

How to make the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law practicable to operational forces?



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List of acronyms and abbreviations

AP I	Protocol Additional to the Geneva Conventions (Protocol I)
AP II	Protocol Additional to the Geneva Conventions (Protocol II)
CNA	Computer Networks Attack
DPH	Direct Participation in Hostilities
GC	Geneva Convention
HagueReg	Annex to HC IV
HC	Hague Convention
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	The International Committee of the Red Cross
ICTY	The International Criminal Tribunal for the former Yugoslavia
IED	Improvised Explosive Device
Interpretive Guidance	The Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law
IHL	International Humanitarian Law
LOAC	Law of Armed Conflict
LOIAC	Law of International Armed Conflict
NCW	Network-centric warfare
NGO	Non-governmental Organization
NIAC	Non-International Armed Conflict
PoW	Prisoner of War
ROE	Rules of Engagement

1 INTRODUCTION

On the 2nd of June 2009 the International Committee of the Red Cross (ICRC) published “The Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” (hereinafter “the Interpretive Guidance”), a result of an expert process conducted by the ICRC from 2003 to 2008. The process has been in collaboration between the ICRC and the TMC Asser Institute, with the goal of providing clarity regarding the notion of direct participation in hostilities. As a part of the process culminating in the present Interpretive Guidance, five informal expert meetings took place in Geneva and The Hague between 2003 and 2008 gathering 40 to 50 legal experts including academics, military officers and governmental representatives as well as experts from international and non-governmental organizations (NGOs) all of whom participated in their private capacity.¹

The Interpretive Guidance seeks to clarify the notion of direct participation in hostilities (DPH) as neither the Geneva Conventions, nor their Additional Protocols provide a definition of DPH.² In many ways the Interpretive Guidance has successfully fulfilled its purpose. However, it is always a challenge making laws, rules and regulations practicable as they do not exist in a vacuum. We need to create fair, functional and predictable frames around them with the aim to make them applicable universally. The Interpretive Guidance has managed to solve some legal challenges, but critics claim that the challenges, in fact, only are transferred to different stages of the military operations. The importance of clear guidelines becomes apparent in situations concerning life and death, which is a reality when making targeting decisions regarding the use of lethal force.

¹ See The ICRC Overview of the ICRC’s Expert Process (2003-2008)

² See Melzer, Nils. *The Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. Geneva (the International Committee of the Red Cross) 2009, p. 12

There are two situations creating criteria constituting DPH: one is the situation where a civilian lose protection from direct attack because he or she directly participates in hostilities, once or more, but without being formally organized or linked to an armed group. The other situation is the one where a civilian is a member (by function) of an organized armed group and is assuming a continuous combat function making him or her a lawful target for the entire duration of his or her membership. A question is whether or not a mere membership in an organized armed group can qualify as DPH and thereby activate loss of protection against direct attack.

The concept of continuous combat function was introduced for the first time in connection with the Interpretive Guidance, and has revived the debate around DPH and organized armed groups. “The membership approach” and “the revolving door” (of protection) are two topics natural and necessary to discuss under this debate. By attempting to avoid the challenges of the “revolving door” mechanism, the Interpretive Guidance requires *both* membership³ and DPH for an act to qualify as DPH for a participant of an organized armed group. Conversely, membership was not a criterion prior to the Interpretive Guidance. By making membership a second criterion, the threshold of DPH has been raised. One can wonder whether a theoretical clarification ever can be practicable to operational forces. The challenge of continuous combat function is to create a realistic criterion for the documentation needed in order to clarify status. Membership based on a criterion of function is the ICRC’s suggestion. An alternative is that mere participation in hostilities triggers loss of civilian protection for the individual in question. The latter approach is too narrow, and it does not distinguish between “direct” and “indirect” or take causal proximity into account. The question is how to deal with the concept of continuous combat function.

³ See chapter 5.1 in this paper

1.1 Subject matter

The legal challenges of armed conflict increase with the vanishing of the traditional battlefield as the technological innovations in weaponry have led to new methods of warfare. That also transforms the traditional combatant into a much more complex figure. The manifestation of the enemy has also changed, as the armed conflicts are getting more and more complicated. The rapid development in technology does not only show in weaponry, but also in the flow of information and command. The state armed forces will face a growing sophistication amongst other militaries as well as among non-state actors. The notion of network-centric warfare (NCW)⁴ appeared after the introduction of cyberspace as a fourth dimension. With NCW the opportunity to centralize the command expands, along with an improved capacity in volume and tempo, better intelligence and a higher occurrence of activity behind enemy lines. From a political and an operational point of view, leading multinational forces in international operations with rapid shifts in the frame of the conflict, creates a series of challenges concerning targeting decisions, ethics, language, religion and culture. A growing level of risk in both international and non-international armed conflicts, increases the likeliness of suffering losses of own combatants. The loss of own combatants can be, as shown in the recent losses of Norwegian soldiers fighting in the war in Afghanistan, a vulnerable issue forcing each participating nation to map the political climate on the threshold for loss.

Regarding the protection of civilians, the increasing occurrence of non-international armed conflicts between government forces and organized non-state armed groups, or between

⁴ See Schmitt, M.N. *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*. 5 Chicago Journal of International Law, Law Journal Library. 2004-2005. The four dimensions are air and space, land, sea, and cyberspace. In network-centric warfare (as opposed to platform-centric warfare where military assets operate as separate entities), various platforms are linked such that they operate as parts of an integrated whole. It is the development and networking of information, sensor, command and control, and engagement grids, that has enabled this transformation in warfare.

such groups for political or economic reasons, is of a growing concern.⁵ In these kinds of armed conflicts, parts of the civilian population are acting as fighting forces, which leads to uncertainties around these fighters' status.

One of the main goals of IHL is to protect members of the civilian population from the effects of an armed conflict. By doing so, there must be made a distinction between the ones who partake in the fighting and those who do not partake, as each category have different rights and duties. The distinction between combatant and civilian determines the international legal status of these two categories, indicating the primary status of a person in an international armed conflict. When belonging to one category, individuals are mutually excluded from falling into the other category.

1.2 Purpose

The purpose of this paper is to show how the Interpretive Guidance can be made more practicable to operational forces. The thesis will in particular discuss DPH and the matter of "continuous combat function", as the concept was presented only last year and has already caused practical challenges in terms of distinguishing between those who assume a continuous combat function and those who fall under the category of conducting "regular" DPH.

The importance of making categories of participants and finding functional ways to place the participants under the "correct" category within a split-second is obvious taken the use of lethal force into account. A clarification around the categories is also important to practitioners and courts dealing with this difficult area of law. In many ways the distinction between combatants and civilians has become more blurry throughout the conflicts of the

⁵ See Stirrup, Air Chief Marshal Sir Jock. *Hearts, minds and guns: the Role of the Armed Forces in the 21st Century*. Guest lecturer at the University of Oslo in cooperation with the British Embassy Oslo, 12th March 2008, p. 6

twentieth century.⁶ Also looking into the future, social, demographic and economic trends are expected to interact in complex ways to change the strategic context in which the armed forces operate.⁷ As depicted above, the armed conflicts are getting more heterogeneous and the challenges of distinguishing combatants from civilians are growing while the importance of such distinction, do not diminish.

In order to discuss the matters addressed in the Interpretive Guidance adequately, I will seek to make as complete a picture as possible by giving an account of the theoretical and terminological background, as well as placing the theory in a practical and political context. As the composition of the Interpretive Guidance is explicitly placed under International Humanitarian Law, the IHL will create a professional framework in this paper. Human rights law and Rules of Engagement will also be addressed, but only for the purpose of demarcation.

1.3 Objectives and structure

Since the study of the Interpretive Guidance is too excessive for this thesis to cover the whole document, I have chosen parts of the study that I would like to shed some light on. The main focus is the notion of DPH and the discussions deriving from it. This paper will be divided into seven chapters. Chapter one is an introduction presenting the topic, background, purpose and methodology by explaining what this thesis seeks to unveil and obtain. Chapter two will identify the legal frame within which this thesis will be written. Furthermore, the legal field of International Humanitarian Law and the Law of Armed Conflict will be defined, and the cardinal principles of IHL will be introduced. When it

⁶ See The UK Manual of the Law of Armed Conflict (2010), p. 37. Melzer, supra footnote 2, refers to more and more frequent direct participation by civilians in hostilities after the Second World War. See also Schmitt, Michael N. *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*. Harvard National Security Journal. Volume 1. 2010, p. 3 where he states that the presence on the battlefield of individuals who are not formally members of the belligerents' armed forces is far from a new phenomenon

⁷ See Stirrup (2008), p. 6

comes to terminology and semantics, frequently used terms or keywords will be defined when presented for the first time in this paper. Some definitions will be presented in the main text, while some will be referred to in footnotes. Any elaborations will follow from particular contexts throughout the paper. Chapter three is an extension of chapter two, dedicated to defining personnel categories and key terms central to the topic of this thesis. The fourth chapter is aiming to define direct participation in hostilities, and give an account of what activities qualify as DPH and where to draw the line. Both chapter two and three establish the importance of distinction between combatants and civilians, and between military objectives and civilian objects. Chapter four will emphasize the importance and illustrate the challenges in deciding where to draw the line. The “unless and for such time”-concept will be discussed under this chapter. The fifth chapter is dedicated to discussing the notion of continuous combat function, analyzing the membership approach and getting familiarized with the expression referred to as the revolving door mechanism. In chapter six the challenges and consequences of targeting will be addressed. The topic of targeting manifests the four principles of LOAC,⁸ in particular the principle of distinction. It is established that combatants are lawful targets whereas civilians in general are not. The controversial issue of “targeted killing” will also be addressed as the issue differs from the general rule of targeting. As the final chapter in this paper, chapter seven is a sum-up leading to a conclusion and a vision of the way forward.

1.4 Methodology and sources

The method used in this thesis will be a normative approach.

As the professional discipline of this thesis falls under the legal area of Public International Law, the sources enlisted in the Statute of the International Court of Justice of 26 June 1945 (hereinafter “the Statute”) Article 38 are central in this paper. The Article is legally binding only to the ICJ, but is looked upon as a general expression of the sources of Public

⁸ See chapter 2.3 in this paper

International Law. The states might be legally bound by resolutions of International Organizations, which only indirectly descend from international conventions.

The order of sources enlisted in Article 38 (a), (b) and (c), is not to be interpreted as hierarchical, although it is natural to assume that customary law is only being activated as a legal source in absence of conventions binding the parties.⁹ Furthermore, the Statute Article 38 (2) allows the ICJ to decide a case *ex aequo et bono*¹⁰ if the parties agree to it.

In relation to this thesis the four Geneva Conventions of 12 August 1949¹¹ and the Additional Protocols of 8 June 1977¹² will be of significance, in addition to other conventions, resolutions, general comments, case law, judicial decisions, manuals, customary international law, books, articles, journals and electronic sources.

⁹ See Ruud & Ulfstein (2002), p. 49

¹⁰ To decide a case *ex aequo et bono* means making a decision resting upon the principle of what is just and fair. When authorized to make such decisions, the ICJ may override the strict rule of law when making a decision based on what is just and fair under the given circumstances

¹¹ The first Geneva Convention: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field – August 12, 1949 (GC I), The second Geneva Convention: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea – August 12, 1949 (GC II), The third Geneva Convention: Geneva Convention Relative to the Treatment of Prisoners of War – August 12, 1949 (GC III), and The fourth Geneva Convention: Geneva Convention Relative to the Protection of Civilian Persons in Time of War – August 12, 1949 (GC IV)

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) – June 8, 1977 (AP I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) – June 8, 1977 (AP II)

2 INTERNATIONAL HUMANITARIAN LAW

2.1 International Humanitarian Law

In the 1949 Geneva Conventions and their Additional Protocols, the term “Law of Armed Conflict” is used, not the term “International Humanitarian Law”. Since IHL generally is used in connection with the GCs and the APs, one must assume that IHL is coherent with LOAC. In this paper both terms will appear without a consistent system. IHL or LOAC comprises the Geneva Conventions, the GCs Additional Protocols, the Hague Conventions of 1907 and subsequent treaties, case law, as well as numerous rules of customary international law.

Jus in bello is a third term concerning the law on the battlefield, and is applicable to the conduct of hostilities once a state has resorted to the use of armed force. However, in order to fully comprehend the *jus in bello*, the lawfulness of resort to armed force, *jus ad bellum*, must be examined, although as a separate set of rules. This means that how the conflict started, *jus ad bellum*, is irrelevant to the *jus in bello*. The modern *jus ad bellum* is based upon Article 2 (4) and Chapter VII of the UN Charter.¹³

2.2 Legal frame and definitions

As mentioned above, IHL also consists of customary international law. Customary international humanitarian law is a set of unwritten rules that has earned acceptance by being acknowledged as law. The rules have derived from a general or common practice that has been exercised consistently and extensively, and is the basic standard of conduct in armed conflict accepted by the global society.¹⁴ Independently of the application of treaty

¹³ See Fleck (ed.) (2008), p. 1. See also the Charter of the United Nations, Art. 2 (4) “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

¹⁴ See Art. 38 (1) (b) Statute of the International Court of Justice: “international custom, as evidence of a general practice accepted as law...”

law, customary international humanitarian law is applicable universally.¹⁵ The aim of the rules of customary international humanitarian law is to protect the victims of armed conflict. This protection is additional to the protection provided by treaty law, and also holds a purpose of filling the gaps where treaties have not been ratified.

Furthermore, International Humanitarian Law must not be confused with human rights law. The latter applies in both time of war and time of peace, although conventions regarding the topic of human rights are primarily designed to apply in time of peace. This means that IHL will often be referred to as *lex specialis*¹⁶ in the situation of an armed conflict. The ICJ has affirmed¹⁷ that in times of armed conflict, the right to life provision must follow from the rules of IHL in deciding whether a killing is lawful or not.

Human rights law is legally binding to states, which means that only a state can be prosecuted for breaking the law of human rights. A person who has committed any breach of the LOAC, may be held individually accountable in accordance with domestic law.¹⁸ In cases of grave breaches of the LOAC, a person may be held individually accountable for war crimes. Despite the importance of distinguishing between the field of IHL and the field of human right, the coexistence of the two will make them meet and cross paths every now and then.

¹⁵ See *Customary International Humanitarian Law, Volume I: Rules*. Edited by Jean-Marie Henckaerts and Louise Doswald-Beck (the International Committee of the Red Cross) Cambridge (Cambridge University Press) 2005

¹⁶ The doctrine of *lex specialis* states that a law concerning a specific subject matter (*lex specialis*) prevails over a law concerning general matters (*lex generalis*)

¹⁷ See the *International Court of Justice advisory opinion on Nuclear Weapons*, Reports 1996, 226, para. 25 and the *International Court of Justice Legal Consequences of the Construction of a Wall*, Reports 2004, 136, paras. 102-142 [106]

¹⁸ See "Lov om Straff av 20. mai 2005, nr. 28", chapter 16, and "Militær Straffelov av 22. mai 1902, nr. 13" Art. 108

An example is the considerable importance of human rights during internal conflicts and in international peace operations,¹⁹ as the LOAC is more unclear in such situations than in international armed conflicts. Although holding its regular mandate, the domestic criminal justice system is often vulnerable and weakened, or non-existent, as a natural consequence of internal conflicts. In most cases the local police do not have the training, capacity or resources to control the chaos of an internal conflict, which gives footing to inter-civilian violence as well as leaving the civilian population with a severely weakened protection from violence and breaches of human rights exercised by militias and members of other fighting forces. There are also situations of total corruption, where the law enforcement is paid and owned by insurgency groups. This is the situation in Mogadishu, Somalia, where Al-Shabaab is fighting to control what has been recognized as an anarchy for the past 20 years.²⁰ The situation in the Republic of Congo illustrates the desperate lack of protection for women. An article from the *Journal of International Peace Operations*²¹ unveils that according to data from the UN's Office for the Coordination of Humanitarian Affairs, on average some 40 women are raped every day in the eastern Democratic Republic of Congo. The article continues: "these horrifying statistics only worsen as conflicts on the African continent spread and civilians become prime targets."

The more unclear the LOAC appears, the greater the national responsibility for human rights is. As mentioned above, the LOAC will be *lex specialis* to human rights law, but in absence of adequate rules under LOAC, the human rights law needs to "step up".

According to the article,²² a peacekeeping researcher with the pan-African human security think tank Institute of Security Studies (ISS), Xavier Ejoyi, links the increasing demand for police peacekeepers to an equally increasing need to reconstruct criminal justice systems.

¹⁹ See Dahl (2008), p. 23

²⁰ See Engdal, Eskil (13/14 November 2010). "Helvetes bakgård". *Dagens Næringsliv*, DN Magasinet.

²¹ See Mbogo, Steve (1 March 2010). "Police for Peace". *Journal of International Peace Operations*, vol. 5, no. 5, March/April 2010. <http://web.peaceops.com/archives/507>. Retrieved 15 November 2010.

²² I.c.

He explains that the fall of the criminal justice systems are the first casualties in Africa's internal conflicts.

“Before, peacekeeping was more of [a case of] monitoring ceasefire between the armies. Today, it is about protecting civilians, establishing law and order and institutions which go with that. This is the only way to make the society start functioning again,” says Ejoyi.” ”

International treaties have no inherent enforcement powers. Each state that has ratified such treaties have jurisdiction over their own citizen-treaty offenders, and is responsible for any violation of the GCs and APs committed by persons forming part of its armed forces.²³ In addition, each state has administrative or criminal enforcement provisions in their domestic law.²⁴

2.3 Four basic principles of the Law of Armed Conflict

There are four²⁵ basic principles of the LOAC counting military necessity, humanity, proportionality and distinction.

Military necessity

Military necessity permits a belligerent to use only that amount and kind of force, not otherwise prohibited by the LOAC, necessary to defeat the enemy. The principle is not codified in either the 1949 Geneva Conventions or in the AP I. It is, however, mentioned in Article 23 (g), 1907 Hague Regulation IV. Military necessity also applies to weapons.²⁶

²³ Art. 91 AP I

²⁴ See Solis (2010), p. 15

²⁵ Dahl (2008), p.45 adds chivalry as a fifth principle. The UK Manual of the Law of Armed Conflict (2010) incorporates chivalry under the principle of humanity, see p.23

²⁶ See the St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. 29 November/11 December 1868.

In the case of *Shimoda et al. v. The State*,²⁷ the St. Petersburg Declaration is quoted: “considering that the use of a weapon which increases uselessly the pain of people who are already placed out of battle and causes their death necessarily is beyond the scope of this purpose, and considering that the use of such a weapon is thus contrary to humanity.”

In his 1863 Code, Francis Lieber defines military necessity in Article 14: “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”²⁸

The principle of military necessity contains four basic elements.²⁹ The first element is that the force used can be and is being controlled. The second element corresponds to the definition statement saying that military necessity only permits the use of force if it is “not otherwise prohibited by the LOAC”, and states that necessity cannot excuse a departure from the LOAC. The third basic element is that the use of force is legitimate if it is necessary to achieve the complete or partial submission of the enemy, though at the earliest possible moment with the minimum expenditure of life and resources. The fourth and last element is, conversely, stating that the use of force which is not necessary is unlawful, since it involves wanton killing or destruction. In practice, military necessity is to be interpreted on the background of the principles of humanity and proportionality.

²⁷ *Shimoda et al. v. The State*. International law aspects (11). Tokyo District Court, 7 December 1963. <http://www.icrc.org/ihl-nat.nsf/276c23458e6a0d2441256486004ad099/aa559087dbcf1af5c1256a1c0029f14d!OpenDocument>

²⁸ See Art. 14, Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863

²⁹ See The UK Manual of the Law of Armed Conflict (2010), p. 22

Humanity

The cardinal principle of humanity forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.³⁰ The principle is to be found in the Martens Clause in the Preamble to Hague Convention II 1899³¹: “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience”.

The concept of unnecessary suffering is codified in Article 35 (2) AP I: “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” The concept is applicable to combatants rather than civilians. Furthermore, it follows from Article 36 AP I that states that have ratified the Protocol are required to test and make sure that new weapons comply with the AP I’s prohibition of unnecessary suffering.³²

Proportionality

The principle of proportionality requires that the civilian losses following from a military action should not be excessive in relation to the expected military advantage. AP I defines proportionality in Article 51 (5) (b) and in Article 57 (2) (b).³³ The first Article relates to

³⁰ Ibid., p. 23

³¹ See also a modified version in the Preamble to the Hague Convention IV 1907

³² See Solis (2010), p.271

³³ Art. 51 (5) (b) AP I: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which could be *excessive in relation* to the concrete and direct military advantage anticipated.” (Emphasis supplied). Art. 57 (2) (b) AP I: “an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of thereof, which would be *excessive in relation* to the concrete and direct military advantage anticipated.” (Emphasis added).

the protection of civilians, whereas the latter relates to the precautions necessary in the attack of a military objective.³⁴ The principle is also in accordance with customary international humanitarian law.³⁵ As mentioned above, proportionality, military necessity and humanity must be seen as a whole. In order to draw lines, one must have an overview of the status of all three principles. Proportionality must be seen as the link between humanity and military necessity.

Distinction

The fourth and last principle is the one of the greatest interest to this paper and is expressed as a basic rule in Article 48 AP I: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian populations and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives” Further the definition of attacks and scope of application follows from Article 49 (3) AP I.³⁶

The principle of distinction separates the combatants from the civilians and legitimate military targets from civilian objects. In such way the principle of distinction has two aspects; one relating to the individuals and one relating to objects. First, the combatant must distinguish him- or herself from civilians, second, the combatant must distinguish between military objectives and civilian objects. The principle of distinction is relevant to targeting decisions as civilians and civilian objects enjoy a general protection from direct attack. This gives combatants a duty to distinguish themselves from the civilian

³⁴ See Solis (2010), p. 273

³⁵ See Henckaerts and Doswald-Beck (eds.) supra footnote 15, Rule 14

³⁶ Art. 49 (3) AP I: “The provisions of this section [section I General Protection Against Effects of Hostilities] apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.”

population,³⁷ and to keep military sites as far away from civilian populated areas as possible. In the ICRC study of customary international humanitarian law, rules 1-10 are dedicated to cover rules on the principle of distinction. After each rule it is indicated whether the rule is applicable to IAC, NIAC or both. Rules 1-6 are on the distinction between combatants and civilians, whereas rules 7-10 are on the distinction between military targets and civilian objects.³⁸ The distinction between military objectives and civilian objects will not be discussed specifically in this paper.

3 PERSONNEL CATEGORIES AND KEY TERMS

3.1 Combatants

Members of the armed forces³⁹ of a party to the conflict are combatants and thereby have the right to participate directly in hostilities.⁴⁰ This does not apply to medical and religious personnel (non-combatants) protected by Article 33 GC III.

3.1.1 Lawful combatants

Combatants are divided into what is referred to as lawful and unlawful combatants. The LOAC applies to lawful combatants who participate in the hostilities of armed conflict and provides combatant immunity,⁴¹ as long as the methods conducted are not forbidden by the

³⁷ Art. 44 (3) AP I

³⁸ See Henckaerts and Doswald-Beck (eds.) supra footnote 15, Rule 1-10

³⁹ See Art. 4 GC III and Art. 43 (1) AP I: “The armed forces of a Party to the conflict consists of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or 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.” See also Art. 44 AP I

⁴⁰ Art. 43 (2) AP I

⁴¹ Combatant immunity grants the combatants immunity from prosecution under the enemy’s law for any lawful, precapture acts of war

LOAC. A lawful combatant is entitled to engage in combat in wartime, which means attacking enemy combatants and military objectives and resisting the enemy without being prosecuted (as long as in accordance with LOAC).

Lawful combatants are members of regular or irregular armed forces (wearing a uniform⁴²) with the exception of medical personnel, chaplains,⁴³ military patients⁴⁴ and Prisoners of War.⁴⁵ Whether being a member of a regular or an irregular armed force, the combatant must act according to the Article 4A GC III. Article 44 in AP I explicitly clarifies the classification of members of liberation movements in occupied territories as combatants. The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps that are a) commanded by a person responsible for its subordinates, b) wearing a fixed distinctive emblem recognizable at a distance, c) carrying arms openly, and d) conducting their operations in accordance with the laws and customs of war.⁴⁶ These qualifications of belligerents are, however, not constitutive elements of the armed forces of a party to the conflict. The requirements rather depict conditions for the post-capture entitlement of irregular armed forces to combatant privileges, such as Prisoner of War status.⁴⁷

The participants of *levée en masse* defined by Article 2 HagueReg and Article 4A (6) GC III are also lawful combatants. The participants of *levée en masse* qualify to combatant status with the entitlement of getting the secondary status of PoW if fallen into the power of the enemy, as long as they carry arms openly and respect the laws and customs of war. There are two additional requirements such spontaneous resistance must meet in order for

⁴² Art. 44 (6) AP I

⁴³ Art. 42 (2) AP I

⁴⁴ I.e. lawful combatant who has become *Hors de Combat*, see Art. 41 (2)(c) AP I.

⁴⁵ Art. 4 (A) GC III

⁴⁶ Art. 1 (1), (2), (3) and (4) HagueReg, Art. 4A (2) GC III, Art. 44 (2) AP I

⁴⁷ See Melzer, *supra* footnote 2 , p. 22

the participants of *levee en masse* to obtain the primary status as combatants.⁴⁸ The first condition is that the *levee en masse* can only lawfully take place on territory which is occupied by actually having been placed under the authority of the hostile army.⁴⁹ Resistance movements that are organized on an already occupied territory are not classified as *levee en masse*.⁵⁰ The second condition is the requirement of “spontaneity”, which means that the resistance must be initiated by the population itself on the approach of the enemy. The armed resistance is only permitted against “invading troops”,⁵¹ meaning that the territory must not already be occupied.

3.1.2 *Unlawful combatants*

The terms “lawful” and “unlawful” has traditionally been used to separate those who have the right to participate directly in hostilities from those who do not have that right. A lawful combatant is positively defined in Article 43 (2) AP and the terms “lawful” and “unlawful” do not appear at all in the GCs. The *Targeted Killing Judgment*⁵² explicitly rejects the category of “unlawful combatants” by stating that “there is no intermediate status...”, continuing by claiming that a civilian participating in combat activities is a civilian criminal who in any case retains his or her civilian status.

a) *Mercenaries*

According to Article 47 AP I a mercenary⁵³ is not a lawful combatant. The criteria enlisted in the Article are defining who is a mercenary and are of a cumulative character. If one of

⁴⁸ See Fleck (ed.) (2008), p. 93

⁴⁹ Art. 42, 1st sentence HagueReg

⁵⁰ Art. 42, 2nd sentence HauguReg

⁵¹ Art. 2 HagueReg

⁵² The Supreme Court Sitting as the High Court of Justice [December 11 2005] *Before President (Emeritus) A. Barak, President D. Beinisch, and Vice President E. Rivlin*. Judgment, HCJ 769/02, p. 3, para. 5

⁵³ See also the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* A/RES/44/34 4 December 1989 (UN Mercenary Convention) and *Convention of the OAU for the Elimination of Mercenarism in Africa*, Libreville 3 July 1977.

the criteria is not fulfilled, the person is not a mercenary according to the AP and will be a lawful combatant if fulfilling the criteria for such.

There is still an ongoing debate whether private contractors and civilian employees are to be considered mercenaries. The conclusion after the topic was brought up at the Third Expert Meeting,⁵⁴ seemed clear on the view that private contractors in armed conflicts could be mercenaries according to the definition in Article 47 AP I, but that it is on rare occasions that the requirements for such qualifications are met. Modern mercenaries are often employees of private military companies (PMCs) or private security companies (PSCs). It is unclear whether or not the corporate element affects the recruitment criterion in Article 47 (2) (b) AP I. According to the DPH requirement in condition (c), a private contractor cannot be regarded as a mercenary unless he or she engages in direct participation in hostilities. This criterion becomes apparent with the corporate element present, if the private contractor is hired to execute purely security functions (as opposed to combat functions).⁵⁵ For the purpose of this paper, the status of mercenaries is not of independent interest as it is not very topical. Concerning private contractors and civilian employees, the discussion will stay within the frames of the debate around the legal consequences of civilian participation in armed conflicts.

The US has never ratified the AP I and do not find themselves bound by Article 47. The ICRC, however, claims that the rule is universally binding through customary law.⁵⁶

b) Spies

The definition of who falls into the category of “spies” (in the context of armed conflict) follows from Article 46 AP I stating that the person must a) be a member of the armed forces of a party to the conflict, b) gathering or attempting to gather information of military value, c) on behalf of his or her party and in territory controlled by an adverse party,

⁵⁴ See The International Committee of the Red Cross and the TMC Asser Institute (2005), p. 79

⁵⁵ See Dinstein (2010), p. 58

⁵⁶ See Henckaerts and Doswald-Beck (eds.) *supra* footnote 15, Rule 108

d) through an act of false pretences or deliberately in a clandestine manner. The person shall not be considered a spy if he or she is wearing the uniform of his or her armed forces while so acting.⁵⁷

There is no prohibition against spies within the area of Public International Law. Espionage is a lawful method of war and is defined in Article 46 AP I and in Article 29 HagueReg. Although not being a criminal, a spy is an unlawful combatant and does not enjoy the privilege of PoW status if fallen into the power of an adverse party.⁵⁸ It is up to each country to protect itself from espionage by the provisions of domestic criminal law.

3.2 Non-combatants

The terminological distinction between combatants and non-combatants is constituted in Article 3 HagueReg, which also states that both combatants and non-combatants in the case of capture by the enemy shall have the right to be treated as Prisoners of War. However, according to the principle of *lex posterior*, it has been argued that the distinction in Article 3 HagueReg no longer is useful as non-combatants are not mentioned in Article 43 AP I.

Individuals falling under this category are members of armed forces such as medical and religious personnel and do not have the right to participate directly in hostilities.⁵⁹ Non-combatants have, however, the right to defend themselves or others against direct attacks. Medical personnel are not entitled to participate in acts harmful to the enemy,⁶⁰ but they do have access to use arms in self defense.⁶¹ According to Article 28 (1) GC I medical and religious personnel “who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require”.

⁵⁷ Art. 46 (2) AP I

⁵⁸ Art. 46 (1) AP I

⁵⁹ Art. 43 (2) AP I

⁶⁰ Art. 21 GC I

⁶¹ Art. 22 GC I

Both medical personnel and chaplains are entitled to be respected and protected under all circumstances⁶² but when in retention they shall not be deemed prisoners of war.⁶³ However, according to Article 28 (2) 2nd sentence GC I, they shall at least benefit by all the provisions of the GC III.

3.3 Civilians

As stated above, in situations of international armed conflict, civilians are defined negatively according to Article 50 (1) AP I as being all persons who are neither members of the armed forces of a party to a conflict, nor participants in a *levee en masse*. This definition of civilians also reflects IHL in international armed conflict.⁶⁴ Civilians are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.⁶⁵ Conversely, when directly participating in hostilities, civilians become both lawful targets of attack and prosecutable for their actions.

Persons who accompany the armed forces without actually being members thereof are entitled to status as Prisoner of War when fallen into the power of the enemy provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.⁶⁶

The term “civilian” is not expressly defined in treaty IHL governing non-international armed conflict, and must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, in this case in the light of the object and purpose of IHL.⁶⁷ According to the wording in Common Article 3 GC I-IV and AP II civilians, armed forces and

⁶² Art. 24 GC I

⁶³ Art. 28 (2) 1st sentence GC I

⁶⁴ See Henckaerts and Doswald-Beck (eds.) supra footnote 15, Rule 105

⁶⁵ Art. 51 (3) AP I, Art. 13 (3) AP II

⁶⁶ Art. 4 (A)(4) GC III

⁶⁷ Art. 31 (1) Vienna Convention on the Law of Treaties

organized armed groups of the parties to the conflict are mutually exclusive categories in non-international as well as international armed conflicts.⁶⁸

3.4 International and Non-International Armed Conflicts

IAC exists whenever there is resort to armed force between two or more States.⁶⁹ The legal basis of IAC follows from Common Article 2 GC I-IV. In addition to all the GCs with the exception of Common Article 3, the AP I, customary international law and agreements prohibiting the use of certain weapons⁷⁰ are regulating IACs.

According to the material field of application of the AP II, Article 1(2) AP II gives a negative definition of NIAC, stating that the Protocol does *not* apply in situations of internal disturbances and tensions (such as riots), isolated and sporadic acts of violence or other acts of similar nature.

The ICRC's definition of NIAC is "Non-International Armed Conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization".⁷¹ If the armed conflict is between the armed forces of a state and dissident or anti-government armed forces, Common Article 3 applies. The same is the case if the armed conflict is between fractions within a state.

⁶⁸ Also mentioned in chapter 1.1 in this paper

⁶⁹ See the International Committee of the Red Cross (ICRC). Opinion Paper, March 2008, p.5

⁷⁰ Such as the 1972 Biological Weapons Convention, the 1993 Chemical Weapon Convention, and the 1997 Ottawa Convention on anti-personnel mines

⁷¹ See The International Committee of the Red Cross and the TMC Asser Institute (2004), p. 16

Given that most armed conflicts of today are of a non-international character,⁷² the application of Common Article 3 is of outmost importance. However, AP II applies in addition to Common Article 3 if the dissident or the anti-government armed forces exercise territorial control sufficient enough to enable them to carry out sustained and concerted military operations and implement Additional Protocol II.⁷³ As mentioned above, no other portion of the GCs applies. However, large parts of the GCs fall under customary international humanitarian law, which in practice might create nothing but a legal detour for certain rules to apply. It should also be noted that the ICJ has acknowledged Common Article 3 as customary international law.⁷⁴

Common Article 3 GC I-IV covers all non-international armed conflicts occurring in the territory of one of the High Contracting Parties.⁷⁵ The point at which the conflict formally may be recognized as belligerency is open to interpretation. Status of belligerency entitles the parties to exercise belligerent rights and duties, and it activates the application of laws and customs of war to the parties in an internal conflict.⁷⁶

According to the Interpretive Guidance, Common Article 3 is not generally perceived to govern the conduct of hostilities.⁷⁷ The Article does not distinguish between combatants and civilians in NIAC. Neither does AP II. However, the Interpretive Guidance claims that the wording opens to certain conclusions to be drawn regarding the generic distinction

⁷² After the Cold War the conflict dynamics on the continent has shifted from being between armies to becoming intra-state

⁷³ See The UK Manual of the Law of Armed Conflict (2010), p. 31

⁷⁴ *Nicaragua v. U.S. Military and Paramilitary Activities in and against Nicaragua*. Merits, ICJ Rep. 4, 27 June 1986, paras. 254-256

<http://www.icj-cij.org/docket/?sum=367&code=nus&pl=3&2p=3&case=70&k=66&p3=5>

⁷⁵ “High Contracting Parties” as used in the 1949 Geneva Conventions or “States”, will in this paper be equivalent to States Party to GC I-IV and AP I-II

⁷⁶ See Solis (2010), p. 153

⁷⁷ See Melzer, *supra* footnote 2, p. 28

between the armed forces and the civilian population in NIAC.⁷⁸ The two categories of persons in NIAC are corresponding to the respective within IAC. In IAC there is a distinction between combatants and civilians, whereas in NIAC the distinction is between what is referred to as “fighters” and protected civilians. Civilians who have temporarily lost their protection against direct attack because of DPH represent a third category.⁷⁹ In other words, unlike AP I, AP II does not give a definition of combatants, but Article 13 (3) AP II is equivalent to Article 51 (3) AP I in the wording of the requirement in order for civilians to keep their protected status.⁸⁰

The fact that Common Article 3 has no enforcement is a challenge to the international community as it has no means to sanction any breaches of the Article. Another challenge is the effective rule of law as at least one of the parties to an internal conflict might not accept international regulations. It is not uncommon that parties to an internal conflict see international regulation as an intrusion and a threat to their sovereignty. To increase the complexity of categorizing armed conflicts, an armed conflict might be both internal and international.⁸¹ That ended up being the case in Afghanistan where the status in 2001 was of an internal character with the Taliban government fighting the Northern Alliance in the northern part of the country. After the US-led military operation “Operation Enduring Freedom” 7 October 2001 a Common Article 2 GC I-IV international armed conflict begun in the south and east with one High Contracting Party invading another High Contracting Party, while the Common Article 3 GC I-IV non-international armed conflict continued in the north. The conflict between the authorities of Afghanistan and insurgents is now regulated by Common Article 3 and since December 2009 the AP II.

⁷⁸ I.c.

⁷⁹ See Schmitt, Michael N., Garraway, Charles H.B., Dinstein, Yoram (eds.) *The new San Remo Manual on the Law of Non-international Armed Conflict*. San Remo (International Institute of Humanitarian Law). 2006

⁸⁰ See also Henckaerts and Doswald-Beck (eds.), *supra* footnote 15, rule 6

⁸¹ See Solis (2010), p. 156 where the occurrence of such situation is referred to as “a dual status conflict”, criterion being that the internal and the international conflict are occurring at the same time within the same state

During the Second Expert Meeting,⁸² an expert participant encouraged a clarification of the distinction between IAC and NIAC in terms of the notion of DPH. The participant referred to the differences in practice where the Statute of the ICC *does* distinguish between IAC and NIAC, whereas the ICTY Prosecutor’s Office *does not*. Another participant stressed that the jurisprudence of the ICTY and of the Inter-American Commission of Human Rights supported a distinction. However, the Interpretive Guidance seems to have limited the discussion by simply referring to treaty law references to hostilities where the notion of DPH appears to apply in both IAC and NIAC. For the purposes of this paper, I will not stress the distinction between IAC and NIAC when discussing DPH on a general basis.

4 DIRECT PARTICIPATION IN HOSTILITIES

4.1 Direct Participation in Hostilities and Continuous Combat Function

The Commentary to AP I defines direct participation as “acts of war which is intended by their nature or their purpose to hit specifically the personnel and the ‘materiel’ of the armed forces of the adverse Party”. The Commentary continues: “direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.”⁸³ According to the Interpretive Guidance the treaty text must be read and understood literally with emphasis on both “participation” and “direct”. The activity must amount to participation in hostilities, and the participation must be direct.

⁸² See The International Committee of the Red Cross and the TMC Asser Institute (2004), p. 17

⁸³ See Sandoz, Yves, Zimmermann, B., Eberlin, P., Gasser, H.P., Wenger, C.F. *Commentary on the Additional Protocols I and II of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva (International Committee of the Red Cross) 1987, p. 515, para. 1679

After the introduction of the notion of continuous combat function, it has become important to separate the two “situations” from one another, as the legal position differs depending on which category the civilian falls under. According to the Interpretive Guidance⁸⁴ civilians lose protection against direct attack for the duration of each specific act amounting to DPH, whereas members of organized armed groups belonging to a non-state party to an armed conflict cease to be civilians and lose protection against direct attack for as long as they assume their continuous combat function. The topic of continuous combat function will be further discussed under chapter 5 in this paper. Under this chapter the focus will be on the “unless and for such time”-concept, aiming to map the criteria for DPH; *which acts* qualify as direct participation in hostilities? *Who* can lose protection against direct attack by conducting such acts? For *how long* will such person lose his or her protection? *How can these criteria be made practicable to operational forces?*

4.2 Direct Participation in Hostilities

There is no definition of “direct participation in hostilities” to be found within the area of Treaty IHL, and neither State practice nor international jurisprudence offer a clear interpretation of the concept. The Interpretive Guidance must therefore be interpreted in accordance with Article 31 (1) Vienna Convention on the Law of Treaties.⁸⁵

The concept of DPH relates to the IHL principle of distinction between combatants and civilians and only applies to civilians. It has, however, been discussed whether persons who take a direct part in hostilities should enjoy civilian status at all. It has been suggested that they should fall under the category of unlawful combatants. The changing of category does not affect their legal position in terms of the entitlement to participate in hostilities or concerning combatant immunity, as neither unlawful combatants nor civilians are entitled to any of the two.

⁸⁴ See Melzer *supra* footnote 2, p. 70

⁸⁵ *Ibid.*, p.41

Article 51 (3) AP I and Article 13 (3) AP II use the term “unless and for such time” to define when and for how long a civilian lose protection from direct attack when directly participating in hostilities. In coherence with the treaty wording the interpretation of the loss of civilian protection must be based upon individual activity (DPH), rather than function or status. Moreover, the loss of civilian protection is temporary, rather than continuous, hence “unless and for such time”. The loss of protection is linked to the present, rather than the past, sanctioning current activity.⁸⁶

When loss of protection against attack is discussed in relation to combatants, the experts⁸⁷ seem to agree that combatants are lawful targets even when on leave, holidays or asleep. The reason why is that combatants are free to take up arms any time during the armed conflict, and therefore it would be inconsistent at the same time giving them immunity against attack. In other words, when it comes to combatants, loss of protection against attack is not an issue, as they never enjoy immunity in the first place (apart from if *hors de combat*).

Regarding civilians who take a direct part in hostilities, the situation is a lot more complex. It is established that civilians normally enjoy immunity against direct attack, but when *directly participating* in hostilities they lose the protection that they otherwise enjoy under IHL. More specifically, the protection is lost and regained accordingly with their DPH. Civilians who take a direct part in hostilities continue to be a member of the civilian population, but their protection is temporarily suspended for the endurance of the DPH. According to Article 51 (3) AP I “Civilians shall enjoy the protection afforded by this section, [Section I General Protection against Effects of Hostilities], unless and for such time as they take a direct part in hostilities”. In non-international armed conflict “Civilians shall enjoy the protection afforded by this Part [Part IV Civilian Population], unless and for

⁸⁶ 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, p. 887

⁸⁷ See The International Committee of the Red Cross and the TMC Asser Institute (2003), p. 6

such time as they take a direct part in hostilities.⁸⁸ In the Interpretive Guidance, the definition of when direct participation in hostilities begins and when it ends is discussed in relation to “preparatory measures”, “deployment” and “return”.⁸⁹

In the *Tadic case*⁹⁰, the ICTY expressed: “It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time.” The ICRC agrees that the approach must be a case-to-case assessment to determine DPH, however in order to do so, there are certain criteria that need to be fulfilled.

4.3 Hostilities

In the process of trying to define the word “hostilities”, some other terms must be used in support to decide what “hostilities” cover. The discussion around the definition of “hostilities” was brought up during the Second Expert Meeting,⁹¹ and although not reaching a unanimous conclusion, some relevant support-terms were introduced.

First, “hostilities” must be understood as reaching beyond “attack” and “armed conflict”. An attack brings up connotations of a rather time limited act of either violence (armed attack) or non-violence (i.e. CNA). “Hostilities” can exist without amounting to one particular attack. An armed conflict, whether international or non-international, has the presence of arms as a criterion. “Hostilities”, though being conducted during an armed conflict, can comprise acts with no direct relation to arms (such as intelligence activities like wiretapping the adversary’s high command or transmitting tactical targeting information).

⁸⁸ Art. 13 (3) AP II

⁸⁹ See Melzer, *supra* footnote 2, p. 65

⁹⁰ *The Prosecutor v. Tadic*, ICTY Opinion and Judgment, 7 May 1997, case No. IT-94-1-T, para. 616
<http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>

⁹¹ See The International Committee of the Red Cross and the TMC Asser Institute (2004), p. 24

Second, the term “fighting” gives connotations to a physical act, which as stated above is only one alternative part of “hostilities”. “Warfare” and “acts of war” can be understood as synonymous to “hostilities”, depending on the definition of the respective.

The Interpretive Guidance emphasizes *participation* in hostilities as being the individual involvement of a person in these hostilities. The notion of direct participation in hostilities refers to a person’s engagement in specific hostile acts, not to his or her function as opposed to the criterion of continuous combat function. The hostilities may be either international or non-international, which means that conduct occurring outside situations of armed conflict does not fall under the concept of DPH. However, under circumstances of declaration of war or occupation of territory without armed resistance,⁹² there can be an armed conflict without any occurrence of hostilities.⁹³

4.4 Specific hostile act

The Interpretive Guidance interprets the concept of direct participation in hostilities as restricted to specific hostile acts. The reason behind this narrow interpretation is that

“...any extension of the concept of direct participation in hostilities beyond specific acts, would blur the distinction made in IHL between *temporary, activity-based loss of protection* (due to direct participation in hostilities), and *continuous, status or function-based loss of protection* (due to combatant status or continuous combat function).”⁹⁴

(Emphasis in original)

The discussion around the specific act approach was addressed at Third Expert Meeting⁹⁵, where it was suggested that such an approach must be based on a wide interpretation of “preparatory measures”, “deployment” and “return” as it would make little, if any, sense if

⁹² Art. 2 GC I-IV

⁹³ See Melzer, *supra* footnote 2, p.41

⁹⁴ *Ibid.*, p. 45

⁹⁵ See The International Committee of the Red Cross and the TMC Asser Institute (2005), p. 60

a civilian directly participating in hostilities immediately regained his or her protected status against direct attack simply because the specific hostile act was terminated. The approach should thereby cover any conduct amounting to DPH. A critique against this view was that the practical situation of armed conflicts rarely allows sufficient intelligence resources to keep track of individuals and their desire to disengage. Therefore, one is left with no other choice than a literal interpretation of each specific hostile act in order to manifest DPH.

Direct participation must refer to specific hostile acts which are carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. In order to determine whether or not a specific act constitutes DPH, the concrete circumstances of that particular situation should be of decisive importance. An example⁹⁶ from the Vietnam War is the situation where civilians were forced to carry ammunition hundreds of miles between North and South Vietnam. The ammunition would be used immediately upon arrival, and the civilians would be sent back for more. The question is, could their activities constitute “preparatory measures” or “deployments to” or “return from” direct participation in hostilities and thereby entail their civilian loss of protection from direct attack? The element of force does not necessarily protect them from a temporary loss of protection, as there is no inherent rule stating that only the voluntary conduct of DPH is to be considered as DPH. The solution must, as mentioned above, be a case-to-case assessment. During the Fourth Expert Meeting, under a discussion about the membership approach in relation to organized armed groups, the case of a thirteen year old girl who was forced into planting booby traps alongside a road is described “although the girl clearly was taking a direct part in hostilities...”⁹⁷ This illustrates one of the DPH-challenges operational forces may face. However, in order to construct a frame around a specific hostile act, the act in question must also be seen in connection with the criteria of preparatory measures, deployment and return.⁹⁸

⁹⁶ See The International Committee of the Red Cross and the TMC Asser Institute (2006), p. 55

⁹⁷ Ibid., p.31

⁹⁸ See chapter 4.7 in this paper

4.5 Three constitutive criteria

There are three constitutive elements established to meet the requirement of DPH: threshold of harm, direct causation, and belligerent nexus.

4.5.1 *Threshold of harm*

The threshold requirement could be qualitatively or quantitatively fulfilled. If a specific act is likely to damage the military operations or military capacity of a party to the conflict, the required threshold of harm would be fulfilled in qualitative terms. In quantitative terms, the required threshold of harm would be fulfilled by inflicting death, injury or destruction on persons or objects not under the effective control of the acting individual.⁹⁹ It is not required that the act in question results in actual materialization of harm for the act to qualify as DPH. The objective likelihood of the act resulting in harm of a specific military nature or in infliction of death, injury or destruction of persons or objects protected against direct attack, qualifies to reach the threshold.¹⁰⁰

4.5.2 *Direct causation*

About direct causation as a criterion, the Interpretive Guidance states that “there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part”.¹⁰¹ The definition of “direct” has, however, ended up as a compromise between narrow interpretations of both “direct” and “indirect” interpretations of causation. The Interpretive Guidance proposed to adopt a flexible requirement of direct causation that would cover both the situation where a specific act directly caused harm reaching the required threshold, and the situation when the act was an integral part of a larger operation which directly caused harm to the adversary.¹⁰² The term “one causal step” has been used as a criterion for causing direct harm. When all three requirements are met, it is only acts or operations that

⁹⁹ See The International Committee of the Red Cross and the TMC Asser Institute (2006), p. 39

¹⁰⁰ See Melzer, *supra* footnote 2, p. 47

¹⁰¹ *Ibid.*, p. 51

¹⁰² *l.c.*

reach the threshold of harm in “one causal step” that fulfills the criterion for DPH. A strict interpretation of direct causation between the specific act and the likelihood of harm has been criticized by Brigadier-General Watkin for excluding acts that simply build up the capacity of a party to inflict harm from the concept of DPH.¹⁰³ Watkin also criticizes the Interpretive Guidance’s reference to Improvised Explosive Device (IED) production when illustrating the causal link criterion. The Interpretive Guidance differentiates between assembling and storing IEDs and planting and detonating the devices. The first two is categorized as causing indirect harm, whereas the latter two are likely to cause direct harm and therefore qualifies as DPH. Watkin points out that those assembling and storing the IEDs may be operating within the command structure of the organized armed group, which means that if so, they should be treated as combatants according to Article 43 (1) AP I.

As mentioned above the Interpretive Guidance establishes that an act constituting an integral part of a concrete and coordinated tactical operation that *directly* causes harm, fulfills the requirement of direct causation. The reason behind this is to pick up the cases “where a specific act does not, on its own, directly cause the required threshold of harm”.¹⁰⁴ The act may still constitute DPH by fulfilling the requirement of direct causation. This means that in collective operations, the resulting harm is not required to have been directly caused, in one causal step, by each individual, but by the collective operation as an integrated whole.¹⁰⁵

4.5.3 *Belligerent nexus*

The third cumulative requirement to DPH is what is referred to as belligerent nexus. There must be a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict. In order to qualify as belligerent nexus “the act must be specifically designed to directly cause the required threshold of harm in support of a party

¹⁰³ See Watkin, Kenneth. *Opportunity Lost: Organized armed groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*. 42, N.Y.U.J. Int’l L.& Pol. 641. 2010, p. 658

¹⁰⁴ See Melzer, supra footnote 2, p. 54

¹⁰⁵ See Melzer, supra footnote 86, p. 866

to the conflict and to the detriment of another.”¹⁰⁶ Unless the violence reaches the required threshold to start a separate armed conflict, it remains of a non-belligerent nature like armed violence carried out by independent armed groups in IAC.¹⁰⁷

Not every act that fulfills the requirement of threshold of harm amounts to DPH and even though the act might also have a direct causation to the harm inflicted, it still would not necessarily amount to DPH. Acts of inter-civilian violence illustrates an example. It is only when these acts are conducted “specifically in support of the military operations of a party to the conflict”, that these acts constitute DPH. In other words, in order to qualify as DPH inter-civilian violence must have a sufficient nexus to military operations or hostilities occurring in relation to a situation of armed conflict.

4.6 Subjective intent

According to the report from the Second Expert Meeting,¹⁰⁸ several experts agreed that, theoretically, subjective intent was a better criterion for qualification of an act as DPH than attempts to define an objective list of activities in order to constitute DPH. The experts did, however, see that subjective intent as a decisive criterion for defining an act as DPH would be difficult from a practical point of view. During the Third Expert Meeting,¹⁰⁹ the majority of the experts found individual motives irrelevant referring to the challenge in determining and proving *ex ante* the subjective intent of the civilian in question. The experts meant that civilian conduct had to be seen based on objective criteria from the perspective of a reasonable soldier. It was also suggested that “subjective intent to support the military action of a party to the conflict could remain a decisive criterion as long as it was objectively determined ...”¹¹⁰ However, it will be difficult avoiding subjectivity even when objectively determining a decisive criterion. How can the perspectives of a reasonable

¹⁰⁶ See Melzer, *supra* footnote 2, p. 46

¹⁰⁷ *Ibid.*, p. 59

¹⁰⁸ See The International Committee of the Red Cross and the TMC Asser Institute (2004), p. 4

¹⁰⁹ See The International Committee of the Red Cross and the TMC Asser Institute (2005), p. 9

¹¹⁰ *Ibid.*, p. 10

soldier be predefined covering multiple potential situations, without containing a strong element of subjective opinions? Accordingly, determining subjective intent must be based on criteria providing too uncertain answers. Subjective intent can therefore not be a decisive criterion for defining an act as DPH, without jeopardizing the legal protection of civilians in a careless manner.

4.7 DPH – when does it begin and when does it end?

Measures preparatory to the execution of a hostile act mark the beginning of DPH. In addition to the preparatory measures and the immediate execution of a hostile act, the deployment and return, is included in the demarcation of the time span of DPH.

4.7.1 Preparatory measures

The ICRC Commentary to Additional Protocol I,¹¹¹ suggests that “hostilities” used in Article 51 (3) AP I includes preparations for combat, as it seems that the word “hostilities” covers the time the civilian is carrying his or her weapon and situations in which he or she undertakes hostile acts without using a weapon, as well as the time when the civilian actually makes use of a weapon.

The concept of preparatory measures amounting to DPH, as described in the Interpretive Guidance, may derive from the wording “military operation preparatory to an attack” in Article 44 (3) AP I. The preparation of specific military operations that are so closely linked to the execution qualifies as DPH, whereas the preparation of a general campaign of unspecified operations would not qualify as such.¹¹²

The Interpretive Guidance gives an example of where to draw the line between an act that qualifies as DPH and an act that does not do so, by saying that loading bombs onto an airplane for a direct attack on military objectives in an area of hostilities qualifies as DPH because it constitutes a measure preparatory to a specific hostile act. Conversely,

¹¹¹ See Sandoz, Zimmermann, Eberlin, Gasser & Wenger, *supra* footnote 83, p. 615, para. 1943

¹¹² See The International Committee of the Red Cross and the TMC Asser Institute (2005), p. 66

transporting bombs from a factory to an airfield storage place for further shipping before an unspecified use of the bombs, would at the most qualify as indirect participation from general preparatory measures.¹¹³ However, the uncertainty of what position those “indirect helpers” hold within an organized network remains. As unveiled above, the Interpretive Guidance has been criticized for making a practical shortcut by simply picking out the last person in a link of actions (preparatory measures and deployment), uncritically claiming that he or she is the one conducting DPH. Being the one to pull the trigger, establishes what number in the chain of contributors a person is, so by position rather than by an assessment of the actual participation, a person will qualify as directly participating in hostilities and therefore lose protection against attack.

4.7.2 *Deployment and return*

According to the Interpretive Guidance a deployment amounting to DPH begins “once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation”.¹¹⁴ However, DPH may already have been constituted from other acts of preparation resulting in loss of protection. It is also stressed that neither preparatory measures nor deployment are independent acts of DPH, conversely, they are acts being an integral part of an operation which meets the three constitutive criteria¹¹⁵ that makes the operation qualify as DPH.

Concerning “the return”, the Interpretive Guidance elaborates saying “as long as the return from the execution of a hostile act remains an integral part of the preceding operation, it constitutes a military withdrawal and should not be confused with surrender or otherwise becoming *hors de combat*.” The return ends once the individual in question has physically separated from the operation.¹¹⁶

¹¹³ See Melzer, *supra* footnote 2, p. 66

¹¹⁴ *Ibid.*, p. 67

¹¹⁵ See chapter 4.5 in this paper

¹¹⁶ See Melzer, *supra* footnote 2, p.67

4.8 Human Shields

The use of civilians as human shields represents a contemporary challenge within the legal area of IHL. The occurrence of the concept has jeopardized the protection of the civilian population in armed conflicts such as the Iraq-Iran war, and in both Operation Desert Storm and Operation Iraqi Freedom. Other examples are from the wars of former Yugoslavia, and also Hezbollah's extensive use of civilians as living shields during the Second Lebanon war.¹¹⁷

The notion of human shields appears in two situations: a) in the situation where civilians are used as hostages (i.e. involuntary human shields), and b) in the situation of voluntary human shielding. Regarding the use of human shields in NIAC there is no treaty-based prohibition.

Article 51 (7) AP I states that "the presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations". Any violation, by the enemy, of this rule would not relieve an attacker of his or her legal obligations to take precautions to protect the civilian population and civilians.¹¹⁸ In agreement to Article 51 (7) AP I, the prohibition is already manifested in Article 28 GC IV reading "the presence of a

¹¹⁷ See Erlich, Reuven. *Hezbollah's use of Lebanese civilians as human shields: the extensive military infrastructure positioned and hidden in populated areas. From within the Lebanese towns and villages deliberate rocket attacks were directed against civilian targets in Israel.* Intelligence and Terrorism Information Center at the Center for Special Studies (C.S.S.), November 2006

<http://www.jewishvirtuallibrary.org/jsourc/arabs/hiz/part1.pdf>

See also Schmitt, Michael. *Human shields in International Humanitarian Law.* Columbia Journal of Transnational Law, vol.47. 2008-2009

¹¹⁸ Art. 51 (8) AP I

protected person may not be used to render certain points or areas immune from military operations.”

In accordance with customary law, the PoWs are provided protection against human shielding in Article 23 (1) GC III. Article 19 (2) GC I provides the same protection for medical units. Moreover, the use of human shields is recognized as a war crime.¹¹⁹ Using PoWs as human shields was recognized to be a crime by the ICTY Appeals Chamber in *Prosecutor v. Blaskic*.¹²⁰

The Interpretive Guidance acknowledges that in the case of civilians voluntarily and deliberately positioning themselves to physically obstruct military operations of a party to the conflict, the act of voluntary human shielding could directly cause the threshold of harm required to qualify as DPH. In cases of operations involving artillery or air attacks where the presence of voluntary human shields often has no adverse impact on the military capacity to destroy a shielded military objective, the Interpretive Guidance claims conversely.¹²¹ The wording in the Interpretive Guidance gives the impression of making a distinction between the voluntary and involuntary nature of human shielding, giving the result that only the act of voluntary human shields can (under certain circumstances) amount in DPH. However, in a post released commentary,¹²² it is stressed that the Interpretive Guidance in general does not distinguish between the act of a voluntary and an involuntary human shield in determining whether the act qualifies as DPH. Accordingly, the Interpretive Guidance claims that the unlawfulness of an act has no bearing on its qualifications as DPH.

¹¹⁹ See Rome Statute of the International Criminal Court Art. 8 (2) (a) (viii) “taking hostages” and (b) (xxiii) ”utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations...”

¹²⁰ *The Prosecutor v. Blaskic*. ICTY Appeals Chamber, 29 July 2004, Case No. IT-95-14-A.
<http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf>

¹²¹ See Melzer, *supra* footnote 2, p. 57

¹²² See Melzer, *supra* footnote 86, p. 869

Voluntary human shields do not enjoy civilian protection against direct attack, which means that they do not fall under the principle of proportionality (the balance between military necessity and civilian losses). However, the UK Manual of the Law of Armed Conflict (2010) is open to the consideration of applying the principle of proportionality even in situations where human shields are being used.¹²³ If the principle of proportionality is to apply, the lawfulness of the shielded target must be established. It is argued that the issue of the status of the human shields is of little consequence during an attack, as long as the balance of proportionality is intact by their presence in or near a lawful target.¹²⁴ The enemy's unlawful activity may, however, be taken into account in the process of assessing the proportionality between the incidental loss or damage and the expected military advantage. The "for such time" concept must be of guidance in the consideration of when a voluntary human shield can be attacked. Since not much preparation is needed for deployment of voluntary human shields, they can only be attacked while being physically in or near the lawful target. In the Interpretive Guidance the concept of voluntary human shields is a selected example placed under the section of Direct Causation. On the Fourth Expert Meeting¹²⁵ the topic was referred to as "quantitative threshold".

¹²³ See The UK Manual of the Law of Armed Conflict (2010), p. 26

¹²⁴ See Dinstein (2010), p. 154

¹²⁵ See The International Committee of the Red Cross and the TMC Asser Institute (2006), p. 44

A recent conviction in the southern command military court in Israel illustrates an example of the legal development concerning the use of human shields. According to News sources¹²⁶ the southern command military court convicted two Israeli soldiers on Sunday 3 October 2010 of using a young Palestinian boy as human shield during the 2008-2009 offensive on Gaza (Operation Cast Lead). The two combat soldiers from the Givati Infantry Brigade were convicted of offences including inappropriate conduct and overstepping authority for ordering a 11-year-old Palestinian to search bags suspected to have been booby trapped. The conviction is the first of its kind in relation with what is by the Israel Defense Forces (IDF) referred to as “neighbor procedure”, the use of human shields during searches and pursuits. IDF protocol strictly prohibits the use of civilians as human shields.

The former commander, Yoni Lichtman, of the two soldiers criticized the court of “attempting to please the world”, as a respond to international pressure on Israel following Operation Cast Lead.

The mere admittance of the legal challenge of human shields implies that human shields are considered to be protected from direct attack, thus they are not regarded, in general, as an example of DPH.¹²⁷

¹²⁶ See Pfeffer, Anshel (3 October 2010). ”IDF soldiers convicted of using 11-year-old as human shield in Gaza”. *Haaretz*

<http://www.haaretz.com/news/diplomacy-defense/idf-soldiers-convicted-of-using-11-year-old-as-human-shield-in-gaza-1.316867>. Retrieved 11 October 2010.

See also Lappin, Yaakov (4 October 2010). “2 soldiers convicted of using boy as human shield”. *The Jerusalem Post*

[http://www.allvoices.com/s/event-](http://www.allvoices.com/s/event-6924035/aHR0cDovL3d3dy5qcG9zdC5jb20vSXNyYWVvL0FydGljbGUuYXNweD9pZD0xOTAwOTQmYW1wO1I9UjI=)

[6924035/aHR0cDovL3d3dy5qcG9zdC5jb20vSXNyYWVvL0FydGljbGUuYXNweD9pZD0xOTAwOTQmYW1wO1I9UjI=](http://www.allvoices.com/s/event-6924035/aHR0cDovL3d3dy5qcG9zdC5jb20vSXNyYWVvL0FydGljbGUuYXNweD9pZD0xOTAwOTQmYW1wO1I9UjI=). Retrieved 11 October 2010.

¹²⁷ See Melzer, supra footnote 86, p. 872

5 CONTINUOUS COMBAT FUNCTION

Members of organized armed groups belonging to a non-state party to an armed conflict cease to be civilians and lose their protection against direct attack for as long as they assume their continuous combat function. As previously mentioned under chapter 4.1, this criterion differs from the “unless and for such time”-criterion. The key to the difference in status is “membership”. While serving a continuous combat function the member waives his or her initial civilian right to protection.

Continuous combat function is a new term to the IHL, and appeared for the first time in the Interpretive Guidance. As depicted above, the necessity of such term has been following the increasing occurrence of acts of terror and by the development in weaponry.

The term “organized armed group” is generally seen as contrary to regular State armed forces. Under an IAC the term usually comprises irregular armed forces belonging to a State (such as certain militias, volunteer corps and organized resistance groups).¹²⁸ In a NIAC an organized armed group usually refers to the armed forces of a non-state party to the conflict.¹²⁹ The Interpretive Guidance has chosen to define “organized armed groups” as irregular constituted armed forces of a State or a non-State party to an armed conflict.¹³⁰ In order for an organized armed group to, per definition, belong to a party to the conflict, it must be a *de facto* relationship between the organized armed group in question and a party to the conflict. In practice this means that the organized armed group must conduct hostilities on behalf of and in agreement with that party. This clarifies the status of “independent” armed groups, leaving its members with status as civilian according to the HagueReg, the GCs and its APs¹³¹ unless the level of violence reaches the threshold of

¹²⁸ Art. 4 A (1), (2) GC III

¹²⁹ According to the wording in Art.1 (1) AP II it is a distinction “...take place in the territory of a High Contracting Party between *its* armed forces *and* dissident armed forces *or* other organized armed groups...” (emphasis added)

¹³⁰ Melzer, *supra* footnote 86, p. 839

¹³¹ Melzer, *supra* footnote 2, p. 23

intensity and organization where the independent armed group become a party to a separate armed conflict. If the situation escalates to that point, its members will change status from civilians to members of an organized armed group.

According to the Interpretive Guidance individuals assuming a continuous combat function are persons whose continuous function involves the preparation, execution, or commands of acts or operations amounting to DPH.¹³² However, it will be an undeniable practical challenge to distinguish the members of an organized armed group who have a continuous combat function and thereby may be attacked at any time, from those who do not have a continuous combat function but who on occasions pick up arms and thereby have the status of a civilian directly participating in hostilities who can only be lawfully targeted accordingly with “unless and for such time”. When an individual is positively identified having directly participated in hostilities on a previous occasion, how can the adversary know whether that was a periodic engagement or an operation conducted on behalf of an organized armed group and the individual assumes a continuous combat function? During the planning of a military operation, it is a practical challenge to acquire adequate information in order to decide whether or not a civilian meets all the conditions of DPH. The adversary must be equipped to distinguish between the “unless and for such time”- individual who has walked through the revolving door reassumed his or her protected status as a civilian and the member of an organized armed group assuming a continuous combat function and thereby having entailed a loss of protection. According to 50 (1) 2nd sentence AP I this means that in all cases of doubt, the individual in question must be considered to be a civilian.¹³³ This shakes the whole foundation of the concept of continuous combat function, as the concept is built on function, rather than formal membership. Like combatants, those with a continuous combat function may be attacked on the basis of their status alone. Another challenge is where a combatant is in a situation that acquires him or

¹³² Ibid., p. 34

¹³³ See also Sandoz, Zimmermann, Eberlin, Gasser & Wenger. *supra* footnote 83, p. 1453, para. 4789, 3rd sentence, emphasizing when in doubt concerning the status of an individual, he or she shall be presumed to be a civilian

her to act in self defense, and he or she must make a split-second decision on whether or not the attacking individual is a lawful target.

The Commentary on the APs¹³⁴ emphasizes that “those who belong to armed forces or armed groups may be attacked at any time.” This is in accordance with the notion of continuous combat function. It is in attempt to prevent members of an organized armed group from gaining an operational advantage over members of State armed forces, that the first mentioned only walk through the revolving door by assuming or stepping out of a continuous combat function. As mentioned above under chapter 4.2, during the First Expert Meeting¹³⁵ it was a broad agreement among the experts that members of the armed forces are lawful targets at all times for the duration of an armed conflict, based on their entitlement to take up arms any time. If the loss of protection against direct attack should be limited in equivalence to the “unless and for such time” exception in DPH, the members of organized armed groups would gain an irrational operational advantage over members of State armed forces.

5.1 The membership approach

For the purpose of this paper, the membership approach will reflect the perspective of the Interpretive Guidance. However, for the purpose of discussion, it will be given an account for Israel’s membership approach by the example of the *Targeted Killing Judgment*.

The Interpretive Guidance operates with a functional criterion for membership. Whenever referring to membership in an organized armed group, the Interpretive Guidance means membership based on continuous combat function, not based on formal membership. Membership in an organized armed group determined by functional criteria has been criticized because of the difficulty of establishing a civilian participant’s future intent on past practice. However, members of organized armed groups belonging to a party to a conflict, who assume a continuous combat function involving the preparation, execution, or

¹³⁴ Ibid., p. 1453, para.4789, 1st sentence

¹³⁵ See The International Committee of the Red Cross and the TMC Asser Institute (2003), p. 6

command of acts or operations amounting to direct participation in hostilities, lose protection from attack for such time. Members of an organized armed group who do not regularly perform combat duties continue to enjoy full civilian protection from attack unless they directly participate in hostilities. Adversely, members of the armed forces and participants in a *levee en masse* do not qualify as civilians, and may therefore be attacked based solely on their status as such, regardless of whether they are directly participating in hostilities at the time of attack.

Critics¹³⁶ have pointed out the unfortunate imbalance between members of organized armed groups and members of state military forces; even when membership is indisputable established, a member of an organized armed group cannot lawfully be attacked unless admitting a continuous combat function, whereas a member of a state armed force is a lawful target even when established that he or she does not perform any functions amounting to the equivalent of DPH. In the *Targeted Killing Judgment* the issue of membership is addressed in connection with terrorist organizations. “In its war against terrorism, the State of Israel employs various means. As part of the security activity intended to confront the terrorist attacks, the State employs what it calls “the policy of targeted frustration” of terrorism. Under this policy, the security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel.”¹³⁷

The judgment dismisses any personnel categories beside “combatants” and “civilians”. In the discussion concerning members of terrorist organizations petitioners note that the State refuses to grant those members rights and protections in accordance with IHL, with “The result [...] that the State wishes to treat them according to the worse of the two worlds: as combatants, regarding the justification for killing them, and as civilians, regarding the need

¹³⁶ See Schmitt, Michael N. *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*. Harvard National Security Journal. Volume 1. 2010, p. 23

¹³⁷ The Supreme Court Sitting as the High Court of Justice [December 11 2005] *Before President (Emeritus) A. Barak, President D. Beinisch, and Vice President E. Rivlin*. Judgment, HCJ 769/02, p. 2, para. 2

to arrest them and try them. This result is unacceptable.”¹³⁸ The *Targeted Killing Judgment* acknowledges the difficulty in the issue of correct and proper classification of terrorist organizations and its members. Professor Dinstein gives emphasis to a third category, by saying that “a person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant.”¹³⁹

During the Second Expert Meeting¹⁴⁰ several experts agreed on the importance of distinguishing between the armed wing of an organized armed group and its other sections, ensuring that only the members whose job it is to conduct DPH can be regarded as military targets. Furthermore, it was suggested that one should identify who is targetable within a state’s armed forces and then apply the same criteria to non-state armed groups. By doing that, it would be easier to determine whether one particular member of an organized armed group could be directly targeted. If implemented, the concept would definitely be of practical use, though it will require resourceful intelligence to gain such knowledge about the internal structure and hierarchy of all organized armed groups participating in an armed conflict. The Interpretive Guidance responds to this challenge by stating that the distinction must be made based upon “information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances.”¹⁴¹ Furthermore, it acknowledges another challenge by saying “In practice, the informal and clandestine structures of most organized 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.” As an *interpretive guidance* the Interpretive Guidance must be careful when giving criteria upon which a distinction between a military target and a civilian object will be based. Finding a functional solution generally applicable in practical situations is difficult. Disengagement from an organized armed group sends the civilian back through the revolving door

¹³⁸ Ibid., p. 3, para. 5

¹³⁹ See Dinstein (2010), p. 36

¹⁴⁰ See The International Committee of the Red Cross and the TMC Asser Institute (2004), p. 22

¹⁴¹ See Melzer, supra footnote 2, p. 35

regaining his or her protected status, and can be expressed explicitly or implicitly by conclusive behavior.¹⁴²

The question is whether or not a mere membership in an organized armed group can qualify as DPH. According to Article 43 (2) AP I members of armed forces¹⁴³ of a party to the conflict are combatants and thereby entitled to conduct DPH. If membership in an organized armed group will result in loss of the civilian immunity against direct attack, it will be in conflict with the rules established in Article 43 AP I concerning armed forces.

Professor Solis depicts a situation using a mere member of al Qaeda as an example. His conclusion is that according to traditional IHL mere membership without a continuous combat function is not enough to make an al Qaeda member a lawful target.¹⁴⁴ However, if there is a Common Article 3 armed conflict in progress and the al Qaeda member is directly participating in the Common Article 3 armed conflict, either as an individual assuming a continuous combat function or as a spontaneous, unorganized act, the member might be targeted. This illustrates the requirement of DPH in NIACs as well as in IACs. The direct participation must be in connection with hostilities during an armed conflict.

The membership approach was discussed during the Fourth Expert Meeting, “leading to the conclusion that a generalized membership approach was too wide and had to be restricted to those members who continuously assumed a combatant function, because that category best corresponded to the concept of “armed forces” of a party to the conflict.”¹⁴⁵

¹⁴² See Melzer, *supra* footnote 2, p. 72

¹⁴³ See Art. 43 (1) AP I

¹⁴⁴ See Solis (2010), p. 544

¹⁴⁵ See The International Committee of the Red Cross and the TMC Asser Institute (2006), p. 31-32

5.2 The revolving door mechanism

The mechanism referred to as the “revolving door” is also referred to as “farmer by day and fighter by night”. The term “unless and for such time”¹⁴⁶ is applicable in both the situation where a civilian conduct DHP only once never to do it again, and in the situation where a person continuously conduct DPH and deliberately take advantage of his or her protected status. In the latter situation the civilian will step in and out of protection (like through a revolving door), losing protection from attack for the duration of a specific hostile act, regaining protection in between military operations. The revolving door constitutes a serious practical challenge for the adversary having to implement different and constantly changing legal regimes in relation to the same person.¹⁴⁷ For the duration of directly participating in hostilities the civilian is a lawful target, but “unless and for such time” he or she is protected against direct attack and if found and held accountable, he or she must be prosecuted under domestic law.

During the Vietnam War the Viet Cong organized peasants in the territory under their control, making them “farmers by day and fighters by night” in their fight against the US and the South Vietnamese government. In 1977, three years after the end of the Vietnam War, the GC I-IV APs were constituted. The concept of DPH has been discussed before the Interpretive Guidance, but the element of membership is new to the discussion.

As mentioned above, the notion of continuous combat function concerning members or organized armed groups belonging to a non-state party was introduced for the first time in the Interpretive Guidance. According to what is previously discussed under this chapter, the attempt to balance the legal position between state armed forces and organized armed groups by lessening the traffic through the revolving door, has altered the traditional “unless and for such time”-criterion for this group by adding the membership-criterion. However, the practical changes have not managed to gain footing yet.

¹⁴⁶ Art. 51 (3) AP I, Art. 13 (3) AP II

¹⁴⁷ See The International Committee of the Red Cross and the TMC Asser Institute (2004), p. 23

6 TARGETING – Operationalizing the Interpretive Guidance

As a general principle of law, a person shall be held innocent until proven guilty. In IHL, a person shall be considered a civilian in cases of doubt. How can there be made a practicable general rule distinguishing between those with a continuous combat function from those who lose protection against attack only unless and for such time they take a direct part in hostilities? In cases where a civilian is caught while conducting the act, this distinction is irrelevant. The same must apply when a civilian is caught in conducting measures preparatory, deployment or proven returning from a military operation having conducted DPH. However, as one rarely can know for sure the accurate network position an individual holds within an organized armed group, the concept of continuous combat function is difficult to deal with in a practicable way. An alternative is, in cases where formal membership in an organized armed group is established, that these members regardless of role and function shall be lawful targets to the adverse. The dysfunctional element in this alternative is how to distinguish between the voluntary and involuntary members. Even based upon the criterion of formal (as opposed to functional) membership, there is a danger of creating a paradox by making involuntary members lawful targets and thereby conducting a second offence towards such individuals. How to make targeting decisions concerning those whose formal membership cannot be established, is another challenge. If making formal membership a criterion documenting status, there must still be a subsidizing rule covering this group. Most likely, it will be impossible to create guidelines universally applicable comprising anything more than “regular” DPH. In accordance with this perspective, the concept of continuous combat function cannot apply in cases not already covered by Article 51 (3) AP I and Article 13 (3) AP II.

6.1 Targeting decisions

When making a targeting decision, all of the four core principles of IHL¹⁴⁸ are involved, in particular the principle of distinction. The distinction between civilians and combatants, and between civilian objects and military objectives, must be made as lawful attacks only

¹⁴⁸ See chapter 2.3 in this paper

can be directed towards combatants and military objectives. In the planning of a military attack, the element of military necessity must be the first principle to be considered. If the planners decide that the targeting is a military necessity, the extent and volume of potential loss of civilian lives must be mapped. If the planners decide that proportionality is quantified, the military attack must be carried out in accordance with the rules of precautions in attack in Article 57 AP I. Furthermore, in the planning and targeting decision arms that will cause unnecessary suffering must be avoided. In addition to these four principles, Article 51 (4) AP I (“the indiscriminate rule”¹⁴⁹) applies. The Article (a) and (b) establish the principle of distinction, whereas the Article (c) establishes the principle of proportionality.

As opposed to a direct attack against civilians, an indiscriminate attack is not intentionally trying to harm the civilian population. According to Professor Dinstein “The key to finding that a certain attack has been indiscriminate is the nonchalant state of mind of the attacker. Any reconstruction of that state of mind must, however, factor in the habitual “fog of war”, recalling that the information available to the attacker in real time may have been faulty or incomplete.”¹⁵⁰ An example is the area bombing of Elverum (“Elverumsfullmakten”) in 1940 where the Germans were targeting the Norwegian King and Government as they were trying to leave the country. The bombing caused harm and destruction excessive to the actual target.

Another established example of an indiscriminate attack is from the Gulf War I where the Al Furdos bunker in central Baghdad was bombed in 1991 by U.S. Air Force, killing over 200 people, most of them civilians. The bombing took place late at night when only a small number of military personnel would be inside. It is indisputable that the bunker was a lawful military target as it functioned as an important command and control center and also as the secret police headquarters. However, the bunker also served as an air-raid shelter for

¹⁴⁹ The indiscriminate rule was first raised in Art. 24 (3) 1923 Hague Rules of Air Warfare and was repeated in Art. 51 (4) AP I.

¹⁵⁰ See Dinstein (2010), p. 127

the families of the military personnel assigned to the bunker. The Americans relied on intelligence evidence indicating the military importance of the bunker, and denied having any knowledge of the dual-use.¹⁵¹

6.2 Rules Of Engagement

Rules of engagement are not IHL and the two must therefore be differentiated from one another. The term “ROE” does not appear in either the GCs or the APs. ROE are not domestic law, and not treaty law, they are military directives issued by a single country, an international organization or a military alliance.¹⁵² They rest upon national policy and operational requirements as well as upon law. The purpose of ROE is to regulate the use of force in armed conflict, primarily in order to make sure to avoid an unintentional outbreak of war, or in order to avoid the escalation of an ongoing conflict, to secure political governing or to make sure that the public international law is implemented where required.¹⁵³ The foundation of ROE is customary law, IHL, military missions and political objectives.¹⁵⁴

Both NATO and the UN have developed documents and methods for ROE applicable for military operations based on a mandate from a resolution from the UN Security Council. The process of composing ROE is thorough, and when a ROE is authorized, the interpretation of how to implement the ROE must be done within the political context of which the ROE was composed. The ROE are meant to function as an interpretive guidance or as a support element in order to carry out operations within the frame of national legislation.

In peacekeeping operations, the use of force is limited to the act of self defense, which means that a ROE challenge will be the definition of self defense. The specified content of

¹⁵¹ I.c., also see Solis (2010), p. 534-535

¹⁵² See Dinstein (2010), p. 30

¹⁵³ See Dahl (2008), p. 398

¹⁵⁴ See Solis (2010), p. 494

the right to self defense is often embodied in Standing Rules of Force (SRUF) given by national governments. Although ROE are supposed to be of a dynamic character in order for its function to be optimal, the SRUF do not change from mission to mission. They stay the same, and the threshold of when acts of self defense can be conducted differs from one national government to another.¹⁵⁵ Naturally it will create practical challenges in NATO operations, when some membership states will act in self defense on the criterion of established hostile intent, while others will be under a more reserved SRUF. Opinions on how soon after an attack an act of self defense may be conducted will also differ. Does the right to self defense include the right to neutralize a threat? The respect for the “blue line”¹⁵⁶ is another element that might be interpreted more literally by some than by others.¹⁵⁷

The USS Cole bombing was a suicide attack against the U.S. Navy destroyer USS Cole (DDG67) that took place on 12 October 2000 in Aden, Yemen. The al-Qaeda claimed responsibility for the attack that killed 17 American sailors and injured another 39. The USS Cole sailors guarding the destroyer had instructions not to fire at suspicious craft. On orders of their captain they were carrying unloaded guns and were ordered not to fire unless fired on. An extract by an article Stephen Robinson from *The Daily Telegraph* published on 15 November, 2000¹⁵⁸ describes the situation of ROE like this:

“Petty Officer Jennifer Kudrick, a sonar technician who survived the attack, said: "If we had shot those people, we'd have gotten in trouble for it. That's what's frustrating about it. We would have gotten in more trouble for shooting two foreigners than losing 17 American sailors."

¹⁵⁵ I.c.

¹⁵⁶ The “blue line” is the geographical operational area of a UN Force

¹⁵⁷ See Dahl (2008), p. 400

¹⁵⁸ See Robinson, Stephen (15 November 2000). "Bombed US warship was defended by sailors with unloaded guns". *The Daily Telegraph* (London: Sunday Telegraph).

<http://www.telegraph.co.uk/news/worldnews/middleeast/yemen/1374316/Bombed-US-warship-was-defended-by-sailors-with-unloaded-guns.html>. Retrieved 24 September 2010.

Petty Officer John Washak was carrying an M60 machine gun at the stern when the ship was attacked. Seconds after the explosion and with blood on his face, he pointed his gun at a second craft to warn it off, believing - incorrectly - that the Cole was still under attack. Even then a senior petty officer ordered him to point the gun away, reminding him: "That's the rules of engagement: no shooting unless we're shot at."

The term "hostile intent" is considered a possible criterion for a lawful act of self defense as a part of the technical terminology of ROE. In the context of hostilities, hostile intent does not have requirements of equivalence to "intent" in criminal proceedings. During the Third Expert Meeting¹⁵⁹ hostile intent was unanimously rejected as a requirement in determining DPH. Hostile intent has been of a particular interest in situations where the enemy engages in activities with no direct application of violence, such as CNAs.¹⁶⁰ However, even as a criterion under ROE, one must be careful when using hostile intent as a justification for the use of lethal force against civilians, as it can be a practical challenge to draw the line in determining and proving intent.

6.3 Targeted killings

A targeted killing can be defined as "the intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting done at the direction of the state, in the context of an international or non-international armed conflict".¹⁶¹ In the Interpretive Guidance section IX, the "kill or capture"-discussion takes place in light of the principle of military necessity and the principle of humanity. For the purpose of this paper, I will not address that discussion here. The topic will, under this chapter, be limited to (targeted) killings.

Whether or not targeted killings are prohibited must narrow down to the circumstances of each specific killing. All enemy combatants in IAC can be lawfully targeted at all times, unless the combatant has retired from military service or become *hors de combat*.¹⁶² The

¹⁵⁹ See The International Committee of the Red Cross and the TMC Asser Institute (2005), p. 37

¹⁶⁰ See The International Committee of the Red Cross and the TMC Asser Institute (2004), p. 24

¹⁶¹ See Solis (2010), p. 538

¹⁶² See Dinstein (2010), p. 34

targeting of lawful combatants includes taking out high-ranked commanders and other individual combatants who serve an important military function. Understood as killings of individual enemy combatants, targeted killings are not prohibited under the LOIAC.¹⁶³

Targeted killing has become a common tactic in fighting terrorists. Sometimes it can be disputable where to draw the line between a politically motivated assassination and a tactically motivated targeted killing. Looking at the definition of targeted killing by Professor Solis, it is, however, a criterion that the targeted killing takes place during an ongoing armed conflict. The person who authorizes a targeted killing must have targeting authority. Several governments, including the U.S., Israel, the U.K., Germany, Russia, Pakistan and Switzerland, have acknowledged to have resorted to targeted killings in their fight against terrorist activities.¹⁶⁴ The concept of national self-defense constitutes the justification for targeted killing. In Yemen on 3 November 2002, a CIA-operated Predator unmanned aerial vehicle (UAV) fired Hellfire missiles at a SUV-style automobile carrying Qaed Salim Sinan al-Harethi, a man believed to be an al-Qaeda senior lieutenant who has been suspected to play a role in the USS Cole bombing. There were five other men with Qaed al-Harethi in the vehicle, including the U.S. citizen Kamal Derwish, and all six men were killed. The killing was condemned by human rights organizations as an execution, without any trial or proof of guilt. Such objections, amongst others, triggered the birth of the Interpretive Guidance.¹⁶⁵

The lawfulness of a targeted killing reflects back to the very topic of this paper: the interpretation of DPH. It is a criterion for the targeting of a civilian that the targeted individual is directly participating in hostilities.¹⁶⁶ The participation can be through a continuous combat function or as a spontaneous unorganized act.

¹⁶³ Ibid., p. 103

¹⁶⁴ See Solis (2010), p. 539-543

¹⁶⁵ Ibid., p. 540

¹⁶⁶ See Art. 51 (3) AP I, 13 (3) AP II

7 CONCLUSION AND WAY FORWARD

7.1 Conclusion

Throughout the time and effort spent trying to make the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law practicable to operational forces, I have from time to time felt overwhelmed by all the challenges. I have not succeeded in finding a simple solution, but I have learnt to recognize the difficulties in attempting to make theory meet with the real world. But most importantly, I have grown to be convinced that finding ways to make the rules of IHL sufficiently practicable can be done. War is chaotic, which means that we must accept a generalization in order to implement the LOAC.

Prior to the GCs AP I, the IHL consisted of two branches, still known as “The Hague Law” and “Geneva Law”. The first mentioned embodies a set of rules concerning the conduct of hostilities, which in addition to the GCs AP I carries the purpose of protecting the combatants from unnecessary suffering. The latter comprises a set of rules which protects the victims of war, such as civilians and combatants who are *hors de combat*. After the GCs 1977 AP I these two branches converged into the IHL as we know it today. The mandate of today’s IHL is to protect both combatants and civilians. Unfortunately, sometimes reality creates “catch -22 situations”, confronting members of the operational forces with heavy decisions regarding targeting and protection.

It is indisputable that combatants are lawful targets, and conversely, that civilians enjoy protection against direct attack. However, the confusion enters with the notion of DPH. Unlike combatants who are lawful targets at all times (even while being asleep), civilians who directly participate in hostilities are lawful targets only for the duration of their conduct of DPH. The notion of DPH requires tools which can be used in determining when and for how long a civilian can be lawfully targeted. This is particularly a challenge in NIACs where the frequency of organized armed groups is high. The Interpretive Guidance has given members of these groups a separate criterion entailing loss of protection.

The membership criterion is based upon a continuous combat function and is in addition to the criterion of the conduct of DPH. Membership by function is, according to the Interpretive Guidance, the documentation clarifying the status of participants of organized armed groups. However, this approach has been the subject of massive debate because of all the challenges in making the criterion practicable. One of the weaknesses in this approach is the requiring of heavy intelligence. Another is the challenge of making sure that members of organized armed groups do not enjoy excessive operational advantages compared to the state armed forces.

7.2 Way forward

As stated in the introduction of this thesis, the challenges of distinguishing combatants from civilians are growing, while the importance of making such distinction does not decrease. The laws, rules and regulations applying to operational forces participating in armed conflicts are many. The complexity of armed conflicts entails a corresponding complexity in the rules, which requires knowledge and understanding from the combatants. In order for the combatants to be equipped to make decisions while in the field, the internal military educational system must make it a general priority to put IHL on the agenda. If being expected to apply IHL, the operational forces must be given a practicable guidance to follow, and the combatants must be taught and trained to interpret the guidance. At this point the operational forces have no clear guidance offering support when determining DPH. This means that there are still a lot of uncertainties around *when* a civilian can lawfully be targeted. As earlier mentioned, in situations of doubt of an individual's civilian status, he or she shall be considered a civilian enjoying immunity against direct attack.¹⁶⁷ The combination of the lack of a clear and practicable guidance and Article 50 (1) 2nd sentence AP I, may create situations of paralysation, making the operational forces unable to act. Without a clear manual, the operational forces may end up in situation similar to the example above where the ROE limited the USS Cole American sailors' alternatives of

¹⁶⁷ See Art. 50 (1) 2nd sentence AP I

acting to the verge of incapacitation. Hopefully, the ICRC's Interpretive Guidance will continue to be developed to the point of one day serving such function.

In addition to putting IHL on the agenda of the military educational system, the political awareness must promote acceptance and understanding around the challenges the operational forces are faced with while participating in armed conflicts, especially as a part of multinational forces, as described in the introduction.

Lasting internal conflicts and non-international armed conflicts in Russia, China and in the Middle East are of direct relevance concerning Norway's strategic position and raise fundamental questions regarding terrorism and the distribution of weapons of mass destruction (WMD).¹⁶⁸ War does concern the nation even in times of peace in our own country.

¹⁶⁸ See Lunde, Leiv et al. (2008), p. 85

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