote required!

In this chapter, I examine what combatant status actually is, and who qualifies for it. I then look at the controversial question of who, besides combatants, can lawfully be targeted in IHL today.

3.1 A word on the terminology which will be used

The term “combatant” is often used in different ways.¹ It can be used to describe the *conduct* of all those who fight within an armed conflict, whether they have a lawful right to do so or not;² or it can be used in a more technical sense, to refer to the *status* of those who have a lawful right to fight.³ When I refer to ‘combatant’, I am using the term in its technical sense, in other words: those who have a lawful right to fight under IHL. When I refer to ‘combatant status’ I am referring to the group of rights which attach to those who have a lawful right to fight under IHL.

The terms used to refer to those who fight without lawful status, are many, examples include unprivileged belligerents⁴ or unprivileged combatants;⁵ unlawful combatants; enemy

¹ See Garraway, Charles H. B.; “*Combatants*” *Substance or Semantics?*; in Schmitt and Pejic (eds); *International Law and Armed Conflict: Exploring the Faultlines*; Koninklijke Brill B V; 2007 p 317 – 334. He explains that originally the term “combatant” was used to indicate the activity of fighting in an armed conflict, rather than the status of the person, for which the term “belligerent was used. (p321) (See, for example Article 1 of the Hague Regulations). He explains that by the time that Baxter wrote his seminal article (Baxter, supra ***) the understanding of the words ‘combatant’ and ‘belligerent’ were beginning to change (p 323). Since the 1950s the use of ‘belligerent’ has declined and is regarded as old fashioned, and now the term ‘combatant’ is used instead to indicate someone who has lawful status to directly participate in an armed conflict. Although, as I explain above, it can also be used colloquially to mean any fighter who participates in an armed conflict.

² Garraway, supra ** p 319 – 320 who cites Gordon Graham in Chapter 3 of his book *Ethics and International Relations*, Oxford, Blackwells, 1996. He uses the term “combatant” in a general sense, “Combatants are those people the purpose of whose activity is to contribute to the threat, non-combatants are those people who do not actively contribute in this sense, though they may constitute part of a relevant causal chain.” (p11 Footnote 5) CHECK REFERENCE!

³ This is most likely to be the way that an IHL expert would understand it, see Garraway supra *** p 318- 319

⁴ Baxter 1951 Supra ***

⁵ Mallison, W. Thomas and Mallison, Sally V.; *The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 Concerning International Conflicts*; 42 Law & Contemp. Probs. 4 1978 at p5

combatants;⁶ non-combatants;⁷ members of organised armed forces; civilians directly participating in hostilities; fighters,⁸ non-state actors, or simply, as I indicated above, combatants. I shall refer to those who participate without having lawful status as ‘fighters’, and I shall refer to those who participate on a more sporadic basis, as ‘civilians who directly participate in hostilities’.

3.2 *Why does the concept of combatant status continue to exist?*

As I explained in Chapter ***, the idea of having a separate fighting class has been with us for a very long time. The reasons for its continued relevance in modern day society are essentially twofold.

First and foremost, it continues to be a vital component of the principle of distinction. Distinction has been described as “the primary vehicle for the humanising of war”.⁹ It separates individuals in armed conflict into, essentially, two classes: combatants, who are lawful subjects of attack; and civilians, who have a presumption of inoffensiveness, and who therefore must not be made the object of attack, unless they are directly participating in hostilities.¹⁰ Spaight writes of distinction that:

the separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of International Law;¹¹

while, Dinstein writes that it is “the hallmark of IHL: remove the principle of distinction and the entire IHL system collapses.”¹² Distinction provides a means of introducing some

⁶ Garraway, supra *** p 327 who criticises the use of both “unlawful combatant” and “enemy combatant” as being confusing. Also see *Hamdi v Donald H. Rumsfeld* 124 S. Ct. 2004 p 2633 – 2640 which makes reference to ‘enemy combatants’ and ‘unlawful combatants’.

⁷ Watkins, Colonel Kenneth W.; *Combatants, Unprivileged Belligerents and Conflict in the 21st Century*; 1 IDF L. R. 69 2003 at p 73 – 74 who discusses the changing meaning of this phrase.

⁸ Cole, et al; *Sanremo Handbook on the Rules of Engagement*, International Institute of Humanitarian Law; Sanremo, November 2009, available at: <http://www.iihl.org/iihl/Documents/ROE%20handbook%20ENG%20May%202011%20PRINT%20RUN.pdf> at p 5 and p 82

⁹ Watkin, Kenneth, supra *** p9

¹⁰ See Articles 48 and 51 AP I and Article 13 of AP II. The principle of distinction is also customary international law, see Rules 1 and 106 of ICRC Study and see *Nuclear Weapons*, supra ***, para 79

¹¹ Spaight, J.M., *War Rights on Land*, MacMillan and Co, 1911, p 37

measure of humanity into armed conflicts. However in order for it to work effectively it is necessary to have clear criteria to distinguish between those who are participating in hostilities and can be targeted and those who are not. Combatant status a method used in IHL to do this.

A second reason for having combatant status, is that it operates as a means of acknowledging that combatants are not acting as individuals, but rather on behalf of another entity, the state.¹³ As I shall explain shortly, combatant status functions to protect those who have it from being prosecuted for acts of violence which they have committed in accordance with the laws of war, and it ensures that upon capture they are entitled to special treatment, rather than being treated as common criminals. Combatant status therefore gives those who hold it, a legitimacy during war.

Combatant status therefore continues to be one of the key components of IHL. However, the question of who is entitled to combatant status can be controversial. The reasons for this continue along the same lines as those which have existed for centuries, and which I discussed in Chapter ***, namely that states are reluctant to grant combatant status to those who are not fighting on behalf of another state.

For those who do not have combatant status, two questions arise: when can they be lawfully targeted and what treatment are they entitled to upon capture?¹⁴ For the purpose of this thesis, it is the first question which is of interest, and I shall turn to examine the possible answers to it later in this Chapter. However first of all let us consider the consequences of combatant status in more detail.

3.3 *What are the consequences of combatant status?*

¹² Dinstein, Yoram, *The System of Status Groups in International Humanitarian Law*; in Wolff Heintschel von Heinegg & Volker Epping, eds., *International Humanitarian Law Facing New Challenges: Symposium in the Honour of Knut Ipsen*; Berlin, Springer 2007 at p145

¹³ See discussion of this in the philosophy chapter

¹⁴ This was the main point of contention which arose after the terrorist attacks in the USA on 9/11, when the question was what treatment *Al Qaeda* and Taliban detainees were entitled to receive. There are many articles written on this, see for example: REFERENCES

The consequences of combatant status are twofold. Firstly they give the fighter the right to directly participate in hostilities; and, secondly, they give them the right to POW status upon capture.

i) The right to directly participate in hostilities

The only treaty provision which specifically refers to this right is Article 43(2) of API, which provides that:

Members of the armed forces of a Party to the conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

There is no mention of such a right in the Hague Conventions or in the Geneva Conventions.¹⁵ One can wonder why it is that such an important right was not expressed in treaty law until 1977. Baxter writes:

The propriety of statements that international law confers a ‘right’.....to exercise ‘belligerent rights’ is highly questionable, and it is probably more accurate to assert that international law has dealt with war as a state of fact which it has hitherto been powerless to prevent.¹⁶

Perhaps the reason was merely that the right of combatants to directly participate in hostilities was deemed to be so obvious and so clearly a part of customary international law that there was not felt to be a need for it to be provided for in treaty law. However, the ICRC Study¹⁷ also did not identify a customary law to this effect, although it is referred to in a Note to Rule 106.¹⁸ Rogers questions where the reason for referring to the right in a note, rather than as a

¹⁵ As I shall discuss shortly, the right to directly participate in hostilities is taken as being inferred from the right to POW status.

¹⁶ Baxter, *supra* ***, 1951, p323-324

¹⁷ International Committee of the Red Cross study on Customary International Law (‘ICRC Study’) available at <http://www.icrc.org/customary-ihl/eng/docs/home>

¹⁸ This states: “The implications of being recognized as a combatant in an international armed conflict are significant, as only combatants have the right to participate directly in hostilities”

rule in itself was because the Study was intended to apply in both IACs and NIACs.¹⁹ However, one rule of the study does apply in IACs only: Rule 106. This rule concerns POW status and specifically states that it applies in IACs only, meaning that the ICRC could have had a separate rule regarding this, rather than referring to it in a note.

What does the right to directly participate in hostilities actually mean? It is made of three different components: the combatant's privilege; combatant attack liability and combatant immunity.

The *combatant's privilege* has been described by the Inter-American Commission on Human Rights as, "in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives."²⁰ It therefore allows a combatant to use violence against people and property, providing that it is done in accordance with the laws of armed conflict.

The flip side of the combatant's privilege is that combatants themselves become lawful targets for enemy fighters who also hold combatant status. This is sometimes known as '*combatant attack liability*'. Dinstein explains that combatants:

can be attacked (and killed) wherever they are, in and out of uniform: even when they are not on active duty. There is no prohibition either of opening fire on retreating troops (who have not surrendered) or of targeting individual combatants.²¹

Thus, for an enemy fighter who has combatant status to attack, injure or kill an opposing combatant is not illegal under IHL, provided that it occurs in accordance with the law.²²

¹⁹ Rogers in Wilmshurst, supra *** p109

²⁰ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5rev.1corr., 22 October 2002, para 68, quoted in Dörmann, Knut; *The Legal situation of "unlawful/unprivileged combatants"*; 85 IRRC 45 (2007) at p 45. The terminology regarding the 'combatant privilege' can be rather confused. In this report, the Inter-American Commission refer to the combatant's privilege as being a separate thing from their right to POW status (para 67). The ICRC also views the combatant's privilege in this way, see Interpretative Guidance, supra *** p 22. Other commentators refer to the combatant's privilege as including both the right to directly participate in hostilities and to POW status, for example see Baxter, 1951 supra *** p 326 – 327.

²¹ Dinstein, 2007, supra *** p148

²² For example providing the combatant is not *hors de combat* (see for example API Article 41), or providing that the weapons used in the attack are lawful (for examples see the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 3 September 1992; Protocol I (on non Detectable Fragments) to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate

Combatants are liable to be attacked at any time until they surrender or are otherwise *hors de combat*.²³

A further consequence of the right to directly participate in hostilities is that combatants have what is termed ‘*combatant immunity*’.²⁴ This can best be described as a ‘legal shield’²⁵ protecting combatants from trial and punishment for any lawful act of war. Combatant immunity has also not been spelt out in treaty law. Instead it is taken as being inferred from the right of a combatant to POW status upon capture and his or her right to be released at the conclusion of hostilities.²⁶

Those who participate without having combatant status are liable to be criminally prosecuted and punished simply for their participation in the hostilities.²⁷

Effects 10 October 1980; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices, and Protocol IV on Blinding Laser Weapons 13 October 1995). Also see Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, *supra* FN *** para 100

²³ API Article 41 and also see Sassòli and Olson; *The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts*; 90 IRRC 871 September 2008 p 599 at p 606

²⁴ See for example Watkin, Kenneth; *Warriors without Rights? Combatants, Unprivileged Belligerents and the Struggle over Legitimacy*; Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, winter 2005, Volume 2 p 12-13, Solf, Waldemar A., *The Status of Combatants in Non International Armed Conflicts under Domestic Law and Transnational Practise*, 33 Am. U. L. Rev. 53, 1983/1984 at p 57 – 58, Dörmann, *supra* *** p 72 - 73

²⁵ Dinstein, Yoram; *Unlawful Combatants and War Criminals* in Dinstein and Tabory; *International Law in a Time of Perplexity, Essays in Honour of Shabtai Rosenne*; Martinus Nijhoff Publishers; 1989; p 104-105

²⁶ GC III, Article 118 and HR Article 20, and see ICRC Study, note to Rule 106 which states “Upon capture, combatants entitled to prisoner-of-war status may neither be tried for their participation in the hostilities nor for acts that do not violate international humanitarian law. This is a long-standing rule of customary international humanitarian law.” Also see Rogers, Anthony; *Combatant Status in Wilmshurst et al; Perspectives on the ICRC Study on Customary International Humanitarian Law*; Cambridge University Press; 2007; p 102 who states that it is implicit in Articles 43(2) and 44(1) of API, which, respectively, grant combatants the right to directly participate in hostilities and to POW status upon capture, that combatants may not be punished for their acts of belligerency carried out in accordance with the laws of war. MORE EXAMPLES

²⁷ Pejić, *supra* *** p 97 and see Rogers, *supra* *** p 119 – 123 discussing whether unqualified participation is in itself a war crime. Rogers concludes that “The weight of contemporary legal opinion now seems to be that unlawful participation is not, by itself, an offence under the law of war”. One can also wonder how realistic it is for most fighters during an armed conflict to be prosecuted simply for participating in the conflict, Garraway makes the point that “the sheer numbers of ‘unprivileged belligerents’ now appearing in modern day conflict makes it impossible to deal with the problem by way of criminal proceedings.....the burden of proving to a criminal standard, acts of belligerency (including complying with modern day evidential rules) may be too

ii) *Prisoner of War Status*

The second consequence of combatant status is the right to POW status upon capture.²⁸ As I discussed in Chapter **,²⁹ POW status is not regarded as punishment for those who are incarcerated, but rather as a means to prevent them from re-joining the hostilities.³⁰ It entitles POWs to certain agreed standards of treatment during their incarceration³¹ and allows them to be released at the end of hostilities.³² Those without POW status, on the other hand, may be incarcerated and, as I mentioned earlier, be punished simply for taking part in the armed conflict.³³ As Chief Justice Stone explained in the *Quirin* Judgement:

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.³⁴

Those who have combatant status under IHL therefore have some extremely important rights: firstly, the right to directly participate in hostilities without fear of prosecution for their actions, providing that they adhere to the law; and secondly, the right to POW status upon capture.

3.4 *Who is entitled to combatant status?*

exactng and...would put the ‘unprivileged belligerent’ in a stronger position than his ‘privileged’ counterpart.” Garraway, supra *** p 331 – 332.

²⁸ Hag. Reg. Article 3; GC III Article 4 and AP I Article 44(1)

²⁹ See page ***

³⁰ NEED REFERENCE AND MAYBE A QUOTE?

³¹ See for example Part III of GC III

³² GC III Articles 118 and 119 MAKE POINT THAT DINSTEIN MAKES THAT THIS CAN TAKE SOME TIME

³³ For an article discussing the applicability of GC IV to detained ‘unlawful combatants’ see Dörmann, supra ***. Also see Pejic, Jelena; “*Unlawful/Enemy Combatants*”: *Interpretations and Consequences*; in Schmitt and Pejic, supra **** p 335 – 355; MORE REFERENCES

³⁴ *Ex parte Quirin et al* (1942) 317 United States 1, 30-31 (CHECK REFERENCE!) and see Dinstein, 2007, supra ***p 152-153

Let us now move on to consider who is entitled to combatant status. I shall examine this question firstly in relation to IACs and then in relation to NIACs.

3.4.1 *Combatant Status in International Armed Conflicts*

In IACs, there are two principal sources of treaty law: Article 4A of GC III³⁵ and Article 43 of API.

i) *Combatant Status under Article 4 A of the Third Geneva Convention*

It must be recalled that Article 4 A of GC III was not drafted with the intention of providing a definition of combatant status, rather it was intended to provide a statement of who is entitled to POW status once captured. The ICRC Commentary states of Article 4 A that:

Strictly speaking...(the) requirements constitute conditions for the post-capture entitlement of irregular armed forces to combatant privilege and prisoner of war status and are not constitutive elements of the armed forces of a party to a conflict.³⁶

As I have already discussed, combatant status is, however, regarded as being implicit in the recognition of POW status in the event of capture.³⁷

The provisions of Article 4 A apply only in situations of armed conflict covered by CA 2 of the Geneva Conventions, namely “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them;” and in all cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance.³⁸

Thus, Article 4A applies only in conflicts between states, IACs.³⁹

³⁵ There is of course also Article 1 of the Hague Regulations which was discussed in Chapter ***. However this has been subsumed into the definition of POW under Article 4A GC III. ?????

³⁶ ICRC Guidance, supra *** p 22. Also see Guidance, supra *** p 22. Also see ICRC Commentary to API para 1677 which states “In the Third Convention, which deals only with the protection of prisoners of war, and not with the conduct of hostilities, ... combatant status is not explicitly affirmed, but it is implicitly included in the recognition of prisoner-of-war status in the event of capture.”

³⁷ See p *** and Commentary to API para 1677; Mallison and Mallison, supra *** p 20

³⁸ CA 2, para 2

³⁹ See Pejić, Jelena; *Status of Armed Conflicts*; in Wilmshurst and Breau; *Perspectives on the ICRC Study of Customary International Humanitarian Law*; Cambridge University Press; 2007; p77 – 100 at p 79 who

Under Article 4A, the following groups are entitled to POW status, and thereby, by implication, combatant status:

a) Members of the Armed Forces

Article 4A (1) grants POW status to members of the armed forces of a Party to the conflict, as well as to members of militias or volunteer corps forming part of such armed forces. These include all military personnel, whether belonging to land, sea or air forces.⁴⁰ Armed forces can be established by a state, pursuant to its laws, or by another party to the conflict using its own methods.⁴¹

The Article contains no additional qualifications, such as those which apply in Article 4A(2). Some commentators, such as Dinstein,⁴² argue that the tests which apply in Article 4A(2), also apply to members of the regular armed forces⁴³ He cites an English Appeal Court decision, the *Mohammed Ali* case from 1968,⁴⁴ which held that a member of a regular armed force engaged in sabotage while wearing civilian clothes was not protected by the Geneva Convention and thereby forfeited their entitlement to lawful combatant status,⁴⁵ and argues that

although ostensibly – in keeping with the strict wording of the Hague and Geneva instruments- the conditions precedent to entitlement to the status

discusses the difficulties of determining the status of an armed conflict , and notes that “There is no body at the international level that can quickly and impartially pronounce on the legal nature of an armed conflict when it commences;” with the result that “different conclusions on the situation of armed violence may thus be reached by different authorities or, in some cases, no conclusion is reached at all”.

⁴⁰ Commentary to GC III p 51

⁴¹ Commentaries to AP I para 1672

⁴² Dinstein, supra *(Unlawful combs) p 105 and also 2007 supra *** p 151

⁴³ This was the US position when arguing that the Taliban did not qualify for POW status under the Geneva Conventions, see Berman, Nathaniel, *Privileging Combat Contemporary Conflict and the Legal Construction of War*, 43 Colum. J. transnat l L. 1 at p 40

⁴⁴ *Mohammed Ali et al v Public Prosecutor* (1969) AC 430, 449-50

⁴⁵ Dinstein, supra ** (Unlawful combs) p 108

of lawful combatants are confined to irregular troops, there is no doubt that in practice the same conditions apply to regular troops.⁴⁶

Others commentators, such as Rogers, disagree with this, and are of the view that there are no additional qualifications applying to those who are members of the armed forces of a Party to the conflict.⁴⁷

b) Members of militias or volunteer corps

Article 4A(2) provides that POW status can be conferred on members of militias and members of other volunteer corps, including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory provided that they satisfy four conditions, namely that of being under responsible command; having a fixed sign recognisable from a distance; carrying arms openly;⁴⁸ and conducting operations in accordance with the laws of war.⁴⁹ These conditions mirror those contained in Article 1 of the Hague Regulations.⁵⁰

Some scholars have argued that there are other conditions which are implicit within this article. Draper, for example, writing about Article 1 of Hague Regulations, which mirror those contained in Article 4A (ii) , added two more conditions which he found were implicit in the wording: dependence to some degree upon the Government of the State belligerent, and a measure of organisation.⁵¹ Dinstein has added a further condition, namely a lack of duty of allegiance to the detaining power.⁵²

c) Members of a levée en masse

⁴⁶ Dinstein, 2007, supra *** p 151- 152

⁴⁷ Rogers, supra *** p114 and 116 ANYONE ELSE?

⁴⁸ There is debate regarding what the phrases ‘carrying arms openly’ and ‘having a fixed sign recognisable from a distance’ actually mean: see Watkin supra *** p 81 - 82

⁴⁹ . Also see Article 1 of the HR which required that militia and volunteer corps fulfil these four conditions.

⁵⁰ See History section

⁵¹ Draper, supra *** Reflections p 217

⁵² Dinstein, *Conduct of Hostilities* p 36-7 (2004 ed) CHECK REFERENCE. For a discussion regarding these additional implied conditions, see Rogers, Anthony, *Combatant Status*, in Wilmshurst and Breau, supra *** p 107

Inhabitants of a non-occupied territory who spontaneously take up arms to resist invading forces upon the approach of the enemy qualify for combatant status under Article 4A(6) of GC III.⁵³ Although such a situation almost never occurred in the Second World War, the stipulation was kept in GC III.⁵⁴ The participants in a *levée en masse* have been described as having “a unique status, being neither civilians nor members of the armed forces”.⁵⁵ The mass levy can only exist for a brief period of time before the controlling authority must replace them with regular troops or incorporate them into the regular army.⁵⁶ Ipsen is of the view that the value of the mass levy is of little significance today, since it is unlikely that a spontaneously organised resistance would be able to find adequate weapons to counter the weapons used by the regular armed forces of an attacking party.⁵⁷ However, in the case of *Orić*, the Trial Court of the ICTY noted that there may have been a *levée en masse* in Srebrenica in April and early May 1992, prior to the facts referred to in the indictment, so it seems that there continues to be a place for this in IHL.⁵⁸

ii) *Additional Protocol I*

⁵³ Also see Article 2 of the HR.

⁵⁴ Commentary GC III p 67 and see: Baxter, 1951, p 335 who writing in 1951 is of the view that the spontaneous mass uprising in the face of the enemy has lost any real significance.

⁵⁵ Watkin, Kenneth; *Opportunity Lost: Organised Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance*; 42 N.Y.U. J. Int'l L. & Pol 641 (2010) p 653

⁵⁶ Commentary GC III p 67 and see Melzer, supra *** p 840 who, when writing about the ICRC Guidance (see below) states “As soon as an initially spontaneous and unorganised resistance by inhabitants of a non-occupied territory becomes continuous and organised, it almost certainly would no longer be regarded as a *levée en masse*, but as an organised resistance movement or other irregular militia belonging to the belligerent party.”

⁵⁷ Ipsen, Knut; *Combatants and Non Combatants* in Fleck, Dieter; *The Handbook of International Humanitarian Law*; 2009, 2nd ed; Oxford University Press; p 94

⁵⁸ *Prosecutor v Orić*; ICTY IT-03-68-T para 136. Also see Watkin, Kenneth; *The Notions of Combatant, Armed Group, Civilians and Civilian Population in International Armed Conflicts* in G L Beruto (ed), *The Conduct of Hostilities - Revisiting the Law of Armed Conflict 100 Years after the 1907 Hague Conventions and 30 Years after the 1977 Additional Protocols* (International Institute of Humanitarian Law) Current Problems of International Humanitarian Law, San Remo, 6-8 September 2007, Proceedings of the XXXth Roundtable, Edizione Nagard (Milan 2008) p 51 who agrees that it is not an historical anomaly.

AP I applies both in the circumstances referred to in CA 2 of the Geneva Conventions;⁵⁹ and also to:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.⁶⁰

The provisions contained in AP I regarding combatant status are intended to supplement the rules contained in GC III without overriding them.⁶¹

Article 43(2) of AP I defines a combatant as being members of the armed forces of a party to the conflict, other than medical personnel and chaplains covered by Article 33 of the Third Convention.⁶²

Article 43(1) defines the armed forces of a Party to a conflict as consisting:

of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

AP I has, on the face of it, as broader and more functional approach than Article 4 A of GC III, in that in order to qualify for combatant status, an individual must be a member of the armed forces of a Party to a conflict which are under responsible command and subject to an internal disciplinary system which enforces compliance with IHL. The ICRC Commentary states that Article 43 means that:

⁵⁹ AP I Article 1(3) and see above p**

⁶⁰ AP I Article 1(4). See Mallison and Mallison supra *** p14 regarding the fears of delegates who negotiated AP I that authorities representing such peoples would be unable to comply with Article 96(3) of AP I, which requires them to adhere to all four Conventions together with AP I itself.

⁶¹ Commentary AP I para 1676

⁶² For the exact text of the Article see above p ***

all members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of "quasi-combatants", which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization ... becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed.⁶³

Article 44(3) provides 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.

The one instance where a combatant can be stripped off his combatant status under AP I is where he fails carry his arms openly in the circumstances outlined in Article 44(3).⁶⁴ If he falls into the hands of an adversary while failing to comply with this then he shall lose his

⁶³ ICRC Commentary to AP I para 1677

⁶⁴ See Mallison and Mallison, supra *** p 23 -24 for summary of the divergent views of the delegates negotiating AP I as to what these phrases meant.

right to POW status, although he is still entitled to protection equivalent to POW protection given in GC III and AP I.⁶⁵

iii) Customary international law

The ICRC Study found a customary law to the effect that “all members of the armed forces of a party to the conflict are combatants, except medical and religious personnel”.⁶⁶

3.4.2 Who is not entitled to combatant status?

IHL specifically provides that certain groups are not combatants and therefore do not have combatant status:

i) Medical and religious personnel

Medical and religious personnel who accompany the armed forces, are members of the armed forces, but do not have combatant status.⁶⁷ This means that if captured by the enemy they are not considered as POWs.⁶⁸ They can be retained “in order to exercise their medical and spiritual functions for the benefit of prisoners of war,⁶⁹ and are entitled, at a minimum, to receive the benefits of GC III.⁷⁰

ii) Spies and Mercenaries

Spying is regarded as a legitimate ruse of war,⁷¹ however a member of the armed forces who is captured while engaged in espionage loses his right to POW status and may be

⁶⁵ AP I Article 44 (4)

⁶⁶ ICRC Study, supra *** Rule 3. Dinstein is of the view that the wording of this rule is unfortunate and argues “not every member of the armed forces is a combatant. By the same token, not every person who is not a member of the armed forces is a civilian”. See Dinstein, 2007, supra *** p 147

⁶⁷ GC III Article 4C and Article 33, AP I Article 43(2) and ICRC Study Rule 3

⁶⁸ GC III Article 33

⁶⁹ GC III Article 33. Also see Dinstein, 2007, supra *** p147 – 148 who notes that “The difference between detention and retention may sound like a theoretical refinement, but its practical consequences can be quite palpable,” the reason being that POWs need not be released until the cessation of hostilities (Article 118 GC III), whereas medical and religious personnel may only be retained if there is a real and pressing need for them.

⁷⁰ GC I Article 28; GC II Article 37 and GC III Article 33 and ICRC Study Rule 3

⁷¹ Baxter, 1951, p 331

treated as a spy, unless he was wearing a uniform.⁷² They continue to be combatants however - Mallison and Mallison write:

Members of the armed forces who are engaged in espionage still retain their status as lawful but unprivileged combatants who may have drastic penal sanctions, including the death penalty, imposed upon them if captured under the limited circumstances enunciated.⁷³

Mercenaries, on the other hand, do not have the right to be either a combatant or a POW.⁷⁴ A definition is provided in Article 47(2) of AP I, however the definition is open to criticism, Mallison and Mallison write:

Article 47 defines mercenaries so narrowly that a person with reasonably competent legal advice should be able to provide needed military services to a party to the conflict and remain beyond the scope of the definition.⁷⁵

iii) Civilians

The Geneva Conventions do not define civilian, despite GC IV being titled the ‘Geneva Convention Relative to the Protection of Civilian Persons in Time of War.’ It defines persons protected by the Convention as those persons who are not protected under the three other Conventions, who find themselves in the hands of a party to the conflict or occupying power of which they are not nationals.⁷⁶

API contains the first definition of civilians, which is negatively defined. Article 50(1) states that a civilian is any person who does not fall into one of the categories referred to in Article 4A (1), (2), (3) and (6) of GC III and Article 43 of API. In case of doubt as to whether a person is a civilian then they are to be considered civilian.⁷⁷

⁷² AP I Article 46(1) and (2). The definition accords with that given in Article 28 of the Hague Regulations.

⁷³ Mallison and Mallison, *supra* *** p 27

⁷⁴ AP I Article 47(1)

⁷⁵ Mallison and Mallison, *supra* *** p 29

⁷⁶ GC IV Article 4

⁷⁷ AP I Article 50(1)

The ICRC Study defines civilians as persons who are not members of the armed forces.⁷⁸ The ICRC Guidance states that in an IAC “all persons who are neither members of the armed forces of a party to the conflict, nor participants in a *levée en masse* are civilians”⁷⁹

Civilians and the civilian population enjoy general protection from military operations⁸⁰ and are not to be made the object of attack.⁸¹ However, they only enjoy such protection unless, and for such time as they directly participate in hostilities.⁸² This is an extremely important exception to the civilian immunity from attack, and it will be discussed in greater detail below.

The ICRC Interpretative Guidance notes that:

The absence in IHL of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by IHL nor criminalised under the statutes of any prior or current international criminal tribunal or court.⁸³

Those who do directly participate in hostilities can be punished under domestic law for their actions.⁸⁴

In IACs the Interpretive Guidance found that all persons who are neither members of the armed forces belonging to a party to the conflict, nor participants in a *levée en masse*, are civilians and are entitled to protection against direct attack unless, and for such time as, they take a direct part in hostilities.⁸⁵ It found that in IACs there are three groups,

⁷⁸ Study supra ***, Rule 5

⁷⁹ ICRC Guidance p 20- 21

⁸⁰ AP I Article 51(1)

⁸¹ AP I Article 51(2)

⁸² AP I Article 51(3)

⁸³ Guidance, supra p 83- 84 NEED TO SORT OUT HOW TO INTRODUCE THE GUIDANCE

⁸⁴ Guidance, supra *** p 84

⁸⁵ Guidance supra ***p 20-26

armed forces, *levée en masse* and civilians,⁸⁶ and “all armed actors showing a sufficient degree of military organisation and belonging to a party to the conflict must be regarded as part of the armed forces of that party.”⁸⁷ Groups engaged in organised violence against a party to the conflict, which do not belong to⁸⁸ another party to the conflict, are civilians,⁸⁹ although this position changes if the level of violence is such that a NIAC exists, meaning the status of the individuals would be determined under the rules applying then.⁹⁰

To conclude, the question of who has combatant status in IACs, where the conflict is between members of the armed forces belonging to a party to the conflict, is relatively uncontroversial. Those who are members of the armed forces are combatants and have combatant status, provided they meet the conditions outlined above.

The question now to be addressed is whether the concept of combatant status exists in NIACs – internal conflicts where a state is in conflict with an organised armed group, or where two or more such groups are fighting one another.⁹¹

3.5 *Combatant status exist in NIACs*

⁸⁶ Guidance, supra *** p 21

⁸⁷ Guidance, supra *** p 22

⁸⁸ For the meaning of the phrase “belonging to”, see Guidance, supra *** p 23 and the references referred to therein. Also see Melzer, supra *** p 840 - 842

⁸⁹ See Watkins supra *** p 666, who criticises this finding on the basis that it “has the potential to significantly erode the validity of civilian status as a means of protecting those not involved in the conflict” and also see Melzer’s response to this criticism, supra *** p 841

⁹⁰ Guidance, supra *** p 23 – 24 and see Melzer, supra *** p 841 - 842

⁹¹ Fleck, supra ***, para 1201 Modern day armed conflicts can comprise of both an IAC and NIAC- it is possible for it to be deemed that there are two different armed conflicts continuing at the same time, see Dinstein, Yoram, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2010, p 26-27; *Tadić* Appeals Judgement, para 84; Pejić, supra *** p91. Also see Corn, Geoffrey S.; *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognise a Hybrid Category of Armed Conflict*; 40 Vand. J. Transnat’l L. 295 (2007) who argues for a hybrid category of armed conflict, an extraterritorial non-international armed conflict (CHECK THIS!) and see Pejić, supra *** p 89 – 94 discussing internationalised non-international armed conflicts. Also see Watkin, supra (2007, Notions of Combatant) at p 54, discussing the problems of identifying whether a conflict is an IAC or a NIAC and stating that “from a normative perspective International Humanitarian Law is often applied as a matter of ‘spirit and principle’”

As was illustrated in Chapter ***, states are traditionally reluctant to have restrictions placed upon their sovereignty which limit their powers to act within their own territory as they deem fit, and this is no more so the case than during an internal armed conflict. For that reason, the treaty law which applies in NIACs is much sparser than that for IACs. There is a current trend seeking to amalgamate the laws of armed conflict in IACs and NIACs,⁹² however not everyone is in agreement with this. Dinstein, for example, states:

it must be grasped that the amalgamation cannot be perfected. The reason for that is simple: the norms of the *jus in bello* simply cannot be copied undiscerningly from inter-State to intra-State armed conflicts.⁹³

One of the remaining most significant areas of difference between the two types of conflict is in relation to combatant status and to who can legitimately be targeted.⁹⁴

I shall now examine firstly, whether combatant status exists in NIACs by considering treaty law and customary international law. I shall then proceed to examine who can lawfully be targeted during a NIAC.

3.5.1 *Does combatant status exist in NIACs?*

There are two sources of treaty law which apply in NIACs relating to this matter: CA 3 of the Geneva Conventions and AP II. A further source of law is of course customary international law. I shall now consider each of these in turn.

i) Common article 3

CA 3 applies in cases of “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”⁹⁵ The Article provides:

⁹² See for example Tadić, and see ICRC Study which seeks to provide a list of customary international law rules which apply in both IACs and NIACs. [MORE REFERENCES](#)

⁹³ Dinstein, 2007, supra *** p149 However, many scholars believe that there should be more integration, see for example, Blum; Crawford, Emily; *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*; Oxford University Press, 2010, [MORE REFERENCES](#)

⁹⁴ ⁹⁴ Corn and Jenks supra *** p328

⁹⁵ For the difficulties which arise in qualifying a conflict as a NIAC see Pejić, supra *** p 79 who writes that qualifying a situation as a NIAC is much more sensitive than qualifying a situation as an IAC and that “more

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

The Article therefore makes no reference to 'combatants', or indeed to 'civilians'. Reference is made to 'members of armed forces', although it is not clarified whether this reference is only to state armed forces or whether it includes non-state armed forces too.⁹⁶ It also refers to "persons taking no active part in the hostilities," thereby implying that there are two groups in such conflicts, those who take an active part and those who do not.

CA 3 contains no equivalent provision to Article 43(2) of API, granting combatants the right to directly participate in hostilities, and there are also no provisions regarding POW status. Indeed, the Article specifically states that its "provisions shall not affect the legal status of the Parties to the conflict": According to the ICRC Commentary:

This clause is essential. Without it neither Article 3, nor any other Article in its place, would ever have been adopted. It meets the fear -- always the same one -- that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the *de jure* Government's lawful suppression of the revolt, or that it may confer belligerent status, and consequently increased authority, upon the adverse Party..... the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion using all the means - including arms - provided for under its own laws; it does not in any way affect its right to prosecute, try and sentence its adversaries for their crimes, according to its own laws.⁹⁷

often than not, the State party involved will deny that the level of violence has reached that of an armed conflict and will tend to characterise its actions as 'law enforcement' or 'counter-terrorism' operations."

⁹⁶ Kleffner, J.K.; From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – on the principle of distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference; NILR 2007 315-336; p424

⁹⁷ ICRC Commentary to Geneva Conventions p60-61

Thus, combatant status, as it exists in IACs, is not provided for under the Article.

ii) Additional Protocol II

AP II has a higher threshold of application than CA 3, in that it applies in:

all armed conflicts which are not covered by Article 1 of AP I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement (the) Protocol.

AP II also makes no reference to ‘combatants’. Instead it refers to “armed forces” and to “dissident armed forces and other organised armed groups” when defining what type of conflicts it applies in.⁹⁸ However when referring to whom the Protocol applies to, it follows CA 3 by simply referring to “persons who do not take part or who have ceased to take part in hostilities”,⁹⁹ again thereby implying that there is another group who is taking part in hostilities. AP II makes reference to “civilian population” and to “civilians” however it provides no definition of these terms.¹⁰⁰ Article 13 of AP II states:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be

⁹⁸ Article 1 states that it applies: “to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

⁹⁹ AP II, Article 4

¹⁰⁰ AP II, Part IV, particularly Article 13 thereof.

the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

This implies that there are participants in the armed conflict who are not civilians who can be subject to attack.¹⁰¹

Again, AP II contains no provision equivalent to Article 43(2), and there is also nothing within it regarding POW status. All it does is to encourage the authorities in power to “grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict.”¹⁰²

iii) Customary international law

The ICRC Study is quite clear that there is no customary international law entitling fighters to combatant status in NIACs. Rule 3 defines combatants as: “All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel”, however the summary of the Rule goes on to say that:

*For purposes of the principle of distinction, members of State armed forces may be considered combatants in both international and non-international armed conflicts. Combatant status, on the other hand, exists only in international armed conflicts.*¹⁰³ (emphasis my own)

As I referred to above, Rule 106, which entitles combatants who distinguish themselves from the civilian population to POW status, states that it applies to IACs only.

3.5.2 What conclusions can be drawn?

¹⁰¹ Corn, Geoffrey, and Jenks, Chris; *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*; 33 U.Pa.J.Int'l L. 313 2011 at p330

¹⁰² AP II, Article 6 (5)

¹⁰³ See supra ***ICRC Study, summary to Rule 3. Also see Guidance, supra *** p33, at Footnote 52, which states that “Combatant privilege, namely the right to directly participate in hostilities with immunity from lawful acts of war, is afforded only to members of the armed forces of parties to an international armed conflict (except medical and religious personnel)”.

It is clear from an examination of Treaty law and customary international law that there is no concept of combatant status in NIACs.¹⁰⁴ This conclusion is shared by most commentators. Pejic, for example, writes:

While “combatant” is sometimes used when referring to non-international armed conflict, such usage is colloquial; as a matter of law, “combatant” status (or the concomitant prisoner of war status) does not exist in internal armed conflicts.¹⁰⁵

The reason for this, as I explained in Chapter ***, is historical in that the modern definition of ‘combatant’ has evolved from a definition agreed upon in late Nineteenth and early Twentieth centuries, which were focused on defining fighters who had lawful combatant status. All subsequent definitions of ‘combatant’, including the Article 43 definition, have evolved from these, and are therefore intimately connected with the concept of lawful combatant status, rather than being drafted with the intention of providing a means to identify who can legitimately be targeted during an armed conflict. Corn and Jenks write:

by linking the definition of combatant with legal qualification to participate in hostilities, the definition became incompatible with the law of NIAC where by definition only the government forces may lawfully use force.¹⁰⁶

However, what then is the status of those who participate in NIACs? Does it follow that everyone is a civilian, or at least everyone who is not a member of the state armed forces¹⁰⁷ is a civilian? In order that the principle of distinction can function effectively,¹⁰⁸ it is vital that some method exists to distinguish those who are participating in the conflict and are legitimate targets, from those who are not. Kleffner explains:

¹⁰⁴ It is possible for a state to agree to grant to organised armed groups status equivalent to combatant status by way of a special agreement under CA 3. See for example, Kleffner, Jann K.; *The Notions of Civilians and Fighters in Non-International Armed Conflicts*; in Beruto (ed) *Supra* *** p 60.

¹⁰⁵ Pejic, *supra* *** (Unlawful/Enemy Combs) p 335 – 336. Also see Solf, *supra* *** at p 54/55 and p 59, Rogers, *supra* ** p 125, Dörmann, *supra* *** p 47, Kleffner, *supra* ***(2007) p 321

¹⁰⁶ Corn and Jenks, *supra* *** p327

¹⁰⁷ which states that members of the state armed forces are combatants

¹⁰⁸ The principle of distinction applies in NIACs, see Rule 1 ICRC Study and the summary of evidence attendant thereto.

The principle of distinction cannot be conceptualised in the same way as in international armed conflicts. This is so because the principle of distinction in international armed conflict has the notion of ‘combatant’ as a reference point: civilians are all those who are not combatants. In contrast the law of non international armed conflicts is deprived of that reference point.¹⁰⁹

The ICRC Study provides that in NIACs all members of the armed forces are combatants for the principle of distinction,¹¹⁰ but what does that make everyone else? If all other fighters are treated as a civilians, then the value of the principle of distinction disappears. As Corn and Jenks argue, “if everyone is a civilian, then no one is genuinely protected by the distinction obligation, for government forces will inevitably blur the line between ‘enemy’ and ‘civilian.’”¹¹¹

In both CA 3 and AP II there is acknowledgement that there are different groups in NIACs: those who are directly participating in hostilities and those who are not. There is also acknowledgement that there are armed forces and that there are civilians. However there remains controversy regarding who can be legitimately targeted. The remainder of this chapter shall examine differing approaches which have been suggested in relation to who can legitimately be targeted and when, before examining in the next chapter how international criminal tribunals have approached the matter.

3.5.3 Approaches towards the question of who can legitimately be targeted in IHL

The question of who can legitimately be targeted in IHL is not answered adequately by treaty law in either IACs or NIACs. In IACs “in a narrow reading of Additional Protocol I anyone who is not a legitimate combatant is a ‘civilian’”.¹¹² Whereas in NIACs, as we have just seen, treaty law leaves it unclear as to who can and who cannot be targeted. As a result, there are

¹⁰⁹ Kleffner (Notions of civ and fighters) supra *** p 60

¹¹⁰ ICRC Study Rule 3

¹¹¹ Corn and Jenks, supra *** p 327

¹¹² Watkin, supra (Notions of Combatants) p 56

differing approaches to this question. Kleffner, has identified three broad approaches which are taken:¹¹³

i) The Membership Approach

This involves following a similar approach to that used in IACs of the combatant/civilian distinction, in that it draws a distinction between two different groups of people, namely between the ‘fighters’: those who are members of armed forces- whether they be the state armed forces or the armed forces of non state actors- and civilians.¹¹⁴ As with combatants in IACs, fighters would be legitimate targets at any time, whereas those who were not fighters would be classed as civilians and entitled to protection from attack. Should civilians directly participate in hostilities then they would lose their protection from being directly attacked for such time as they directly participated in hostilities.¹¹⁵

The advantages of this approach are that it accords with the traditional view of armed conflict, in that there are deemed to be two parties on each side, whose fighters are equally targetable at all times (unless *hors de combat*).¹¹⁶ However it faces the problem that it is not straightforward to determine what the limits should be surrounding who is a member of an organised armed group.¹¹⁷

ii) The Specific Acts Approach

The second approach which Kleffner identifies is the specific acts approach. This requires that a distinction be drawn between those who do, and those who do not, directly participate in hostilities.¹¹⁸ This would mean that only those who were directly participating at that

¹¹³ Kleffner, J.K, From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities- On the Principle of Distinction in Non International Armed Conflicts One Hundred Years After the Second Hague Peace Conference; NLR (2007) 315

¹¹⁴ Kleffner, 2007 p330

¹¹⁵ Ibid, p 330. Also see *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*; University Centre for International Humanitarian Law; 1- 2 September 2005; p 36 where some experts argued that there was clearly a category of ‘combatants’ in NIACs. Other experts disagreed however.

¹¹⁶ Kleffner, supra *** p 332

¹¹⁷ Kleffner supra *** p 333 - 334

¹¹⁸ Ibid p 331

specific time could be directly targeted. Unlike in IACs, fighters would be protected from attack prior to, and after, directly participating when their protection as a civilian would be regained.

For the purposes of this approach it is vital to have a solid definition of exactly what constitutes direct participation in hostilities, for example, does it include deployment to and return from a place where direct participation occurred; what acts constitute direct participation, does it include manufacturing weapons or preparing food or ferrying supplies?

This approach has been followed in practice: Corn and Jenks note that “there is an increasing tendency to treat all non-state actors as merely a conglomeration of civilians who take a direct part in hostilities”.¹¹⁹ Interestingly, they argue that the effect of the concept of continuous combat function introduced by the Interpretative Guidance has

made it more convenient to analyse the legality of attacking non-state actors through the direct participation in hostilities methodology than to assess whether such actors fall into a category of presumptively targetable belligerents subject to attack, no differently than their IAC counterparts.¹²⁰

However, they argue that viewing hostilities within a NIAC as being between the state armed forces and civilians directly participating in hostilities is “fatally flawed” in that it “distorts the fundamental lines of authority and obligation historically associated with armed conflict”.¹²¹

Indeed, this approach would encourage criticism along the same lines as Watkin’s criticism of the Interpretive Guidance, in that it could grant more protection to irregular fighters, who would only be lawful targets when directly participating in hostilities, than to those of the state armed forces, who are targetable all the time.¹²²

¹¹⁹ Corn and Jenks, *supra* *** p316

¹²⁰ Corn and Jenks, *supra* *** p316

¹²¹ Corn and Jenks, *supra* *** p331

¹²² Watkins, ICRC Guidance article, check reference!

It would also, as Kleffner argues “make it virtually impossible for state armed forces to employ force offensively rather than defensively.”¹²³

iii) Direct participation on a sliding scale

This third approach is an intermediate position between the previous two approaches.¹²⁴ It entails that those who are members of organised armed groups would be regarded as permanently directly participating in hostilities, and would therefore be permanently targetable while they were members of the group. Those who were not members of the group would only lose their protection while actually directly participating in hostilities.

However, as Kleffner notes, the danger of this approach is that it:

conflates two conceptually distinct categories of persons- members of armed groups and others who directly participate without being members of such groups – under one and the same heading of ‘direct participation’.¹²⁵

3.5.4 The approach taken in the ICRC Interpretive Guidance

The approach taken by the ICRC is to adopt a path along the lines of the Membership Approach which Kleffner described above. In 2009 the ICRC issued its Interpretive Guidance on the Notion of Direct Participation in Hostilities in IHL (the ‘Interpretative Guidance’),¹²⁶ in which it sought to determine the answers to three questions: who is considered a civilian for the purposes of the principle of distinction; what conduct amounts to direct participation in hostilities and what modalities govern the loss of protection against direct attack.¹²⁷ The Interpretative Guidance recognises three groups who can be lawfully targeted: members of the regular armed forces; members of organised armed groups who have a continuous combat function and civilians who are directly participating in hostilities.¹²⁸

¹²³ Kleffner, supra *** p 332

¹²⁴ Kleffner, supra *** p332

¹²⁵ Kleffner, supra *** p 333

¹²⁶ Supra ***

¹²⁷ Supra *** p 6 and 13

¹²⁸ Supra *** p 28

The Interpretive Guidance bases its findings on two different concepts of membership in the armed forces, depending on whether the forces were constituted regularly (*formal* membership according to national law) or irregularly (*functional* membership based on a *de facto* exercise of continuous combat function).¹²⁹

The Interpretive Guidance defines all armed forces as:

all armed actors showing a sufficient degree of military organisation and fighting on behalf of a party to an armed conflict as part of the ‘armed forces’ of that party, regardless whether they distinguish themselves from the civilian population.¹³⁰

i) *Members of Regular Armed Forces*

Identifying who are members of the State armed forces is based on a formal approach to membership, in that membership in state armed forces is generally determined by domestic law and is expressed through formal integration into permanent units, distinguished by uniform, insignia and equipment.¹³¹ This approach to membership is the one taken by treaty law.¹³² The Interpretive Guidance states that those who are members of State armed forces are not civilian, regardless of the function which they perform; they are combatants, and can therefore be targeted. Their civilian status is only restored when they disengage from active duty and reintegrate into civilian life, whether by way of a full discharge from duty or as a deactivated reservist.¹³³

ii) *Organised Armed Groups*

¹²⁹ Melzer, supra *** p843

¹³⁰ Melzer, supra *** p 884

¹³¹ Guidance, supra *** p31

¹³² Melzer, supra *** p 844

¹³³ Guidance, supra *** p31

For those who are members of organised armed groups¹³⁴ membership is more difficult to define, as there are rarely formalised rules regarding membership, and are frequently none regarding uniforms, distinctive fixed signs or identification cards, with the result that :

in practice, the informal and clandestine structures of most organised armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces.¹³⁵

The ICRC's approach is to determine membership of these groups in a "functional sense" which means that:

membership must depend on whether the continuous function assumed by the individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict.¹³⁶

In order to acquire a continuous combat function, there must be evidence of a lasting integration of an individual into an organised armed group, thus

individuals whose continuous combat function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.¹³⁷

This is to be distinguished from those who may accompany or support an organised armed group, but who do not have a function to directly participate in hostilities. Such individuals remain civilians.¹³⁸

The continuous combat function can be assessed on the basis of openly carrying weapons, or the wearing of uniforms or distinctive signs. It can also be made on the basis of

¹³⁴ The same criteria applies to irregular state armed forces, such as militia, volunteer or paramilitary groups whose membership is not generally legislated for under domestic law, ICRC Guidance, supra *** p31. Also see Melzer, supra *** p 838 – 839 regarding the concept of an organised armed group.

¹³⁵ Guidance, supra *** p 33

¹³⁶ Guidance, supra *** p 33

¹³⁷ Guidance, supra *** p 34. Also see Melzer, supra *** p 850

¹³⁸ Guidance, supra *** p 34 and 35

behaviour, for example where a person repeatedly directly participates in hostilities, rather than doing so on a spontaneous, sporadic or temporary basis.¹³⁹

Those individuals who are deemed to have a continuous combat function are members of an organised armed group belonging to a party to the conflict and they are deprived of protection against direct attack for as long as they remain members of that group.¹⁴⁰ However, “Continuous combat function, does not, of course, imply *de jure* entitlement to the combatant privilege.”¹⁴¹ Although members of organised armed groups have combatant attack liability they do not have combatant status.

Corn and Jenks are of the view that the “test provides a logical and workable method to status based targeting authority in NIAC”.¹⁴² Watkins, however, argues that the ICRC approach to membership of organised armed groups “creates a bias against State armed forces” in that it construes membership too narrowly, compared to the concept of membership of state armed forces.¹⁴³ He argues that members of organised armed groups who carry out support functions for the group, are not legitimate targets under this approach, whereas members of state armed forces performing similar functions would be.¹⁴⁴ This view is refuted by Melzer, who argues that members of State armed forces are legitimate military targets, not due to their function, but due to their formal status as regular combatants. In addition, he is of the opinion that in practice there is unlikely to be a problem, as in state armed forces almost all non-combatant members of regular forces, except medical and religious personnel, are trained, armed and expected to directly participate in hostilities, should the situation require it, and therefore, Melzer argues, have a continuous combat function.¹⁴⁵

¹³⁹ Guidance, supra *** p 35

¹⁴⁰ Guidance, supra *** p 72. See Watkin who argues that the concept of continuous combat function should be wider than it is construed in the Interpretative Guidance. He argues that it should also include those who

¹⁴¹ Melzer, supra *** p847

¹⁴² Corn and Jenkins supra *** p 338

¹⁴³ Watkins, supra *** p 694

¹⁴⁴ Watkins, supra *** p 644

¹⁴⁵ Melzer, supra *** p 851 - 852

iii) *Civilians who directly participate in hostilities.*

The Guidance defines the notion of direct participation in hostilities as “specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict”.¹⁴⁶ In order to qualify as direct participation in hostilities an act must fulfil three criteria:

1. It must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on protected persons or objects. In other words, the act must reach a certain threshold of harm.
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from coordinated military operations of which the act constitutes an integral part; and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.¹⁴⁷

Civilians who directly participate in hostilities lose their protection from attack “unless and for such time as” they take a direct part in hostilities.¹⁴⁸ As soon as they stop directly participating, their protection against attack is regained.

It must be recalled that the Interpretative Guidance is not binding; it reflects the ICRC’s institutional position regarding how the existing law should be interpreted.¹⁴⁹ However, the ICRC is one of the more authoritative voices in this field of law, and its views are, of course, highly influential. As I indicated above however, the Guidance has not been received without criticism.¹⁵⁰

¹⁴⁶ Guidance, supra *** p 45 and see, generally p 43 45

¹⁴⁷ Guidance, supra *** p 46 and see generally p 46 to 64

¹⁴⁸ Guidance, supra *** p70 referring to AP I Article 51(3); AP II Article 13(3), and ICRC Study, Rule 6

¹⁴⁹ Guidance, supra *** p9 and see Melzer, Nils; *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*; 42 N.Y.U. J. Int’l L. & Pol 831 (2010) at p 835- 836

¹⁵⁰ See for example: Boothby, Bill; *“And for such time as”*: *The Time Dimension to Direct Participation in Hostilities*; 42 N.Y.U. J. Int’l L. & Pol. 741 (2010); Parks, W. Hays; *Part IX of the ICRC “Direct Participation*

3.7 Conclusion

To conclude, combatant status, with its attendant rights to directly participate in hostilities and to POW status upon capture, remains a vital part of IHL. In IAC, the idea of combatant status is well regulated and well established, however in NIACs, the concept of combatant status does not exist.

For fighters who take a direct part in hostilities in IACs without having combatant status, and for all fighters who directly participate in NIACs, the question of who is a legitimate target is not settled.

The next chapter shall explore how the international criminal courts have approached the issue of who is a legitimate target, and whether they have dealt with the matter in a consistent manner.

in Hostilities” Study: No Mandate, No Expertise and Legally Incorrect; 42 N.Y.U. J. Int’l L. & Pol. 769 (2010); Schmitt, Michael; *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*; 42 N.Y.U. J. Int’l L. & Pol. 697 (2010); Watkin, *supra* ***; and the reply to them by Melzer, *supra* ***. Also see Corn and Jenks, *supra* *** MORE REFERENCES