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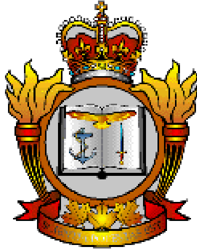

CIVILIANS TAKING DIRECT PART IN HOSTILITIES: WHY THE 'REVOLVING DOOR' MUST BECOME A ONE-WAY TURNSTILE

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CIVILIANS TAKING DIRECT PART IN HOSTILITIES:
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Abstract

In an armed conflict, it is a war crime to intentionally attack civilians. They have protected status. Civilians, however, who 'for such time as they take direct part in hostilities' become lawful military targets. The dilemma is determining what constitutes 'for such time' and 'taking part in hostilities'. This paper will argue that civilians may not opt in and out of protected status once they choose to regularly and persistently take direct part in hostilities. Civilians who participate in a hostile engagement do not resume protected status while waiting for the next assignment. There is no 'revolving door' of protected status. Once the civilian passes through, it is like a one-way turnstile and the civilian assumes the risk of being targeted. There are sound legal, policy and practical reasons why there is no re-entry to protected status unless the civilian clearly and unambiguously renounces direct participation. For instance, the principle of 'distinction' would lose its primary raison d'etre as a foundational principle if civilians were permitted to escape the consequences of direct participation in hostilities. This paper will introduce the basic sources and principles of the law of armed conflict as a background to the issues at play regarding who may be lawfully attacked in an armed conflict. Concepts like 'determining conflict status', 'individual battlefield status' and 'the law of targeting' will be reviewed to provide the theoretical underpinning for the enquiry into how and when civilians lose protected status in an armed conflict. A major focus of this analysis will be the ICRC's 2009 Interpretative Guidance on the notion of civilians taking direct part in hostilities. This report will be critically reviewed to highlight the difficulties behind the 'revolving door' concept. Finally, some alternative criteria will be suggested for determining when civilians have directly participated in hostilities.

INTRODUCTION:

> *It is not the object of war to annihilate those who have given provocation for it, but to cause them to mend their ways.*
>
> **Polybius, History (2nd century B.C.)**

International Humanitarian Law aims to achieve a dynamic balance between the principles of military necessity and humanity. Asymmetrical armed conflict brings these two principles into sharp focus because insurgents are co-opted civilians taking direct part in the conflict. The law of armed conflict seeks to protect civilians and their property. The challenge is determining under what circumstances these civilians, turned fighters, can be targeted. Starkly put, can civilians who take direct part in hostilities opt in and out of this protected status?

This paper will argue that there should be no 'revolving door' providing protected status. Civilians who persistently and regularly engage in an armed conflict assume the risk of being targeted until they unambiguously withdraw from taking direct part in hostilities.

The arguments advanced in this paper are based upon and supported by scholarly literature and other source materials.

Prior to examining the 'notion of civilians taking direct part in hostilities', the first three chapters outline the theory and sources of the law of armed conflict and its overall application to international and non-international armed conflicts. The paper examines the status of individuals on the battlefield; their corresponding rights, obligations, and consequences of participating in a conflict. The paper also reviews the law of targeting,

which determines which persons and objects may be attacked and in what manner. The armed conflict in Afghanistan, which began after the events of 9/11, will be used as a case study to illustrate how these concepts apply in practice.

The next four chapters focus on the key points and findings in the International Committee for the Red Cross's (ICRC) five year study on the 'notion of civilians taking direct part in hostilities'. The study culminated in a report released by the ICRC in 2009, called the *Interpretive Guidance*. The paper summarizes and critically reviews the *Interpretive Guidance* to demonstrate the significant legal, policy, and practical reasons why civilians should not be permitted to alternate from protected status, to legitimate targets and then back to protected status again.

In addition, this paper will refer to the notional 'commander' of regular forces and the decisions and dilemmas the commander faces when conducting counter-insurgency operations. The paper concludes by offering alternative methods to determine *when* a civilian is taking direct part in the armed conflict. The paper explores a contextual or case by case analysis and reviews examples from current military manuals. The case by case method is enhanced by identifying different criteria to evaluate direct participation. Finally, the principle of *distinction* is applied to amplify these determinations.

CHAPTER I – DETERMINING CONFLICT STATUS

The starting point for any discussion about the law of armed conflict and the use of force in an armed conflict, either against a combatant or civilian directly participating in hostilities, is characterizing the armed conflict status. This chapter will examine the sources of the international humanitarian law or, as also will be referred to in this paper, 'the law of armed conflict', as well as explaining the justifications for resorting to armed conflict and how armed conflict is regulated. In others words, what are the theoretical and legal underpinnings of the law applicable to the conflict. As well, it is necessary to establish which parts of the law of armed conflict apply in any given conflict. In particular, the specific rules governing the use of lethal force against military objectives, including the members of the armed forces or other organized armed groups or individual civilians; taking direct part in an armed conflict, is essential to this understanding.[1] The chapter ends with an examination of the two types of conflicts that occurred during the current armed conflict in Afghanistan.

A. Jus ad Bellum and Jus in Bello and the Theory of the Law of War

1. Jus ad bellum – the right to use force and to engage in armed conflict.

Jus ad bellum,[2] the right to engage in armed conflict, is the theoretical starting point for determining when military force can be used by one state against another.[3]

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[1] Michael Schmitt, "Targeting and International Humanitarian Law in Afghanistan", *Israel Yearbook on Human Rights*, 39 (2009), 311.
[2] "Jus ad bellum" means rules and laws that govern the lawfulness of, or the justification for, resorting to the use of force.
[3] Department of National Defence, Craig Forcese, Research Report: Assessment of Complainants Legal Claims, *Military Police Complaints Commission* 2008-042, 5.

Article 2(4) of the *U.N. Charter*[4] limits the application of military force and mandates that "all Members [States] 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." This rule has achieved the status of customary international law[5] and is indeed recognized by states as a fundamental principle of international law.

The other principle is under Article 51 of the *UN Charter* which recognizes the inherent right of self-defence.[6] Article 51 preserves the, "inherent right of the individual or collective self- defence if an armed attack occurs against a member of the United Nations, until the Security Council takes measures necessary to maintain international peace and security." The *U.N. Charter* also permits self-defence alliances such as NATO to exercise collective self-defence.[7]

There is considerable academic debate about whether the right of 'anticipatory' or 'pre-emptive' self-defence[8] can be used to justify the use of force against another state. The principal case relied upon to begin a review of the concept of pre-emptive self-defence is the *Caroline* incident. During the 1837 rebellion in Upper Canada, Canadian

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[4] *Charter of the United Nations*, 1945, 9 *Int. Leg*. 327 ("*UN Charter*")

[5] "Customary International Law" means the "general practice of states which is accepted and observed as law, i.e. from a sense of legal obligation". Theodor Meron, *Human Rights and Humanitarian Norm as Customary Law* (Oxford:Clarendon Press, 1989), 3.

[6] The term 'self defence' can be defined as, "the use of armed coercion by a state against another state in response to a prior use of armed coercion by the other state or by a non-state actor operating from that other state." See: Sean Murphy, "The Doctrine of Pre-emptive Self-Defence"**,** 50 *Villanova Law Review* 699, (2005), 4.

[7] Meron, *Human Rights and Humanitarian Norm…,* 6.

[8] The term 'anticipatory self-defense' refers to the use of armed coercion by a state to halt an imminent act of armed coercion by another state (or non-state actor operating from that other state). Likely a better term instead is the use of 'pre-emptive self defense' defined as: "the use of armed coercion by a state to prevent another state (or non-state actor) from pursuing a particular course of action which is not yet directly threatening, but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state". See: Murphy, The Doctrine of Pre-emptive…,4.

forces seized a US vessel, in American waters, known as *The Caroline* and destroyed it. The US protested to the United Kingdom and in the correspondence exchanged, U.S. Secretary of State Daniel Webster stated that preventive action by a foreign state is confined to cases in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[9]

The judicial wing of the United Nations, the International Court of Justice ("ICJ"), has refrained from taking a position on whether pre-emptive self-defence is permissible under international law, or whether if permissible, only under certain conditions. In the *Nicaragua* case[10], the ICJ advanced important interpretations regarding the status of law on the use of force, but the ICJ specifically refused to express a view on whether force was justified in response to an imminent threat of an armed attack.[11]

2. Jus in Bello – How the use of force is regulated.

The body of law theoretically known as *jus in bello*[12] or "battlefield law" as one author describes it[13], regulates armed conflict. A central tenet of the law of armed conflict is that *Jus in bello* or 'battlefield law' applies in cases of armed conflict regardless of whether the resort to armed conflict was lawful or justified.[14]

There are essentially two principal 'streams' of the law of armed conflict. The first stream protects victims of war; civilians and combatants. This is known as the

[9] *The Caroline Case*, Note of August 6, 1842, 2 Moore, *Digest of International Law*, 412.
[10] *Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 14 (June 27).
[11] Murphy, The Doctrine of Pre-emptive…, 4.
[12] "Jus in bello" means the rules and laws governing the conduct of armed conflict. Jus in bello applies in cases of armed conflict regardless of whether the resort to armed conflict was lawful or justified.
[13] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, (New York: Cambridge University Press, 2010), 22.
[14] Adam Roberts and Richard Guelff, *Documents on the Law of War*, 3d ed. (Oxford: Oxford University Press, 2000),1

'Geneva Stream' and is made up of the four Geneva Conventions of August 12, 1949[15] ("Geneva Conventions") or ("GC") and their two 1977 Additional Protocols ("API" and "APII").

The second stream is composed of international conventions which regulates the means and method of armed conflict on land, in the air and at sea. This is known as the 'Hague Stream'. These international conventions date back as far as 1899 and 1907 (and in particular the 1907 Hague Regulation IV) and include more recent conventions such as the Ottawa Convention which regulates the use of land mines (collectively the "Hague Law").[16]

B. The Difference Between an international Armed Conflict and a Non-International Armed Conflict.

There are two principal types of armed conflicts that will be discussed in this paper. The first is an international armed conflict, defined by Common Article 2 of the four Geneva Conventions. An armed conflict is of an 'international nature', if the conflict is between two high contracting parties to the Geneva Conventions. Hence, if the armed conflict is an international armed conflict, all four Geneva Conventions apply to that armed conflict and for those states that have ratified it, API and the Hague Law.[17] (Throughout this paper, this type of conflict will be referred to as a "Common Article 2

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[15] The first Geneva Convention deals with the wounded and sick ("GCI), the second Geneva Convention deals with the wounded, sick and shipwrecked at Sea ("GCII"); the third Geneva Convention deals with the protection of Prisoners of War ("GCIII") and the fourth Geneva Convention deals with the protection of Civilians ("GCIV").

[16] For a more complete outline of Hague Law and other international conventions which are concerned essentially with regulating the actual conduct of military operations including the methods and means of combat. See: Office of the Judge Advocate General, Law of Armed Conflict at the Operational and Tactical Level, *Joint Doctrine Manual* B-GJ-005-104/FP-021, 2001.

[17] Common Article 2 Conflicts can and typically do transition to conflicts of a non-international nature.

Conflict"). In addition, if the armed conflict involves a conflict in which peoples are fighting against colonial domination, alien occupation or racist regimes, then the Geneva Conventions and API apply. Customary international law also applies to Common Article 2 Conflicts.

If the conflict is an 'internal' armed conflict, that is if the opposing armed forces or organized armed group within a state are not the armed forces of another state, then it can be classified as non-international armed conflict.[18] In order for this type of conflict to be truly an internal armed conflict the test to be applied focuses on two key aspects of the conflict; (a) the intensity of the conflict; and (b) the organization of the parties to the conflict. The purpose is to distinguish a Common Article 3 Conflict from an unorganized and short term insurrections or terrorist activities, which would not be subject to the law of armed conflict.[19] Article 1(2) of APII also provides more clarity on the types of conflict that would not be considered an armed conflict namely, situations like internal disturbances, such as riots and isolated sporadic acts of violence and other similar acts of a similar nature. A Common Article 3 Conflict can become 'internationalized' if another state intervenes in the conflict. Therefore, one or more armed conflicts, either of an international or internal character, may be occurring simultaneously.[20] This often occurs in 'failed state' scenarios, as will be outlined below in discussing the armed conflict occurring within Afghanistan. There is a need in these situations to reconcile and apply the rules or both types of conflicts.

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[18] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, (New York: Cambridge University Press, 2010), 152.
[19] *Prosecutor v. Tadic*, IT-94-1-T, Judgment (7 May 1997), para. 562.
[20]Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge: Cambridge University Press, 2010, ed.) …, 26-28.

The body of international law that applies to the conflict is Common Article 3 of the Geneva Conventions and APII.[21] (Throughout this paper, I will refer to this conflict as a "Common Article 3 Conflict".) Common Article 3 essentially mandates in this type of conflict, that detainees, whether civilian taking no part in the hostilities, or armed forces who have laid down their arms, must be treated humanely and without discrimination. In addition, no judicial sentences may be carried out except by regularly constituted courts, adhering to "judicial guarantees which are recognized as indispensable by civilized peoples."[22]

C. What rules apply in armed conflict

Jus in bello rules seek to protect humanitarian values within large scale armed conflict. This is a delicate balance given that the law seeks to define and minimize "unnecessary" suffering during armed conflict. The law of armed conflict can therefore be distilled into three types of rules to promote this objective:

(1) who and what may be attacked;

(2) the means and methods used in executing lawful attacks; and

(3) treatment of persons subject to the authority of the enemy (e.g., persons captured and detained in time of war).[23]

[21] Common Article 3 Conflicts may start out as a Common Article 2 Conflict.
[22] Common Article 3(1) to all four Geneva Conventions.
[23] Derek Jinks, "Protective Parity and the Laws of War", *Notre Dame Law Review*, 79 (2004), 3.

The generally held view is that the nature or status of the conflict has important implications for the law governing the conduct of parties in any armed conflict.[24] The Geneva Conventions and API detail rules on the treatment of victims of international armed conflict, namely civilians but also protects soldiers who withdraw from the conflict, either by (a) surrendering, and thereby becoming prisoners of war; or (b) because they become sick or are wound during conflict. These soldiers are combatants who are '*hors de combat*'.

The principle of *distinction* is one of the foundational principles that apply during Common Article 2 Conflicts. This principle imposes an obligation on commanders to distinguish between legitimate targets of military necessity (both combatants and military objectives) and civilians and their property. It is of primary importance when selecting targets.[25] The law of armed conflict's norms regulating attacks during Common Article 2 Conflicts on the one hand and Common Article 3 Conflicts on the other, have become nearly indistinguishable.[26] Indeed, in the *Tadic* decision, the International Criminal Tribunal for the former Yugoslavia, Appeals Chamber held that the principle of 'distinction' which lies at the heart of the law of targeting, applies equally to non-international armed conflicts.[27]

Whether the conflict is classified as a Common Article 2 Conflict, or a Common Article 3 Conflict, customary international law applies to both. The Martens Clause first

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[24] Forcese, Research Report …, 12.
[25] Office of the Judge Advocate General, *Law of Armed Conflict at the Tactical…, para.204.*
[26] Schmitt, Targeting and International …, 308.
[27] *Prosecutor v. Tadic*, case no. IT-94-1. Decision on defence motion for interlocutory appeal on jurisdiction. 127 (Oct 2, 1995). This theory will be expanded upon in chapter 4 below.

incorporated in the 1899 Hague Land Warfare Regulations and explicitly addressed gaps in the law of armed conflict treaty coverage as follows:

> Pending the preparation of a more complete code of the laws of war, the high contracting parties deem it opportune to state, in cases not provided for in the rules adopted by them, the inhabitants and the belligerents shall remain under the protection of and subject to the principles of the law of nations, as established by the usages prevailing among civilized nations, by the laws of humanity and by the demands of public conscience.[28]

The maxim *lex specialis*, also known as the principle of speciality, holds that "as a rule, the special rule overrides the general law". In other words, if an action is regulated by both the general provision and a specific one, the later prevails as the most appropriate because it is more specifically directed towards the action.[29] Consider the issue of whether international human rights law applies during armed conflict. There is some debate as to whether the laws of armed conflict take precedence as *lex specialis or* does international human rights law remain applicable, governing where there is a gap in the law of armed conflict coverage.

There is no general consensus regarding the application of human rights law to conflicts regulated by the law of armed conflict. The European view is that the human right law applies in times of peace and armed conflict.[30] The ICJ attempted to clarify this murky area of the law. One decision essentially held that both regimes applied in some circumstances and in others, either had exclusive jurisdiction.[31] The US position, is that the law of war is the *lex specialis* of armed conflict, and as such, is a controlling body of

[28] Glazer, "Playing by the Rules: Combating Al Qaeda with the Law of War", *William and Mary Law Review*, 51 (2009), 963.
[29] Ibid.
[30] Solis, The Law of Armed …, 24.
[31] Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 43 ILM (2004), 1009, para. 106.

law with regard to the conduct of hostilities and for the protection of the victims of war. In other words, international human rights norms do not apply to armed conflicts falling under the jurisdiction of the law of war.[32]

An alternative view as to how armed conflict should be regulated is offered by Monica Hakimi. She argues that the law of armed conflict and law enforcement regimes, governing when states may resort to the use of deadly force and target, or preventatively detain non-state actors, should be abandoned and replaced with a new functional approach.[33]

Even if an armed conflict is characterized as a Common Article 3 Conflict, states may choose to apply the more the extensive Common Article 2 Conflict rules and protections to Common Article 3 Conflicts. In fact, Canada trains its forces to one standard when it comes to detaining persons apprehended on the battlefield. Canadian soldiers apply the safeguards under GCIII applicable to prisoners of war to these detainees, whether the Canadian Forces are deployed to an international armed conflict or non-international armed conflict.[34]

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[32] W. Hays Parks, Part IX of ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect", *International Law and Politics*, 42 (2010), 798.

[33] Monika Hakimi, "A Functional Approach to Targeting and Detention", *Michigan Law Review*, 110, (2012), 1369. She argues that the approach is "functional" in that it defines the authority to target or detain in terms of the substantive considerations that the law is intended to serve, not by reference to the formal categories. This functional approach demonstrates a common set of principles which she labels liberty-security, mitigation, and mistake should all animate the law on targeting and detention. In other words, the liberty security principle mandates that in order for targeting or detention to be justifiable the security benefits must out-weigh the costs to individual liberties. Her mitigation principle requires that states try to lessen those costs by pursuing reasonable, less intrusive alternatives to contain a threat. Last, the mistake principle requires that states exercise due diligence to reduce the stakes.

[34] Canada, Office of the Judge Advocate General, *Code of Conduct for CF Personnel*, B-GJ-005-104/FP-023 at 2-9. It states as follows:

> It is the legal obligation for PWs to be treated in accordance with the Third Convention. The CF will also apply the Third Convention to detainees because it represents a high level of protection

D. The Conflict Status in Afghanistan

1. International Armed Conflict.

The international community has widely accepted that the use of force in Afghanistan by the United States after the 9/11 attacks was justified. The United States determined that leaders of al Qaeda and a large part of its membership training camps were located within Afghanistan. The Taliban, who controlled all but a small part of that country, and were effectively its government, were requested by the United States to turn over al Qaeda to the Americans. The Taliban refused and made it clear that they would continue to give sanctuary to al Qaeda.[35]

After the 9/11 attacks, the UN Security Council acknowledged the right of the United States to invoke the right of self-defence[36] and condemned the terrorist attacks. For the first time in the history of the North Atlantic Treaty Organization (NATO), the United States invoked Article 5 of the *North Atlantic Treaty*[37], triggering a collective defense response from NATO members. In October 2001, the United States and coalition countries commenced air strikes against the Taliban and terrorist forces based in Afghanistan.

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for those persons. From an operational perspective it is also advantageous in that CF personnel may only be trained to one set of rules for the treatment of persons held under their control.

[35] George Aldrich, "The Taliban, al Qaeda the Determination of Illegal Combatants", *The American Journal of International Law*, 96 (No. 4 2002), 891.

[36] There are in fact two schools of thought on whether the use of force in these circumstances was justified on the basis of self-defence or 'pre-emptive' self-defence. Most international lawyers believe that the 9/11 armed attacks justified an Article 51 self-defense response. Some scholars have asserted that the United States' use of force constituted pre-emptive self-defense because the, "armed attack against the World Trade Center and the Pentagon was over, and no defensive action could have ameliorated its effects." See Murphy, The Doctrine of Pre-emptive Self-Defence …, 20-21.

[37] 1949, 34 U.N.T.S. 243.

Both Afghanistan and the United States were parties to the Geneva Conventions and, therefore, the armed attacks by the United States and other nations against the armed forces of the Taliban in Afghanistan, clearly constituted a Common Article 2 Conflict. In these circumstances, the Geneva Conventions, the Hague Law and customary international law applied.[38]

After the de-facto Taliban government was defeated in the latter part of the fall of 2001, the United Nations convened an assembly of prominent Afghans in Bonn, resulting in the "Bonn Agreement" and the creation of an Afghan interim authority in December 2001.[39]

The UN Security Council then issued resolution 1386 (2001), authorizing NATO to establish an International Stabilization Assistance Force (ISAF). This enabled authorized member states participating in ISAF to take "all necessary measures to fulfill its mandate". This type of UN Security Council resolution is commonly regarded as the Security Council's authorization for member states to use all necessary means, including the use of military operations and lethal force, to carry out the mandate under the UN's Security Council Resolution.[40]

[38] Aldrich, The Taliban al Qaeda …, 893.
[39] Forces, Research Report …,7.
[40] Ibid. Under Chapter VII of the *UN Charter*, the UN Security Council may authorize states to use force to return peace and security to a region. See Articles 39 to 44 of the *UN Charter*.

2. Non-International Armed Conflict.

In June of 2002, a group of respected Afghan elders and leaders, known as the *Loya Jirga,* elected Hamid Karzai, president of the transition authority, which the United Nations recognized as establishing a legitimate government over sovereign Afghanistan.[41] The Security Council renewed ISAF's mandate a number of times with Security Council resolutions 1510 (2003), 1563(2004), 1623 (2005), 1707 (2006), 1776 (2007). [42] Under the Chapter VII mandate, the newly installed Afghan Government began entering into agreements with various NATO countries which were part of ISAF to assist the government in bringing about peace and security to the region. ISAF member countries were no longer invading forces but there by UN Mandate and at the invitation of the Afghan Government. Thus the armed conflict in Afghanistan evolved from a Common Article 2 Conflict to a Common Article 3 Conflict. This conflict was between the Afghan Government, as supported by ISAF, and various insurgents groups, the most prevalent of which were the Taliban and al Qaeda.[43] Aldrich suggests that there were in fact two separate armed conflicts being waged in Afghanistan. The first conflict was with the Taliban. This was a separate and distinct armed conflict as it evolved from a Common Article 2 Conflict to a Common Article 3 Conflict.[44]

The second conflict was directly with al Qaeda and is not limited to the territory of Afghanistan. Aldrich suggests that Al Qaeda is a clandestine terrorist organization consisting of elements in many countries and composed of people of various

[41] Schmitt, Targeting in Internationally …, 308.
[42] Forcese, Research Report ..., 8.
[43] For the purposes of this paper, the assumption is that the Taliban did not control any territory to enable them to carry out sustained and concentrated military operations, thus APII was not engaged.
[44] Aldridge, The Taliban al Qeada and the Determination …, 893.

nationalities. He suggests they are dedicated to advancing political and religious objectives by the means of terrorist acts directed against the United States and other largely western nations.[45] The alliance with the Taliban in Afghanistan provided al Qaeda a sanctuary in which it could train and indoctrinate fighters and terrorists, import weapons and forge ties with other jihad groups and leaders to plot terrorist schemes.[46] According to Aldrich, Al Qaeda would fit a classic description of a 'non-state actor'. In this context, al Qaeda does not resemble a state nor is it subject to any international law and lacks international legal personality. Because it is not a legal entity, it cannot lawfully enter into any international conventions, let alone the Geneva Conventions. Most nations regard it as a criminal organization and, therefore, the conflict in Afghanistan against al Qaeda can be classified as a Common Article 3 Conflict.[47]

This view is actually supported by the *Hamdan*[48] decision, where the Supreme Court of the United States considered the case of Hamdan, a detainee who was captured during the Common Article 2 phase of the conflict when the US invaded Afghanistan. This detainee was associated with al Qaeda but not the Taliban forces. Al Qaeda was not an armed group supporting a party, namely the Taliban, to the conflict. Al Qaeda members could not be classified as combatants under GC III, Art. 4(A)(2) because they did not satisfy the four cumulative conditions (as will be explained in more detail in Chapter II below). Their status was that of civilians taking direct part in the hostilities.

[45] Ibid.
[46] *The 9/11 Commission Report: Final Report on the National Commission of the Terrorist Attacks Upon the United States* (New York: WW. Norton & Co, 2004), 47-67. The Commission reported that U.S. Intelligence estimates puts the total number of fighters who underwent instruction in Bin Ladin – supported training camps in Afghanistan from 1996 through 9/11 at 10,000 to 20,000. (67).
[47] Aldrich, The Taliban al Qaeda…, 893. This paper will not pursue the issue of whether attacks against al Qaeda outside the territory of Afghanistan continues as an Article 3 Conflict.
[48] *Hamdan v. Rumsfeld*, 548 U.S. 557.

The Court held that Common Article 3 Conflicts operated in "contradistinction" to Common Article 2 Conflicts. This established, at least as far as the United States is concerned, that the controlling interpretation of Common Article 3 requires that all armed conflicts not satisfying the requirements of Common Article 2, are *ipso facto* non-international conflicts within the meaning of Common Article 3.[49]

CHAPTER II- INDIVIDUAL BATTLEFIELD STATUS

In this chapter, the status of the individual on the battlefield will be examined as this is not only critical to the principle of *distinction* but also who may lawfully engage in hostilities. Therefore, the concepts of 'lawful combatants' and 'unlawful combatants' will be considered. As well, the rights, consequences and liabilities that flow from that status will be reviewed.

No one on the battlefield is without some sort of status with an accompanying level of humanitarian protections.[50] Margaret Stock puts it this way:

> Status determines the specific treatment to which a person is entitled. The international committee of the Red Cross has stated that during a conflict between two or more high contracting parties, the general principle of the Geneva Conventions is that everyone must have some sort of status – is a prisoner of war, civilian, or member of the medical profession. *There is no intermediate status; nobody in enemy hands can be outside the law.* (Emphasis added.)[51]

This means that under the Geneva Conventions and API, civilians have protected status as non-combatants.[52] They should not be intentionally attacked. Nor are they permitted to lawfully participate in combat. Those who do, can may be tried and

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[49] Geoffrey Corn & Eric Jensen, "Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations", *Israel Law Review*, 42 (2009), 9.
[50] Gary Solis, The Law of Armed …, 187.
[51] Stock, Detainees in the Hands of America …, 121.
[52] API Art. 51(3).

punished. This does not mean that civilians who take part in hostilities are not without certain protections. Among other provisions, Article 75 of API provides fundamental protections for persons who are in the power of a party to a conflict and who do not benefit from more favorable provisions or treatment under the Conventions. They are entitled to be treated humanely in all circumstances and enjoy minimum protections[53] without discrimination.[54]

A. Lawful combatant: combatant immunity and liability

At this juncture it is necessary to discuss the concept of "lawful combatants" or "privileged belligerents". A commander's goal is ultimately to destroy the enemy's will to resist and at the same time, incur the least amount of casualties, while using minimal military resources. Given these imperatives, it is vitally important that belligerents on the battlefield distinguish between combatants, who are lawful targets, and civilians, who are protected persons and who may never intentionally be targeted. Balancing the concepts of military necessity and humanity and the obligation to distinguish between lawful combatants and protected persons is perhaps the most fundamental tenet.[55]

At the very heart of the law of armed conflict, the principle of distinction between combatants and non-combatants (civilians) is paramount.[56] In its purest form, the law of armed conflict regulates hostilities to ensure that all feasible precautions are taken to ensure that hostilities are waged solely among the combatants of the belligerent parties.

[53] This includes, but not limited to inhuman treatment and not to be subject to torture, murder or other humiliating and degrading treatment.
[54] API Articles 45(3) and 75.
[55] Watkins, Combatants on Privilege Deliverance ..., 44.
[56] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge: Cambridge University Press, 2004, ed.) ..., 27.

There must at all material times be a stark and clear demarcation line separating combatants and civilians.[57]

For that very reason, it is necessary to examine who is a combatant, who is entitled to be a combatant and what rights and privileges are attached to combatant status. Any definition of combatant must first look at conflict status for guidance. Jurists look to defined terms in statutes to assist in the interpretation of its provisions; however, nowhere in the entire body of international law that encapsulates the law of armed conflict is the word 'combatant' actually defined. For instance, Geneva Convention III offers no definition of the word combatant, except it has been widely accepted that Article 4 outlines who may lawfully take part in hostilities, as supplemented by Articles 43 and 44 of API. The closest thing to a definition is Art 43(2) of API which seems to define combatant in the context of an Art 2 Conflict, "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains…) are combatants, that is to say they have the right to participate directly in hostilities."

In an international armed conflict, 'combatants' fall into two alternative categories as follows:

(i) Members of the armed forces of a belligerent party (except medical and religious personnel), even if their specific task is not linked to active hostilities; and

(ii) Any other person who takes active part in hostilities.[58]

Traditional categories include members of the armed force of a party to a conflict as well as members of militias and volunteer corps forming part of such armed forces.

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[57] KW Watkins, "Combatants, Unprivileged Belligerents and Conflicts in the 21st Century", *Judge Advocate General Newsletter*, 1 (2005), 44.
[58] Dinstein, *The Conduct of Hostilities* (2004 ed.)…, 27.

These would include regular armed forces and reserve members of that force. Many NATO countries have both regular force and reserve force members who would obviously fall into this category.

1. Combatant Immunity.

No one disputes or debates the right of a soldier, whether in the regular or reserve force, to fight as a belligerent on behalf of a party to a conflict and be protected by the concepts such as "combatant immunity" or "privileged belligerent". At the heart of the term 'combatant' denotes the right to participate directly in hostilities. Lawful combatants can directly and intentionally attack enemy combatants as targets of military necessity and cause death, injury and destruction.[59]

The key right of combatant immunity that results from a soldier's conduct on the battlefield is as follows:

> At bottom, warfare by its very nature consists of a series of acts of violence (like homicide, assault, battery and arson) ordinarily penalized by the criminal code of all countries. When a combatant, John Doe, holds a rifle, aims it at … a soldier belonging to the enemy's armed forces with an intent to kill, pulls the trigger, and causes … death, what we have is a pre-mediated homicide fitting the definition of murder in virtually all domestic penal codes. If, upon being captured by the enemy, John Doe is not prosecuted for murder, this is due to only one reason only. [The law of war] provides John Doe with a legal shield protecting him from trial and punishment…[60]

The combatant's privilege is in essence a license to kill or wound enemy combatants and destroy the other enemy's military objectives.[61] The very crux of this right is that lawful combatants cannot be prosecuted by domestic criminal courts for their

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[59] Ibid.
[60] Ibid., 31.
[61] Knut Dormann, The Legal Situation of Unlawful/Unprivileged Belligerents …, 45.

lawful conduct while engaging in hostilities during military operations. Combatant immunity excuses what would otherwise be criminal acts or a serious crime if carried out in peace time.[62] Margaret Stock frames the analysis another way:

> Under the Geneva Conventions in customary international law, combatants (belligerents) can legally inflict violence to kill other combatants, and if captured by the other side, are entitled to combatant immunity for such acts (although they can be detained for the duration of hostilities). As a general principle, however, combatants are not privileged to inflict violence on non-combatants, or otherwise violate other established principles of the law of war. If they do, and are captured, they may be tried and punished for their violation of the laws of war. [63]

Glazier argues that the "combatant's privilege", the immunity afforded to lawful combatants, is more important than the standards of treatment mandated for a prisoner of war. He further states that rules governing prisoner of war treatment would be of limited value if captured combatants can be criminally prosecuted for waging warfare.[64]

2. Prisoner of War Status.

In addition to combatant immunity, another right or privilege of being a lawful combatant is the entitlement to prisoner of war status; namely, the right upon capture by the enemy to be afforded all the rights and privileges of a prisoner of war under GC III.[65] As stated above, combatants withdraw from the hostilities by becoming *hors de combat*. As Dinstein observes:

> A combatant who is *hors de combat* and falls into the hands of the enemy is, in principle, entitled to the privileges of prisoner of war. Being a

[62] Ibid., 45.
[63] Stock, Detainees of America …, 120.
[64] Glazier, Playing by the Rules …, 999.
[65] GCIII, Article 4.

> prisoner of war means denial of liberty, i.e., detention for the duration of the hostilities (which may go on for many years).[66]

Again, as noted above, detention has only one purpose, to deny the ability of the combatant from further engaging in hostilities for the duration of the conflict. Detention is not due to any criminal act committed by this combatant during hostilities.[67] Therefore, even though his liberty is being temporarily affected, the soldier's life, well-being and dignity as a prisoner of war are guaranteed and preserved by the detailed provisions of GC III.

3. Consequences of combatant status.

Of course the corollary to combatant immunity and prisoner of war status is that until the soldier withdraws from the conflict, or is otherwise *hors de combat*; he or she remains a combatant and thus may be lawfully targeted by the enemy belligerents. Combatants may be attacked at any time until they surrender. So they are lawful targets even though they are not fighting or threatening the enemy. They may be attacked upon withdrawal, either to their forward operating base or to their main camp. This illustrates the downside of being a lawful combatant**.** A lawful combatant enjoys the combatant's privilege but also is a continuing lawful target.[68]

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[66] Dinstein, *The Conduct of Hostilities* (2004 ed.) …, 28.
[67] Ibid., 28.
[68] Gary Solis, The Law of Armed Conflict …, 188.

4. Summary of rights and consequences.

Parks articulates that the law of armed conflict recognizes the following seven rights or consequences of combatants' privilege. These can be summarized as follows:

1. Is entitled to carry out attacks on enemy personnel and objectives, subject to the specific law of war prohibitions (such as perfidy and denial of quarter) and limitations on the risk to civilians that may be incidental to an attack.

2. May be the object of lawful attack by enemy military personnel at any time, wherever located, regardless of the duties in which he or she is engaged.

3. Enjoys combatant immunity, that is, there is no criminal responsibility (a) for killing or injuring, (i) enemy military personnel or (ii) civilians taking a direct part in hostilities, or (b) for causing damage or destruction to property in connection with military operations, provided his or her acts, including the means employed to commit those acts, have been in compliance with the law of war.

4. If captured, is entitled to prisoner of war status.

5. If captured, must be treated humanely.

6. May be tried for breaches of the law of war.

7. May only be punished for breaches of the law of war as a result of a fair and regular trial.[69]

B. Combatancy: The Hague Law and the Geneva Conventions

1. The Criteria used to establish lawful combatants.

If the categories of combatants were limited to regular and reserve force soldiers, there would be no academic debate or controversy about lawful combatancy. Lawful and unlawful combatant status has its roots going back to the American Civil War. Francis

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[69] Parks, Part IX of the ICRC Direct Participation …, 778-779.

Lieber was likely the first to address the concept of guerrilla warfare and the classification of prisoners in a civil war. What became known as the "Lieber Code" underwent further development in the un-ratified "Brussels Declaration" of 1874. The first international convention which codified rules governing who can qualify as a "combatant" was adopted under the Hague Regulations of 1899. The following are the Hague Regulations:

> Article 1. The laws, rights and duties of war apply not only to armies, but also to also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed, distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or other volunteer corps constitute the army, or form part of it, they are included under the denomination "army."[70]

The Hague Convention (IV) of 1907 also adopted these conditions, but Article 2 of the 1907 version added a category of combatants called a "levée en masse"[71].

Hague Regulation 3 further prescribes that:

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[70] Glazier, Playing by the Rules …, 998.

[71] *Regulations Respecting the Laws and Customs of War on Land*, Annex to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, Laws of Armed Conflicts 63, 75. "*Levée en mass*" is defined as follows:

> The inhabitants of a territory which has not been occupied, who, on approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article I, shall be regarded as belligerents if they carry arms openly and if the respect the laws and customs of war.

> The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have the right to be treated as prisoners of war.[72]

In 1929, the first Geneva Prisoner of War Convention adopted the Hague Regulations' conditions for combatants outlining the former standard for prisoner of war eligibility. Dinstein argues that the Hague formula establishes four general – and cumulative – conditions for lawful combatancy:

I. Subordination to responsible command;
II. A fixed, distinctive emblem;
III. Carry arms openly; and
IV. Conduct warfare in accordance with the law of armed conflict.[73]

(Collectively the "Four Conditions").

He further observes that solely in the special circumstances of a *levée en mass* are conditions I and II not applied. He opines that the Four Conditions taken from the Hague Regulations establish the test for lawful combatancy and these are *considered to embody the 'customary law of war' on land*.[74] (This is an important point as will be discussed below.)

GCIII Art 4(A)(2) retains the Hague formula, which Dinstein argues makes the qualification for combatant status even more stringent. Art. 4(A) outlines these requirements:[75]

> Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

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[72] Dinstein, *The Conduct of Hostilities* (2004 ed.) ..., 34.
[73] Ibid., 33.
[74] Ibid., 34.
[75] Ibid.

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of the military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, 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.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more

> favourable treatment under any other provisions of international law.
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units provided they carry arms openly and respect the laws and customs of war.[76]

The first and foremost category of persons entitled to the status of "prisoner of war" are members of the armed forces of the parties to the conflict.[77] As stated above, these are usually the regular and reserve forces of a belligerent state. There are many different structures of military service, namely compulsory or voluntary units comprised of standing armed forces with different components.[78] The primary distinction is between regular forces of all types; on the one hand, and irregular forces, or guerilla war resistance fighters, on the other.[79]

Glazier argues that GC III, Article 4, expanded prisoner of war eligibility and thus 'combatant status'. The part of (A) of Article 4 lists six categories of persons entitled to prisoner of war status, but does not explicitly state that only four of these can ever be entitled to combatant status.[80] He states further:

> The "Combatant privilege" is thus logically separable from POW status. A combatant receives no immunity for the law of war violations however, only from domestic prosecutions. It has been clear from Lieber's time that "[a] prisoner of war remains answerable for his crimes against the captors'

[76] Ibid., 34-35.
[77] Ibid.
[78] For instance, in Canada, under sections 14 to 16 of the *National Defence Act*, R.S.C., 1985. c. N-5, the Canadian Forces consists of one Service called the Canadian Armed Forces, with a Regular Force component, a Reserve Forces component and under prescribed circumstances, a Special Force.
[79] Dinstein, *The Conduct of Hostilities* (2004 ed.) …, 36.
[80] Glazier, Playing by the Rules … 1000

> army or people, committed before he was captured, and for which he has not been punished by his own authorities."[81]

2. *Members of the regular armed forces must comply with the Four Conditions.*

Dinstein strongly contends that the presumption that regular forces are entitled to combatant status can be rebutted if they fail to meet the Four Conditions. While the Geneva Conventions do not pose any conditions on the eligibility of regular forces to prisoner of war status, he maintains:

> Nevertheless, regular forces *are not absolved from meeting the cumulative conditions binding irregular forces.* There is merely a presumption that regular forces would, by their very nature, meet those conditions. (Emphasis added.)[82]

He cites as his authority the decision in the *Mohamed Ali*[83] case of 1968. In that case, the Privy Council held that it is not enough to establish that a person belongs to the regular armed forces to guarantee the status of prisoner of war. The facts were that Indonesian soldiers were participating in an armed conflict between Indonesia and Malaysia, and planted explosives in a building in Singapore (then a part of Malaysia) while wearing civilian clothes. The Privy Council further maintained that even members of the armed forces must observe the cumulative conditions [the Four Conditions] imposed on irregular forces, although this is not expressly stated *expressis verbis* in the Geneva Conventions or the Hague Regulations.[84] Since these soldiers were denied prisoner of war status, they lost combatant immunity and were unlawful combatants. The result was harsh and the Privy Council upheld the soldiers' death sentence for murder, on

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[81] Ibid., 1000

[82] Dinstein, *The Conduct of Hostilities* (2004 ed.) …, 36.

[83] *Mohamed Ali et al v. Public Prosecutor* (1968), [1969] AC 430, 449.

[84] Ibid.

the ground that a regular soldier committing an act of sabotage, when not in uniform, loses his entitlement to prisoner of war status.[85]

The Supreme Court of the United States came to a similar conclusion in the decision of *Re Quirin*. German members of the armed forces took off their uniforms on a sabotage mission in the United States, where they had landed by submarine. The court confirmed that by doing so they lost their entitlement to prisoner of war status[86] and therefore combatant status.

Solis appears to agree with Dinstein. In analyzing whether the Taliban could be regarded as lawful combatants and entitled to POW status during the Common Article 2 phase of the conflict in Afghanistan, he applied the Four Conditions. He reasoned, that notwithstanding that the Taliban were the *"armed forces of Afghanistan",* the Taliban did not wear uniforms, or display a distinctive sign. Hence they were not lawful combatants because:

> …the [four] conditions are cumulative, members of the Taliban forces failed to qualify…" as "these criteria admit no exception, not even in the unusual circumstances of… the Taliban regime."[87]

Not all academic scholars agree that the Four Conditions are applicable to regular armed forces or militia. Aldrich considered the question of whether, in the aftermath of the 9/11, when the United States and its allies attacked Afghanistan, whether the Taliban had been legal or unlawful combatants. In other words, were they persons who had a legal right to take part in hostilities or, to the contrary, were they persons who could be prosecuted and punished for murder and other crimes under national law for their

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[85] Ibid., 451-454.
[86] *Ex Parte Quirin* (1942), 317 US 1.
[87] Solis, The Law of Armed …, 213.

participation in the armed conflict.[88] Aldrich maintains that the argument that the Four Conditions apply to a state's armed forces is a "debatable question" and defies 'textual logic".[89] Other authors seem to support this view.[90]

The Four Conditions that follow the Hague Regulations have clear underpinnings in the balance between the two principles that animate the law of armed conflict, namely military necessity and humanity. To absolve members of the regular armed forces or other militia and volunteer corps belonging to a party to the conflict from complying with the Four Conditions, would be to undermine the basic principle of distinction between combatants and civilians. For instance, the condition of having 'a fixed distinctive sign recognizable at a distance' and the requirement to 'carry weapons openly' are both intended to eliminate confusion in adhering with this very important principle and to avoid deception and perfidy.[91]

The wearing of a uniform or a distinctive sign illustrates this very issue. The fundamental purpose of a distinctive sign is to avoid an intention to deceive the enemy. While legitimate ruses of war, such as camouflage are acceptable, the issue is not whether combatants can be seen but "the lack of desire on their part to create the false impression they are civilians."[92] The carrying of weapons openly also has a strong foundational

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[88] Aldrich, Taliban, Al Qaeda and the Determination …, 892.
[89] Ibid., 895.
[90] W. Thomas Mallison and Sally V. Mallison, "The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict", *Case Western Reserve Journal of International Law,* 39, (1977) 47; Ruth Wedgewood, "Al Qaeda, Terrorism and Military Commissions", 96 *American Journal of International Law (2002) 335*. Michael J. Matheson implies that the four conditions do not apply to the armed forces of a state. (See: Michael J. Matheson, "U.S. Military Commissions: One of Several Options", 96-*American Journal of International Law* (2002), 355.
[91] Dinstein, *The Conduct of Hostilities* (2004 ed.) …,37.
[92] Ibid., 38.

footing in the distinction between lawful combatants and civilians. Again, a lawful combatant must not create a false impression that he or she is an innocent civilian.[93]

The fourth condition – namely conducting operations in accordance with the law of armed conflict is key to understanding the philosophy behind the difference between lawful and unlawful combatants. Unless the combatant is willing to adhere to the law of armed conflict, he is estopped from relying on that very body of law from which he wishes to benefit.[94]

3. Irregular forces and how these combatants are treated.

As stated above, the category which has engendered much scholarly debate relates to the second category of combatants under the Geneva Conventions, which comprises irregular forces, which include guerrillas, partisans and resistance movements. This is the most 'problematic category', given the proliferation of such forces in modern warfare."[95]

In addition to the Four Conditions, Dinstein also argues that there are three other conditions that can be implied from the *chapeau* of Article 4(A)(2) and Hague Law that need to be recognized for irregular combatants to retain lawful combatancy:

1. The parties must be part of an organization. (The theory is that lawful combatants will act within a hierarchal framework. embedded in discipline and subject to the supervision of commanders responsible for their soldiers in the field.[96])

2. Those combatants must belong to a party to the conflict. (His point in this regard is that it is evident that an independent band of guerrillas cannot be regarded as lawful combatants even if they

[93] Ibid., 39.
[94] Ibid., 39.
[95] Ibid., 36.
[96] Ibid.

> observe the other criteria because a certain relationship with a belligerent government is necessary.)[97]

3. Lack of allegiance to the Detaining power.[98]

In a non-international armed conflict, civilians who participate in armed conflict forfeit certain protections. Common Article 3 applies only to persons "taking no active part in hostilities", and therefore arguably significantly limits the protections provided.[99]

B. Has Article 44(3) of API waived the Four Conditions of lawful combatancy?

1. Article 44(3) waives the Four Conditions.

Art 44(3) of API appears to relax the lawful combatancy requirement of the Four Conditions under Art 4A(2) of GC III as follows:

> Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

This category generally applies to insurgents and terrorists and is one of the primary reasons why the United States and other countries refused to ratify API.[100] What is most disturbing about the effect of Art. 44(3) is that it appears to eliminate the

[97] Ibid., 40.
[98] Ibid.
[99] Michael Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilians Employees' - *Second Expert Meeting on the Notion of Direct Participation in Hostilities* –, ICRC -The Hague 25/26 October 2004, 7.
[100] It is noteworthy that a number of countries, other than the United States, including, Israel, Russia and France have not ratified API, and it is questionable whether API has achieved the status of customary international law.

requirement that these combatants, namely insurgents, display a distinctive sign and comply with the laws of armed conflict. Curiously, an earlier ICRC Commentary states that, "if resistance movements are to benefit by the Convention, they must respect the four special conditions…".[101]

It is difficult to reconcile the two views given that the comparison leads to a rather counter intuitive and manifestly unfair result. The logical conclusion is that the armed forces of a party to a conflict have to comply with the Four Conditions to preserve their combatant immunity; yet insurgents, to retain combatant status, need only carry their arms openly during an actual engagement and during such time as they are visible to the enemy in the deployment phase of an attack. The ICRC Commentary acknowledges however that an individual who does not comply with this latter requirement loses combatant status.[102] Article 44 eliminates the need for "fixed distinguishing emblem visible at a distance" and "compliance with the laws of armed conflict". According to one scholar, this represents a "convoluted and dismaying picture" and cannot be the intended result.[103] The paradoxical outcome is to confer lawful combatancy on these belligerents.

2. This apparent relaxation of the Four Conditions tips the balance of protection in favour of the insurgent.

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[101] Jean Pictet, *Commentary III Geneva Conventions (*Geneva: ICRC:, 1960), 59.
[102] Thus criminal prosecution becomes possible, even for hostile acts which would not be punishable in other circumstances. In other words, such a prisoner can be made subject to the provisions of the ordinary penal code of the Party to the conflict which has captured him. See COMMENTARY ON THE ADDITIONAL PROTOCOL OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, para. 1719 (Yves Sandoz, Christophe Swinarki & Bruno Zimmerman eds. 1987).
[103] Dinstein, *The Conduct of Hostilities* (2004 ed.) ...,45.

The consequence of this interpretation is to, 'tip the balance of protection in favour of irregular combatants to the detriment of the regular soldier and the civilian."[104] There is merit in this view. In the final analysis, it is civilians who will suffer the consequences of insurgents who fail to properly distinguish themselves. This is because regular forces, to maintain force protection, would treat civilians more harshly and with less restraint if they believed that their opponents were free to pose as civilians with protected status.[105]

While Art. 44(3) of API does not refer to the Four Conditions, it does not specifically exclude these conditions either. As pointed out above, Dinstein maintains that the Four Conditions have achieved customary international law status and so they must be complied with irrespective of Art. 44's apparently relaxing of these conditions.

Another viewpoint confirms that notwithstanding Art. 44, the Four Conditions must be adhered to in order to retain status as a lawful combatant. The most important of which is that individuals who are members of an armed organization must conduct their operations in accordance with the laws and customs of war. This applies to the planning and the preparation stage of any military operation and these conditions remain in effect and unchanged.[106]

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[104] G.B. Roberts, "The New Rules for Waging War: The Case against Ratification of Additional Protocol I", *Virginia Journal of International Law* 26, (1985-6), 129.
[105] Dinstein, *The Conduct of Hostilities* (2004 ed.) ..., 46.
[106] Josh Kastenberg, "Customary International Law of War and Combatant Status: Does the Current Executive Branch Policy Determination on Unlawful Combatant Status for Terrorists Run Afoul of International Law or is it just Poor Public Relations?", 39 *Gonzaga Law Review* (2003-2004), 509

3. The Geneva Conventions and API must be read together and not as distinct legal instruments.

Nor does API relieve any combatant, irregular or otherwise, including civilians who take direct part in hostilities, from the requirement to comply with the laws of armed conflict. It must be remembered that API neither replaces the Geneva Conventions nor the application of their provisions - but - "reaffirms and develops them."[107] Further, the Preamble to API, states, "Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol *must be fully applied in all circumstances to all persons* who are protected by those instruments…" (Emphasis Added.) Given the introduction to API and that it reaffirms the Geneva Conventions, it is unreasonable to conclude that Conditions 1 and 4 are relaxed or waived.

In addition, Article 83 of API specifically requires that all high contracting parties disseminate the Conventions and API as widely as possible in their respective countries. Specifically, the parties are to include the study of the Conventions and Protocols in their programs of military instruction. Parties are also required to encourage this study by the civilian population so the Conventions will be well known to both the armed forces and the civilian population alike.[108] In other words, ignorance of the law does not provide a lawful excuse for failing to comply with the basic tenets of the law of armed conflict.

Well-trained and disciplined soldiers will comply with their rules of engagement and the law of armed conflict. If they are held to this standard, then policy and reciprocity

[107] Green, The Contemporary Law of …, 62.
[108] See also Article 47 GCI.

dictates that armed insurgents engaging in hostilities should be held to the standard of complying with the Four Conditions as well.

C. Unlawful combatants do not have combatant immunity

1. Civilians may be prosecuted by domestic courts for taking direct part in hostilities.

As stated above, in an armed conflict there two classifications of persons on the battlefield; they are combatants and civilians. There is much debate about the existence of the term "unlawful combatants", as a discrete third group.[109] Civilians who are not actually members of the armed forces to a party to the conflict, who unlawfully take direct part in hostilities, lose their protection against attacks for as long as they take part.[110] They become unlawful combatants because even though they can be targeted, they cannot benefit from combatant immunity.

The corollary, of course, to the Four Conditions necessary to establish lawful combatant status is to look at what circumstances will lead to a finding that an individual is an unlawful combatant and the logical consequences flowing from this conclusion. Civilians that do not take direct part in hostilities enjoy the privilege of protection from being intentionally targeted during military operations.[111] Where there are only two distinct classes of participants, it is wrong to simply label civilians as non-combatants. 'Non-combatants' can be defined as persons who not take direct part in hostilities and who are not permitted or incapable of doing so. (This includes medical personnel,

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[109] Glazier, "Playing by the Rules …", 997.
[110] Marco Sassoli, "Legitimate Targets of Attacks Under International Humanitarian Law" *Harvard Program on Humanitarian Policy and Conflict Research-International Humanitarian Law Research Initiative*, 2003, 9
[111] Article 48 and 51 API.

corpsman, chaplains, contractors, civilian war correspondents, and armed forces personnel who are unable to engage in combat because of wounds, sickness or capture.)[112]

Civilians who take direct part in hostilities have been defined as “unprivileged belligerents”[113] However, a civilian who takes direct part in hostilities becomes a combatant and may be lawfully targeted. [114] A civilian, who migrates to the status of “unprivileged belligerent”, places a number of rights and benefits enjoyed by protected civilian status as guaranteed by the Geneva Conventions and API at risk. Dinstein claims that a civilian who takes direct part in hostilities relinquishes his civilian status and becomes an unlawful combatant.[115]

These consequences are supported by a number of scholars, including Dormann. The terms “unlawful/unprivileged or combatant/belligerent” include all persons taking direct part in hostilities without being entitled to do so and who cannot be classified as prisoners of war falling into the power of the enemy.[116] This appears to be a commonly shared understanding and would include civilians taking direct part in hostilities.

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[112] Watkins, Combatants and Unprivileged Belligerents…, 45.
[113] Ibid.
[114] Article 51(3) of API which states:

> Civilians shall enjoy protection afforded by this section, *unless and for such time as they take direct part in hostilities* (emphasis added).

[115] Dinstein, *The Conduct of Hostilities* (2004 ed.) …, 29.
[116] Knut Dormann, “The legal situation of ‘unlawful/unprivileged combatants’”, *International Review of the Red Cross* 45 ((2003), 46.

2. Unprivileged belligerency.

It is clear that the concept of an 'unlawful combatant' is historically not new.[117] Baxter was the first to define unlawful combatants and coined the phrase, that "'Unlawful belligerency' is really 'unprivileged belligerency'."[118] This label applied to:

> A category of persons who are not entitled to treatment as either peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoner of War Convention of 1949…[119]

Unlawful combatants pose a threat to the unique balance between military necessity and humanity. They create danger to civilians who risk being mistaken for guerrilla fighters or insurgents. The law of armed conflict deliberately does not provide protection to 'unprivileged belligerents' because of that danger and is "sufficient to require the recognition of wide retaliatory powers."[120]

Put another way, the Geneva Conventions create incentives for lawful combatants on the battlefield to distinguish themselves from civilians by denying protections to battlefield unlawful combatants.[121] Callen says the Geneva Conventions protect civilians by encouraging combatants to distinguish themselves from non-combatants. He summarizes his view this way:

> War blurs distinctions between armies and civilian populations. It is therefore essential that a bright line be drawn between combatants and the rest of the population. This allows the average soldier to tell the difference between those individuals who pose a threat to him (and are therefore

[117] Jason Callen, Unlawful Combatants and the Geneva Conventions, *Virginia Journal of International Law*, 44 (2003-2004), 1026. For an early discussion on the strategic use of civilians in arms see Carl Von Clausewitz, *On War* 479-83 (Michael Howard & Peter Paret Eds & Trans., 1989).
[118] Richard R. Baxter, "So Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*", Brit. Y.B. International Law* 28, (1951), 343.
[119] Ibid., 328.
[120] Ibid., 343.
[121] Callen, Unlawful Combatants and the Geneva…, 1030.

> legitimate targets) and civilians (who possess both the right not to be intentionally targeted and an obligation not to participate in the fighting). The standard qualification for a prisoner of war outlined in the Convention creates incentives for combatants to distinguish themselves from civilians.[122]

3. Summary of the consequences of being an unlawful combatant.

The consequences for a civilian who chooses to become an unprivileged belligerent or an unlawful combatant are serious and profound. They can be summarized as follows:

1. First and foremost the civilian who takes direct part in hostilities becomes a combatant in the sense that he can be lawfully targeted by the enemy;
2. He no longer enjoys the benefits of civilian status provided by Article 5(1) of the Geneva Convention IV relative to the protection of civilians in time of war;
3. He does not qualify for the privilege of being a prisoner of war under GC III;
4. He may be subjected to administrative detention; and
5. He does not benefit from combatant immunity and he may be prosecuted by domestic civil or military courts as a criminal for his unlawful participation in hostilities.

D. Individual Battlefield Status as it applies to the Taliban and al Qaeda in the Afghan conflict

1. The status of the Taliban.

In the Afghan conflict the status afforded to the combatants was determined by the conflict status and which laws of armed conflict applied. As outlined above, there is general consensus that when the United States attacked Afghanistan it became a Common Article 2 Conflict.

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[122] Ibid., 1063.

Aldrich is of the view that the Taliban were likely entitled to prisoner of war status under GCIII because the Taliban government was in effective control over Afghanistan and the Taliban were in fact the armed forces in that country. He argues that the Four Conditions apply only to militias and other volunteer corps that are part of the armed forces of the party to a conflict.[123] Aldrich speculates that the reason why the United States did not want to treat the Taliban as prisoners of war was because the US wanted to interrogate the Taliban detainees and confine them in Guantanamo Bay to facilitate successful interrogations of these detainees.[124]

Regardless of their legal entitlement, there is merit in the view that given the doubt about the entitlement of the Taliban to prisoner of war status, they should have at least been given an opportunity to have their status reviewed by a tribunal convened under Article 5 GCIII.[125] This view is supported by the fact that apparently the Taliban called themselves a militia and therefore the Four Conditions under GCIII 4(A)(2) could have been used to determine their status. Others take the position that the Taliban are presumed to be the regular forces in Afghanistan, in which case the cumulative Four Conditions were not required.[126] This premise is based on the assessment that the

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[123] Aldrich, The Taliban al Qaeda …, 894-895.
[124] Ibid., 896.
[125] GCIII Article 5. While this paper will not attempt to definitely clarify the debate as to whether or not the Taliban and al Qaeda fighters were entitled to prisoner of war status, any discussion of the status of the conflict under the Geneva Conventions is not complete without making a distinction between those persons entitled to prisoner of war status under GCIII and those person entitled to protections under Common Article 3. The true distinction, as will be seen later in this paper, is not whether any person falling under the protection of a detaining power is entitled to humane treatment but who may be lawfully targeted. Internationally mandated norms dictate that whether a person who falls into the hands of a detaining power as a prisoner of war under GCIII, or simply a detained person under Common Article 3, both are entitled to minimum standards of humane treatment. For instance this paper will not delve into whether the doctrine of military necessity enabled the US government to carry out inhumane interrogations measures as a result of not providing prisoner of war status to Taliban and al Qaeda members.
[126] Kono Keiko, "The Legal Status of the Taliban Detainees as Unlawful Combatants: International Armed Conflict with a Failed State", *NIDS Security Reports*, 9 (2008), 39.

Taliban were the *de jure* and *de facto* government in Afghanistan at the time of the Article 2 Conflict. The Taliban controlled ninety percent of Afghanistan and were recognized as a legitimate government by Pakistan, Saudi Arabia and the UAE Chechnya. Taliban had demanded a seat the general assembly but were denied. [127]

There are strong arguments to suggest that the Taliban were not entitled to prisoner of war status. These are principally based on the assumption that the Four Conditions applies to the regular armed forces of a state under Art. 4(1) GCIII. Even though the Taliban were arguably the armed forces of Afghanistan, they did not satisfy the Four Conditions which are cumulative in nature.[128] They did not wear uniforms nor display distinctive signs. Dinstein forcefully states that the Taliban were not entitled to prisoner of war status because:

> All armed forces – including the Taliban – are required to wear uniforms or use some other fixed distinctive emblem. If they do not, they cannot claim prisoners of war status under customary international law.
>
> The legal position seems singularly clear to the present writer.[129]

There are some important policy considerations which also support the view that unlawful combatants, such as the Taliban, should not be afforded prisoner of war status during a Common Article 2 Conflict. Providing prisoner of war status to unlawful combatants like the Taliban risks unraveling the fabric of international humanitarian law by eroding the "rule of distinction", which is one of the normative principles of the law of

[127] Ibid., 40.
[128] Dinstein, *The Conduct of Hostilities* (2010 ed.)…, 55-56. See also: Solis, *The Law of Armed*…, 213.
[129] Ibid., 48.

armed conflict. Thus the over protection of unlawful combatants risks the systemic under-protection of "innocent civilians" who do not take direct part in hostilities.[130]

As the conflict in Afghanistan evolved from a Common Article 2 Conflict to a Common Article 3 Conflict, the law applicable in non-international armed conflict does not contemplate a combatant's privilege for civilians taking direct part in hostilities (i.e. the right to participate in hostilities and the concomitant legal immunities for lawful acts committed during hostilities).[131] The terms "unlawful combatant" or "unprivileged belligerents" are only germane to Common Article 2 Conflicts.

2. Individual Battlefield Status as it applies to al Qaeda.

As observed above, there were two separate armed conflicts waged in Afghanistan. When Afghanistan was attacked, members of al Qaeda were non-state actors participating in hostilities but were not part of the Common Article 2 Conflict. Al Qaeda was aligned with the Taliban, and although they were supported and provided sanctuary by the Taliban government, they did not belong to nor were part of the armed forces of the party to the conflict.[132]

The conflict against al Qaeda can be classified as a Common Article 3 Conflict. Al Qaeda does not resemble a state and is not subject to international law. It lacks international legal personality and therefore cannot be a party to the Geneva Conventions. Even though it could be argued that when al Qaeda personnel were captured while accompanying the Taliban forces (and arguably) to whom the Geneva Conventions apply,

[130] Jinks, Protective Parity…, 30.
[131] Dormann, The legal situation …, 47.
[132] Aldrich, *The Taliban, al Qaeda* …, 893.

members of al Qaeda were not entitled to prisoner of war status because they were unlawful belligerents.[133] Al Qaeda, as civilians, whether individually or as members of an organized armed group taking direct part in hostilities, were lawful targets[134].

Aldrich contends that al Qaeda fighters are civilians engaging in hostilities who are not entitled to prisoner of war status. However, if captured, they were entitled to humane treatment, under customary international law and in the manner prescribed by Common Article 3. In addition, they could be lawfully prosecuted under domestic laws for taking part in hostilities and for any other crimes such as murder and assault they may have committed. He takes the position that they were unprivileged belligerents.[135]

Kastenberg argues that religious based fighters such as al Qaeda have shown a preference for intentionally targeting civilians and civilian related infra-structures. He focuses on the ideological statements made by al Qaeda's public statements or Fatwas, which include:

> [T]o kill the Americans and their allies – civilians and military" – is an individual duty for every Muslim who can do it in any country in which is it possible to do it" and "every Muslim who believes in God and wishes to be rewarded to comply with God's order to kill the Americans and plunder their money wherever and whenever they find it".[136]

Kastenberg's view is that the law of armed conflict applies equally to non-state actors, such as al Qaeda, and understanding the context of modern religious based insurgency is important to the classification of combatants because of its methods of warfare and core philosophy. He observes that essentially individuals belonging to

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[133] Ibid.
[134] AP II, Art 13(3)
[135] Aldrich, *The Taliban, al Qaeda* …, 893.
[136] Kastenberg, "Customary International Law of War and Combatant …, 515

organizations such as al Qaeda have ignored the law of armed conflict. (The 9/11 attacks are probative and conclusive evidence that al Qaeda intentionally targets civilians and civilian objects.) While al Qaeda are clearly combatants who may be targeted, their very behavior, reflecting their ideology, has rendered them unlawful combatants.[137]

Al Qaeda, like the Taliban, did not use a uniform or use a distinctive emblem or sign and al Qaeda has displayed an utter distain towards adhering to the principles of the law of armed conflict.[138] Dinstein observes:

> No group conducting attacks in such an egregious fashion [as occurred in 9/11] can claim for its fighters prisoner of war [lawful combatant] status. Whatever lingering doubt which may exist with respect to the entitlement of the Taliban forces to prisoners of war status, there is – and there can be none – as regards al Qaeda terrorists. [139]

CHAPTER III – THE LAW OF TARGETING

This chapter will consider the law of "targeting", how it has been codified and what standards are used to make targeting decisions. It will also review the types of rules of engagement that were crafted in the context of ISAF's military operations in Afghanistan to demonstrate how the use of force is controlled in modern armed conflicts.

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[137] Ibid.

[138] Dinstein, *The Conduct of Hostilities* (2004 ed.)…, 49. Further Dinstein asserts: Al Qaeda's contempt for this quintessential pre-requisite qualification of lawful combatancies was flaunted in the execution of the original armed attack of 9/11. Not only did al Qaeda terrorists, wearing civilian clothes, hijack US civilian passenger airlines, the most striking aspect of the shocking events of 9/11 are that (a) the primary objective targeted (the twin towers of the Trade Centre in New York city) was unmistakably a civilian object, rather than a military objective: close to 3000 innocent civilians lost their lives in the ensuing carnage; (b) the twin towers – as well as the other target of attack (the Pentagon, no doubt a military objective) were struck by hijacked passenger airlines, which (with their explosive fuel load) were used as flying bombs, in total oblivion of the fate of hundreds of civilian passengers on board.

[139] Ibid., 49.

A. The law of targeting serves to distinguish between lawful and protected targets

The law of targeting is fairly straightforward; it embodies rules requiring the parties to an armed conflict to distinguish between targets of military necessity and civilians and civilian objects; and to direct their attacks against only military objectives.[140]

The law of armed conflict seeks to infuse the violence of war with humanitarian considerations. Military necessity justifies the application of force not prohibited by international law. The authority derived from the law of armed conflict, namely military necessity, is to take those measures deemed necessary by the state to effect the prompt submission of the enemy.[141] Because armed conflict largely consists of the application of deadly force, balancing the use of violence with humanity forms a major and highly visible part of international humanitarian law.[142]

Those considerations have to be balanced against military necessity to optimize success on the battlefield and ensure force protection.[143] As Schmitt aptly states:

> As a result, IHL represents a very delicate balance between two principles: military necessity and humanity. This dialectical relationship undergirds virtually all rules of IHL and must be borne in mind in any effort to elucidate them.[144]

In Common Article 2 Conflicts, the application of the law of armed conflict on the battlefield is critical and should animate the thinking of any reasonable commander committing his forces to the use of lethal force. The only legitimate aim of force is the

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[140] Schmitt, Targeting and IHL …, 311.
[141] Corn & Eric Jensen, “Transnational Armed Conflict …, 12.
[142] Watkins, Controlling the Use of Force …, 10.
[143] Schmitt The Interpretive Guidance on the Notion of DPH…, 6.
[144] Ibid., 6.

weakening the military potential of the adversary.[145] In this regard, the principles of 'distinction',[146] 'military necessity'[147] and 'proportionality'[148] are engaged so that belligerents can distinguish between combatants who are lawful targets and civilians who are protected persons and who may not be deliberately attacked.

B. API has codified the modern law of targeting and its provisions are based on the principles of military necessity, distinction and proportionality

The law of targeting is based on two fundamental principles of the law of armed conflict; namely that:

1. Only targets of military necessity may be attacked[149]; and
2. These targets must be distinguished to minimize and avoid collateral damage[150] to protected persons, property and places.

Military necessity, both as a specific element and a foundational principle, is central to understanding international humanitarian law. Military necessity exists in a state of balance with the principle of humanity, which guards against unnecessary suffering incidental to armed conflict.[151] As observed by Schmitt, "This symbiotic

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[145] David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence", *European Journal of International Law*, 16 (2005), 190.
[146] See page 7 note 25.
[147]Military necessity is related to the primary aim of armed conflict - the complete submission of the enemy at the earliest possible moment with the least possible expenditure of personnel and resources. The concept of military necessity justifies the application of force not forbidden by International Law, to the extent necessary, for the realization of the purpose of armed conflict. See: Office of the Judge Advocate General, *Law of Armed Conflict at the Tactical…,* para. 202(2).
[148] See page 46 and note 161.
[149] Article 48 API.
[150] Collateral damage is defined as, "Unintended and incidental loss of civilian life, injury to civilians and damage to civilian property". See Art, 57(2) API
[151] Michael N. Schmidt "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", *Virginia Journal of International Law*, 50 (2010), 796.

relationship determines in which direction, and at what speed, IHL evolves. It also determines the manner of its application on the battlefield."[152]

The principles outlined below represent the key elements of API which codifies the law of targeting and regulates that dynamic tension between military necessity and humanitarian concerns.

1. Distinction

The principle of distinction is paramount and is the underlying premise of the following basic rule: In order to protect civilians and civilian objects, the parties shall distinguish between combatants and civilians and direct attacks and operations against military objectives, including members of the armed forces and other organized armed groups participating in the conflict.[153]

2. Military Objectives.

Military objectives are limited to those objects which by their very nature, location, purpose or use make an effective contribution to the military action and whose total or partial destruction, capture, or neutralization in the circumstances ruling at the time offers a definite military advantage.[154] Military objectives include combatants and civilians taking direct part in hostilities.[155]

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[152] Ibid.
[153] Articles 48, 49 and 51 API.
[154] Article 52(2) API.
[155] Sassoli, Legitimate Targets of Attacks …, 9.

3. Civilians and civilian objects must not be attacked.

Article 51(1) of API clearly states that the civilian population, including individual civilians, shall enjoy general protection against dangers arising from military operations.[156] The prohibition on intentionally and willfully attacking civilians is absolute and not justifiable by considerations of military necessity.[157] Hence commanders must do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects, and are not otherwise subject to special protection but are clearly military objectives.[158] The *Rome Statute* states that it is a war crime to intentionally attack civilians or civilian objects.[159]

4. No Indiscriminate Attacks.

In addition, attacks must not be indiscriminate. They must be directed against a specific military objective, using means and methods which are directed against only those military objectives.[160]

5. Proportionality.

Attacks which breach the principle of proportionality are unlawful. Therefore, an attack will breach this rule if it is: "expected to cause incidental loss of civilian life, or

[156] Article 51(1) API.
[157] *Prosecutor v. Galic*, Case No. IT-98-29-A, Appeals Chamber Judgment, para. 130.
[158] Article 52(2) and Article 57(2)(a)(i) API.
[159] Article 8(2((b)(i)-(ii) *1998 Rome Statute of the International Criminal Court*.
[160] API Art. 51(4).

injury to civilians, or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[161]

C. What are the standards and considerations for targeting decisions?

For the law of targeting to be meaningful, standards and considerations must be implemented to ensure these principles are adhered to during the target selection or decision making process.

The *Canadian Forces Operations* manual defines 'targeting' as follows:

> Targeting is the process of selecting targets and matching to them the appropriate response. It considers strategic and operational requirements and capabilities and the threat to friendly forces [as well as legal considerations]. Targeting occurs at all levels of command and is performed by forces capable of attacking targets with both lethal and non-lethal disruptive and destructive means.[162]

Military doctrine, such as NATO's *Allied Joint Doctrine for Joint Targeting* manual,[163] encapsulates the principle of military necessity by delineating targeting from an effects-based approach to create specific military effects necessary to achieve the planned objectives for any given mission. As part of that process, concepts such as 'Pre-Approved Target Sets' are created to limit and control attacks. This type of doctrine also provides for target cycles which specify how targets are developed, nominated, validated and then prioritized.[164]

The concept of 'target validation' occurs to ensure the target relates to the commander's objectives and guidance, and that the attack is in compliance with the law

[161] Article 51(5) API.
[162] Department of National Defence, B-GJ-005-300/FP-000, *Canadian Forces Operations*, Ch. 2 2005-08-15 at p. 5-9).
[163] NATO, *NATO Allied Joint Doctrine for Joint Targeting*, AJP 3.9, ch. 4, 4-1 to 4-10 (May 2008)
[164] Ibid.

of armed conflict. The target is also validated to verify the credibility and accuracy of the information which was used to identify the target. The target is then nominated for approval. Corn and Corn summarize what happens next:

> It is at the next stage that the commander and staff engage in the detailed analysis of available capabilities in relation to desired effects. This process of "weaponeering" is heavily impacted by the LOAC principle of proportionality. The commander and planners seek to mitigate the risk of collateral damage by selecting weapons and tactics that will, to the greatest feasible extent, produce the desired effect while limiting such collateral damage.[165]

In this way, 'High Value Target Lists' are created to prosecute targets composed of persons, things and places for the successful conduct of an operation to seriously degrade the enemy's capabilities. Similarly 'High Pay-Off Target Lists' are developed to deliberately target the enemy's leadership to disrupt and degrade command and control functions.[166]

In order for a target to be lawful, there has to be an honest and reasonable belief that the target has been identified as a military objective.[167] Therefore, commanders must prioritize "the collection, collation, evaluation and dissemination of timely target intelligence".[168] Accordingly, the commander must make targeting decisions in light of all the facts known or reasonably available to the commander but these decisions will not be later assessed by applying a standard of perfection.[169]

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[165] Geoffrey S. Corn and Gary P. Corn, "The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens", *Texas International Law Journal* 47, No. 2 (2012), 352.
[166] Ibid.
[167] *Prosecutor v. Galic ...,* para. 50.
[168] Hakimi, A Functional Approach to Targeting …, 1397.
[169] Office of the Judge Advocate General, *Law of Armed Conflict at the Tactical and Operational Level* … para. 418.

Targeting decisions are made keeping a unique balance between military necessity, military economy and legal constraints, as aptly expressed from the perspective a military lawyer deployed on operations with the Canadian Forces:

> Looking at the targeting issue from another perspective, the legality of targeting is not divorced from practical military concerns. Tied in with the concept of military necessity is the idea of the efficient application of force. If only the force necessary to accomplish the military objective is used – and no more than that – it follows that excess expenditure of resources is avoided. In short, the efficient application of force dovetails nicely into the legal issues respecting targeting given the ever-present reality of logistical constraints in military operations. [170]

Other considerations include maintaining force protection and completing the mission successfully, while all the time choosing alternative methods of attack, if reasonably available, so as to minimize civilian casualties and damage to civilian property. Consequently, questions such as which types of weapons to use or what tactics to employ are considered. The objective is to retain a "similar military advantage" in attacking the military objective, while at the same time avoiding collateral damage.[171]

Schmitt argues that the rule of proportionality is often misconstrued as either prohibiting "extensive" collateral damage or is a balancing of collateral damage against military advantage. Schmitt observes, "Restated, the lynch pin term "excessive" indicates unreasonable collateral damage in light of the reasonably anticipated military advantage expected to result from the attack." [172]

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[170]Online: General Brigadier-General Kenneth W. Watkin[1] and Captain Zenon Drebot , "The Operational Lawyer: An Essential Resource for the Modern Commander", http://www.forces.gc.ca/jag/publications/oplaw.
[171] Schmitt, Targeting International Humanitarian Law …, 312.
[172] Ibid.

D. Rules of engagement and use of force guidelines in Afghanistan

1. Common Article 3 Conflict Rules of Engagement.

While the law limits targeting options, the nature of an armed conflict will necessitate operational limits on the use of force as a matter of policy, through the use of rules of engagement and use of force guidelines.[173] Rules of engagement can be far more restrictive than those required by the law of armed conflict and are drafted taking into account a number of mission-specific, legal, diplomatic and policy/political and operational considerations.[174]

As will be demonstrated in this paper, as the conflict in Afghanistan transitioned from a Common Article 2 Conflict to a Common Article 3 Conflict, the characterization of the conflict is germane to the law of targeting. Since the codified rules in API do not apply to Common Article 3 Conflicts, which law of armed conflict norms apply to targeting principles in these conflicts? As outlined in Chapter 1, the answer starts with the International Criminal Tribunal for the Former Yugoslavia.[175] In *Tadic*, the appellate chamber recognized the need to regulate and apply international norms and a regulatory framework to non-international armed conflicts. It held that a number of fundamental

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[173] The Canadian Forces publishes use of force guidelines. See Department of National Defence. B-GJ-005-501/FP-001, Canadian Forces Operations: Use of Force in CF Operations, *Joint Doctrine Manual* (Ottawa: DND Canada, 2008).

[174] "There are a number of major factors that guide how the use of military force will be controlled in a given conflict situation. A number of legal directions exist that limit the use of force; for example, any use of force by the CF must comply with applicable Canadian domestic and international law. Legal limitations can come as well from the United Nations Charter and applicable UN Security Council resolutions if the mission is a UN-mandated one. The Laws of Armed Conflict also impose constraints. The use of force by the CF must be in concert with the higher level Government of Canada political and policy objectives, as well as diplomatic considerations that may impact what the CF might be allowed to do in a purely Canadian operation. Finally, but by no means of less significance, the use of force may be constrained by operational considerations – such as efforts to avoid friendly-on-friendly engagements." Use of Force in CF Operations…, paras 101-105.

[175] Corn & Jensen, *Transnational Armed Conflict* …, 10.

principles developed to regulate international armed conflicts had made a 'gradual extension' in the conduct of hostilities that applied equally to both international and non-international armed conflicts.[176] This trend was also recognized in the publication of the San Remo Manual on the *Law of Non-international Armed Conflicts* ("NIAC Manual") and specifically, the assertion that the principle of distinction is "indisputably" part of customary international law for non-international armed conflicts.[177]

The fundamental issue is under what circumstances may persons, who would normally be characterized as civilians and thus protected under Common Article 3, be targeted. Applying the fundamental principles of 'military necessity' and 'distinction', it is certain that insurgents, cloaked in the guise of civilians, who take direct part in hostilities, divest themselves of their protected status and become lawful targets.[178]. This was in fact the case in Afghanistan.

What emerged in Afghanistan was how to characterize the status of insurgent fighters in this Common Article 3 Conflict. In conventional armed conflicts, the armed forces of one state party fight the regular armed forces or the other state party. In these types of conflicts, the enemy the armed forces, including organized armed groups supporting the enemy, are usually "declared hostile" at the beginning of the conflict, or when an organized armed group is identified as being part of the conflict.[179] Declaring 'forces hostile' serves to 'operationalize' the principle of *distinction*[180]which permits the

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[176] *Prosecutor v. Tadic*, Case No. IT-94-1-A, 119.
[177] Michael Schmitt, Charles Garraway & Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict With Commentary*, San Remo-International Institute of Humanitarian Law, 2006, at 1.2.2.3.
[178]Corn & Jensen, *Transnational Armed Conflict* …, 18.
[179]Michael N. Schmitt, Targeting and International Humanitarian Law in Afghanistan, *Israel Yearbook on Human Rights*, 39, (2009), 314
[180] Ibid.

opposing forces to attack combatants wherever they may be found. In these types of conflicts, for the individual to be attacked, there is no need to stipulate rules of engagement which distinguish between a 'hostile threat' and 'hostile act'. The individual's declared status alone as a combatant, belonging to the other party to the conflict, makes him or her a lawful target.[181]

In a Common Article 3 Conflict there is usually no conventional force to declare hostile because the 'enemy' are likely completely composed of civilians who have become insurgents in whatever cause they are pursuing against the state. The NIAC Manual addresses the issue of characterizing these civilians/insurgents as 'fighters' who are participants in the non-international armed conflict and who are "members of armed forces and dissident armed forces or other organized armed groups, or taking active (direct) part in hostilities".[182]

2. Specific Rules of Engagement to Combat an Insurgency.

In Afghanistan, the concept of "Likely and Identifiable Threat" (LIT) was used by Coalition forces to identify individuals subject to "status" based targeting.[183] This enables the targeting authority to establish identifying criteria verifying the person as a threat and linking the individual to a hostile group. This process validates the individual as a lawful target, regardless of this individual's belligerent behaviour at the time of targeting.[184] Contrast this to the general permissive authority to target under the law of armed conflict,

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[181] Ibid.
[182] NIAC Manual, …,1.1.2.
[183] Corn & Jensen, *Transnational Armed Conflict* …, 20*.*
[184] Ibid.

which does not limit attacks only against individuals who pose a direct, immediate or imminent threat.[185] The implication of authorizing these types of rules of engagement is:

> … a signal that there are opposing forces who can be engaged upon sight, thus implicating the LOAC… [a nation's] adoption of status-based rules of engagement for its military in a particular military operation should constitute the trigger requiring nations and its military to apply the laws of war to that operation…because status-based ROE require no justification for the use of force beyond threat recognition and identification to trigger the targeting authority….[186]

In an insurgency, the battlefield will be made up of innocent civilians who never engage in hostilities and insurgents, who "based on a pattern of actions and affiliations that create a nexus sufficient to non-temporarily forfeit civilian protections."[187] LIT is less permissive than the practice of declaring forces hostile, referred to above (which is the practice under Common Article 2 Conflicts) because LIT still requires identifying the fighter as a threat; namely, circumstances justified the attack and not membership in an armed group.[188]

However, in fighting a counterinsurgency operation like Afghanistan, in addition to the principles of military necessity and distinction, the United States for one has incorporated 'the legitimacy imperative' in its counterinsurgency manual as one of it's guiding principles controlling the use of force. Not only is there a need to control the use of lethal force, but the State wants to ensure domestic and international support for the State's military operations.[189] The commander wants to win the hearts and minds of the civilian population, among which the insurgents live and hide. Canadian Army doctrine

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[185] Ibid.
[186] Ibid., 20-21.
[187] Ibid.
[188] Schmitt, Targeting International Humanitarian Law …, 315.
[189] Ibid., 312.

adopts a similar approach as observed by a Canadian infantry officer deployed to Kandahar Province, Afghanistan in 2006:

> Although the situation was more complicated than described, it highlights the delicate issue of applying deadly force and hints at the validity of another enduring counter-insurgency tenet: guerrillas need to be defeated with the minimum use of force. This was again evident in a specific incident where the Taliban used a graveyard to fire mortars at one of B Company's operating bases. We knew they were firing from this location but to return fire into a graveyard would have had extremely negative effects and had the very real potential of turning neutral elements of the population into insurgent supporters. While all ranks well understood the concept that, in contrast to conventional operations focused on the enemy and ground, *our focus was human terrain and gaining the support of the Afghan population*, the reality that sometimes it was better not to shoot took time to comprehend.[190] (Emphasis added.)

Highly visible mistakes resulting in collateral damage detract from a mission's overall effectiveness. Again, using the conflict in Afghanistan as a case study, there were two mistaken strikes on an International Committee of the Red Cross warehouse in the first month of the conflict, and then later a mistaken attack on a wedding party.[191]

As a consequence, modern forces like the United States and other coalition countries use rules of engagement, which include a number of targeting restrictions that go well beyond any limits required under the law of armed conflict. In Afghanistan, these included mechanisms like:

a. 'No-strike lists'. Individuals on this list cannot be targeted, for policy reasons, even if they would normally qualify under LIT;

b. 'Restricted targeting lists'. Individuals who require special targeting authority approval before being attacked.

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[190] Department of National Defence, Major Jason Adair, "Learning on the Run, Company Level Counter-Insurgency in Afghanistan" 10, *Canadian Army Journal* 10.4 Winter (2008), 34.
[191] Schmitt, Targeting International Humanitarian Law …, 312.

c. ‘Individual target folders’. Limiting the type of weapon and maximum weapons effects range;

d. ‘Soldier cards’. These are tactical battlefield rules that soldiers refer to and contain simplified rules of engagement.[192]

In addition, these rules of engagement would include requirements such as: the positive identification (PID) of the target as a threat before an attack,[193] an assessment of the pattern of life (Pol) to eliminate the presence of civilians in the vicinity of the attack; and the collateral damage estimate methodology (CDEM) to minimize any mistakes. CDEM is a standardized procedure for estimating the potential for “collateral damage”[194] and the options available to mitigate that damage and prior approval authorities for attacks based on the anticipated collateral damage during operations.[195]

Therefore, with the intent of avoiding unintended harm to the civilian population, ISAF commanders imposed strict restrictions on the conduct of operations through these stringent rules of engagement and use of force directives. Other examples include ISAF commanders directing their forces to employ precision munitions wherever possible; yet the law of armed conflict does not impose the specific use of any weapon. In addition, on-scene commanders were required to ensure that houses from which their troops received fire were free of innocent civilians prior to returning fire. This restriction was imposed, even though, according to the law of armed conflict, returning fire in these circumstances is governed by the rule of proportionality. The requirement is to take all

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[192] Ibid., 314.
[193] Ibid., 316.
[194] ‘Collateral damage’ is defined at footnote 150.
[195] Schmitt, Targeting International Humanitarian Law …, 311.

feasible precautions in the attack; the presence of civilians is just one important factor to consider in weighing whether the attack would be excessive in the circumstances.[196]

CHAPTER IV - THE ICRC'S INTERPRETIVE GUIDANCE CRITERIA FOR ESTABLISHING A CIVILIAN'S DIRECT PARTICIPATION IN THE HOSTILITIES

This chapter will provide a backdrop to why the ICRC established a study to consider the notion of civilians taking direct part in hostilities and provide a critical review of the study's ultimate conclusions.

A. The need for the ICRC's Interpretive Guidance Study

Perhaps of all the principles that animate the law of armed conflict, 'distinction' is likely the most important issue in differentiating between civilians and targets of military necessity. Indeed, the International Criminal Court of Justice in the *Nuclear Weapons Advisory Opinion* held that 'distinction' was the cardinal principle constituting the fabric of humanitarian law and one of the intransgressible principles of customary international law.[197] This chapter will outline the process by which the ICRC came to consider the issue of civilians taking direct part in hostilities and the results of that study.

Through the principle of distinction and the protections afforded to civilians, legal scholars writing on the law of armed conflict have been trying to distill the meaning of the phrase *"unless and for such time as they take a direct part in hostilities"* found in Art. 51(3) API. This codified protection is also found in APII where under Article 13(3),

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[196]Ibid., 313.
[197] *Nuclear Weapons Advisory Opinion*, [1996] ICJ Reports, para 78.

"civilians shall enjoy the protection afforded by this part, unless, and for such time as they take a direct part in hostilities". Indeed, international humanitarian law is focused on the need to address the trend towards increased civilian participation in hostilities. This is because of the shift in the conduct of hostilities into civilian population centers, including places like Afghanistan and Iraq. These conflicts have been "characterized by an unprecedented intermingling of civilians and armed actors".[198]

1. The background to the rationale for the study.

The ICRC brought together a group of international legal scholars to examine the notion of "direct participation in hostilities" with a view to strengthening the implementation of the principle of distinction.[199] The text prepared by the ICRC sought to facilitate the distinction between civilians, who never take direct part in hostilities on the one hand, from those individuals who do take part. The latter group may do so in the following ways:

a. as individuals, in a sporadic or unorganized basis; or

b. as an organized armed group.

This study will be referred to as the "Interpretive Guidance".[200] Prior to the Interpretive Guidance being released, the focus of the study was to provide guidance on the interpretation of international humanitarian law, relating to the notion of direct participation in hostilities and examined the following three questions:

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[198] Nils Melzer *Interpretive Guidance on the Notion of Direct Participation in the Hostilities Under International Humanitarian Law*, International Committee of the Red Cross, (2009), 5.
[199] Ibid., 5-6.
[200] Ibid. (The Interpretive Guidance is not meant to be legally binding on states. There is widespread criticisms of and disagreement with the study's conclusions and the document cannot claim to have acquired the status of customary international law.)

1. Who is considered a civilian for the purposes of the principle of distinction?

2. What conduct amounts to 'direct participation in hostilities'?

3. What modalities govern the loss of protection against direct attack?[201]

One of the critical questions considered was whether a person could be 'a protected civilian by day and targetable fighter by night', and then revert back to protected status the next day when he resumes his civilian activities. In other words, given the phrase "*unless and for such time as they take direct part in hostilities*", does this mean or suggest that civilians are free to opt-in and opt-out of protected status after returning from each engagement. This is known as the 'revolving door' theory, as will be explained in detail later in next chapter of this paper.

All legal scholars participating in the study recognized the fundamental problem caused by the failure of persons directly participating in hostilities, (whether civilians or members of armed forces or armed groups), to adequately distinguish themselves from the civilian population. All agreed that "direct participation in hostilities" refers to conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations under API and they become lawful targets.[202] For instance, a civilian firing at military convoy.

This was just not an academic exercise. It is indisputable that, since 2001, the US and other coalition forces have engaged in large scale overt combat operations in places like Afghanistan. Whether as a Common Article 2 Conflict, or as it evolved into a

[201] Ibid., 6
[202] Ibid., 11-12

Common Article 3 Conflict, the international law of armed conflict applied to both conflicts in that country and so did the principle of distinction. In these armed conflicts, the difficulty for commanders is to distinguish between innocent civilians who do not engage in hostilities and those civilians who take up the mantle of an insurgency. Commanders had to distinguish between which groups were acting jointly as a single entity, and which were distinct, yet mutually engaged in the conflict.[203] However, what is important for the purposes of this paper is to identify and discuss how civilians, who would otherwise be protected persons, join an insurgency and either lose or gain their protected status *when* they engage in hostilities.

2. The Interpretive Guidance's key determinations.

The ICRC's focus initially looked at how the Geneva Conventions and the Protocols actually frame the concept of who is a 'civilian' thus maintaining protected status. The ICRC acknowledged that in an international armed conflict, civilians are defined negatively; as all persons who are neither members of the armed forces belonging to a Party to the conflict nor participants in a *levee en masse*.[204] The meaning of 'belonging to' to a party to a conflict and the degree of control required to make a state responsible for the conduct of an organized armed group is not settled in the international law of armed conflict.[205]

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[203] Robert Chesney, "Beyond the Battlefield, Beyond al Qaeda: The Destabilizing Legal Architecture of Counter Terrorism", *University of Texas Law Review*, Public Law, Research Paper (212), 16.

[204] Meltzer, Interpretive Guidance on the Notion …, 20. See Article 50(1) Additional Protocol 1, Article 4(A)(1), 2 and GCIII and Article 43(1) Additional Protocol 1.

[205] See *International Court of Justice, Military and Paramilitary Activities In and Against Nicaragua* (NIC *v. USA* Judgment of June 27, 1986) Merits, paragraph 115 and International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadic*, Case No. IT-94—A Judgment of July 15, 1999 (Appeals Chamber), para. 145.

The starting premise of the Interpretive Guidance was to look at membership in an organized armed group in a strictly functional sense. It argues that membership must depend on whether the "continuous function" assumed by an individual, corresponds to that of the collective exercised by the group as a whole; namely the conduct of hostilities on behalf of an armed non-state party to the conflict.[206] The Interpretive Guidance states:

> Consequently under IHL, the decisive criterion for determining individual membership in an organized armed group, is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: "continuous combat function")... .[207]

Persons who occupy a 'continuous combat function' are required to integrate within the organized armed group. Their continuous function may involve preparation, execution and or command of operations, all of which must amount to direct participation in hostilities. The significant point to highlight from the Interpretive Guidance is that members of an organized armed group constituting the armed forces of the non-state party to the conflict, *will consist only of individuals whose continuous combat function is to take direct part in hostilities*.[208] In other words, individuals assuming what would typically be a combat service support function would not qualify as fulfilling a continuous combat function.

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[206] Meltzer, Interpretive Guidance on the Notion …, 33.
[207] Ibid., 33. It is interesting to note that Meltzer acknowledges that combatant privilege, namely the right to directly participate in hostilities with immunity from domestic prosecution for lawful acts of war, is afforded only to members of the armed forces of parties to an international armed conflict (except medical and religious personnel), as well as participants of a *levee en masse* (Articles 1 and 2) GCIII and Article 43(1) API. He acknowledges that although all privileged combatants have the right to directly participate in hostilities, they do not necessarily have a function requiring them to do so (he uses examples of cooks, and administrative personnel). Conversely, individuals who assume a continuous combat function outside the privileged categories of persons, as well as in non-international armed conflict, are not entitled to combatant privilege under IHL.
[208] Ibid., 36.

B. The Interpretive Guidance's three criteria for determining direct participation

The focus of the debate centers on the "notion of direct participation in hostilities" which the Interpretive Guidance argues does not refer to a person's status, function or affiliation to an armed group but to his or her participation in specific hostile acts.[209] The Interpretive Guidance recommended the following three criteria for determining direct participation:

1. The civilian's act must be likely to adversely affect the military operations of a party to the conflict, or alternately, be likely to inflict death, injury or destruction of persons or objects protected against direct attacks. This is the *threshold of harm* requirement.

2. There must a direct causal link between the act and the harm likely to result. This is the *direct causation* requirement.

3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another. There must be a *belligerent nexus* between the civilian's act and the resultant harm.[210]

The Commentary for API appears to support the premise of a direct and high threshold of participation;[211]"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 place where the activity occurs" [212]

The Commentary also describes 'direct participation" as "acts which by their nature and purpose are intended to cause actual harm to personnel and equipment of the

[209] Ibid., 44-45.
[210] Ibid., 46.
[211] Michael N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contracts or Civilian Employees", *ICRC Second Expert Meeting on the Notion of Direct Participation*, Hague, 25-26 October 2004, 15.
[212]COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, para 1679 (Yves Sondoz, Christophe Swinarki & Bruno Zimmerman Eds., 1987).

armed forces" and defines 'hostilities' as "acts of war which are intended by their nature or purpose to hit specifically the personnel of the armed forces of the adverse party."[213]

C. Critiques of the Interpretive Guidance

1. Summary of the problems with the Interpretive Guidance.

There are three main grounds of criticism of the Interpretive Guidance.

The first relates to what actions constitute 'direct participation'. The scholars critiquing this aspect of the study say the Interpretive Guidance interprets the concepts of preparation for, deployment to, and return from a hostile engagement too restrictively.

Second, by limiting the continuous loss of protection to members of an organized armed group, who occupy a continuous combat function, the Interpretive Guidance ignores the fact that there are civilians who regularly and persistently engage in hostilities but are not members of an organized group. This gives the latter group of civilians an unbalanced and unfair advantage over the opposing armed forces that are continuously targetable.

Third, the Interpretive Guidance endorses the concept of a 'revolving door' for a civilian, who is not a member of an organized armed group but who continuously participate in hostilities. The civilian is only subject to attack when engaged in a specific hostile act but regains protected status after returning from this hostile engagement.

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[213] Ibid., paras 1942 and 1679.

2. The interpretation of "direct participation" is too restrictive.

Under the Interpretive Guidance's theory, it is not necessary that an individual foresaw the eventual resultant harm of the operation but only that he or she *knew* their participation was indispensable to a 'discrete hostile act' or 'series of acts' which were relatively 'direct and immediately harmful' to the enemy.[214] The label for this is the "kill chain" approach. Namely, if a particular activity is necessary to accomplish the "kill" in a specific situation, the activity is 'direct participation'. This is overly restrictive because it limits the activities to only those related to the application of deadly force and not all military operations seek to weaken the enemy in this fashion.[215] For instance, civilians could destroy a bridge thus making it more difficult for government forces to patrol an area.

The Interpretive Guidance says that a civilian, who is a general supporter of an organized armed group but does not take an active role in the hostilities, is not directly participating. The example given is the fighter whose conduct consists of smuggling weapons to a fighter's forward position and conceals them there. The Interpretive Guidance would preclude an attack upon a civilian who regularly and persistently smuggled and concealed weapons for fighters participating in the armed conflict. In these circumstances, the civilian's participation is *direct*. However, according to the Interpretive Guidance, this person still classifies as a civilian with protected status.[216]

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[214] Schmitt, Humanitarian Law and Direct Participation in Hostilities …, 16
[215] Ibid.
[216] Bill Boothby, "And for such time as": The Time Dimension to Direct Participation and Hostilities, *International Law and Politics* 42 (2010), 748.

The Interpretive Guidance's definition of 'direct participation' limits the conduct to activities such as 'preparation', 'deployment' and 'return'. Limiting the loss of continuous protection to "members of organized armed groups with a 'continuous combat function' as opposed to individual civilians who opt-in and out of fighter status, without being a member of an organized armed group, gives those civilians a "privileged, unbalanced and unjustified status of protection as compared to members of opposing regular armed forces, who can be continuously targeted."[217]

3. *The entirety of the hostile conduct must be considered, not merely the tactical participant.*

Consider the example of an individual who after each engagement, returns to his home, cleans, prepares and conceals his weapon and thus remains ready for his next assignment. This person should be regarded as directly engaging in hostilities because he waits in preparation for another hostile act.[218] In fact, this interpretation is consistent with the reference to the API Commentary which defines a hostile act as "any action carried out with a view to combat".[219] Boothby is critical of the ICRC's attempt to narrow the scope of direct participation in hostilities by introducing "recognizable and proximate criterion", which he says lacks a convincing basis in law.[220]

The Interpretive Guidance equates "continuous combat function" with "direct participation in hostilities" and concedes that these fighters need not be engaged in this continuous combat function at any given time in order to be attacked. This notion is to be

[217] Ibid., 743.
[218] Ibid.
[219] Ibid.
[220] Ibid., 749

contrasted with members of an armed group who do not have what is considered to be a continuous combat function, but who nevertheless take direct part in hostilities. The Interpretive Guidance asserts that these persons may only be attacked 'for such time', as they undertake actions qualifying as direct participation. This imports a temporary limitation on their status as a lawful target. In other words, those members who consistently engage in intelligence gathering, the assembly and storage of weapons or the transportation of weapons and munitions to the battlefield are treated in the same way as civilians who engage in hostilities on a "merely spontaneous, sporadic or unorganized basis".[221] The Israeli Supreme court in the *Targeting Killing Case*[222] has held that once a civilian has joined a terrorist organization:

> …which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.

When demarcating the relevant time span in the course of which a civilian is taking direct part in hostilities, there is a need to examine both the "upstream" and "downstream" conduct that makes up the whole continuum of the actual engagement to determine direct participation.[223] The ICRC's position contains an inherent inconsistency that preserves that civilian's immunity from attack each time the person ends his distinct and time based engagement in a hostile act. Dinstein is critical of this position:

> The two positions are inconsistent since the only practical way to foil the assumption of the double roll of a soldier by night and a peaceful citizen by day is to treat the person purporting to be both as an unlawful

[221] Schmitt, The Interpretive Guidance on the Notion…,21
[222] *Pub. Comm Against Torture in Israel v. Government of Israel (Targeting Killings)* 2005, 35 HCJ 769/02, 28.
[223] Dinstein, *The Conduct of Hostilities* (2010 ed.)…148

> combatant at all times. Differently put, he must lose protection from attack even during the intermediate periods punctuating military operations.[224]

4. The improvised explosive device scenario.

Perhaps the most convincing example of the Interpretive Guidance's restrictive approach is where it maintains that the assembly and storage of an improvised explosive device ("IED") would not constitute direct participation in hostilities. Consider the conflicts in Afghanistan and Iraq as two cases in point. The use of IEDs by the insurgents in both countries became an effective tactic against superior and regular armed forces. IEDs are often assembled and stored in close proximity to a convoy route where superior forces will travel, and although the precise location and time in which these routes would be used is not known in advance, the IEDs will likely be used sometime after assembly.[225]

The Interpretive Guidance sought to equate the assembly of an IED with the production of ammunition in a munitions factory, far removed from the frontline of the armed conflict, which would be indirect support for the armed conflict. However, the production of weapons is case specific. In most cases, the assembly and storage of an IED in close proximity to the battlefield will amount to direct participation in hostilities.[226]

It seems incongruous that collecting IED parts from a compound and assembling them would not constitute direct participation. It would seem odder still to prohibit a coalition section commander, whose section is conducting an IED search and seizure

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[224] Ibid.
[225] Schmitt, The Interpretive Guidance on the Notion…, 21.
[226] Ibid., 31

operation, from interdicting or targeting the very individual who meets the "Likely and Identifiable Threat" criteria. Otherwise, a few hours later, another insurgent will plant that same IED to attack the coalition section as it returns along the convoy route after conducting operations.

5. The causal link approach.

The Interpretive Guidance focuses on the tactical level of war, emphasizing the direct causal link to hostilities. This does not reflect the realities of how warfare is actually conducted and the emphasis on 'bearing arms' fails to fully recognize how armed groups are organized.[227] For instance, the production and transport of weapons or equipment, would be excluded from the notion, unless the act is carried out as an integral part of an identifiable military operation specifically designed to directly cross the 'threshold of harm'.[228]

Requiring the harm to "be brought about in one causal step" is overly limiting.[229] The Interpretive Guidance's "one causal or one single step" analysis would exclude the civilian's participation in any conjunctive chain of conduct that would lead to a hostile act.[230]

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[227] Kenneth Watkins, "Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance", *International Law and Politics*, 42, (2010), 644.
[228] Ibid., 658.
[229] Michael N. Schmitt, "Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis", *Harvard National Security Journal*, 1 (2010), 29
[230] Ibid., 29-30.

The "one causal step" theory excludes any hostile activity that simply builds up the capacity of a party to inflict harm on the enemy. [231] Watkins is critical of the ICRC's 'causal link criteria' as highlighted by yet another IED production example:

> An uninterrupted causal chain of events between the production of the IED and the application of violence is insufficient. Interpretive Guidance states definitively that "the assembly and storage of improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components may be connected with the resulting harm…but, unlike the planting and detonation of that device, do not cause that harm directly.[232]

This approach limits the action to deal with such attacks to a 'reaction posture' focused on acts, rather than on the capacity of the combatant to plan and attack in the future. Nowhere in the ICRC's discussion relating to the assembly and storage of IEDs is there a consideration that those persons assembling and storing the IED may be operating within a command structure of the organized armed group. The use of IEDs represents one of the greatest threats to both civilians and security forces in contemporary conflicts such as Afghanistan and Iraq. The ICRC's failure to properly address this challenge places both groups at risk from a "particularly perfidious means of warfare".[233]

6. *Membership in organized group is not limited to front line fighters.*

The preferred approach and one which the Interpretive Guidance fails to recognize is that the conduct of a military operation occurs as a group activity, which requires the same type of hierarchical organization and command structure even though the participants are non-state actors. Watkins posits as follows:

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[231] Watkins, "Opportunity Lost: Organized …, 658.
[232] Ibid.
[233] Ibid., 658-659.

> …those groups require not only the participation of fighters, commanders, and planners, but also logisticians, and intelligence personnel. Further, it has long been recognized that insurgent campaigns, like conventional warfare, are fought with strategic as well as tactical goals in mind. As a result, the exercise of command, planning, intelligence and even logistics functions can involve direct participation in hostilities above the tactical level.[234]

The concept, then, of direct participation in hostilities should not be based on a "continuous combat function" or even on membership in an organized armed group. The focus should use a comprehensive approach to evaluate whether the civilian regularly and persistently participates in hostilities. This approach would capture not only direct combat roles, but indirect roles such as intelligence gathering, planning, and the logistical support of any hostile act, or hostilities generally, that are related directly to conduct harmful to the enemy.

The ICRC's interpretive guidance unreasonably narrows the notion of membership in the military wing of an armed group. Sivakumaran argues that an alternative approach would be to recognize membership of a military wing of the armed group using two distinct forms. The first is using a *de jure* membership, which implies a formal legal relationship to the military wing of the non-state actor and second, a *de facto* membership through ongoing and active direct participation in hostilities.[235]Sivakumaran argues that a fighter's ongoing "chain of hostilities with short periods of rest between them" suggests the assumption of fighter status, particularly if the rest periods serve as a preparation for the next military engagement. These persons should be considered *de*

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[234] Ibid., 690.
[235] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, (Oxford: Oxford University Press, 2013), 360.

facto members of the military wing of the armed group because they are sufficiently different from civilians who take an entirely *ad hoc* part in hostilities.[236]

D. The Contrary View

There are, of course, contrary views to those expressed in this paper as to whether or not a civilian loses protection during temporal breaks from hostilities. Dormann is firmly of the view that a civilian is any person who does not belong to any one of the categories of persons referred to in Article 4(A)(1)(2)(3) and (6) of GC III and Article 43 of API, and he states "thus, for the purposes of the law on the conduct of hostilities, there is no gap."[237] If person is a civilian, the civilian remains so except for such time as they directly participate in hostilities and become lawful targets for that period only. When they do not directly participate in hostilities, they are protected civilians and may not be targets. He goes on to state: "It must be stressed that the fact that the civilians have at some time taken direct part in hostilities does not make them lose their immunities from direct attacks once and for all."[238] However he offers no guidance or criteria for determining what "some time taken direct part" means nor any criteria to assess this participation.

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[236] Ibid., 361.
[237] Knut Dormann, The Legal Situation of "Unlawful/Unprivileged Combatants" *IRRC*, 85 (2003), 72.
[238] Ibid.

CHAPTER V – THE 'REVOLVING DOOR' OF PROTECTED STATUS

This chapter will explain the revolving door theory and outline why the 'revolving door' theory should be rejected for legal, policy and practical reasons.

A. The 'revolving door' theory

The revolving door theory centers on the ICRC's view that civilians lose protection from direct attack for the duration of each specific hostile act amounting to direct participation; however, after each direct engagement, civilians regain protected status. The ICRC position, as reflected in the Interpretive Guidance, is that this 'revolving door' of protection from attack stems from the language in the treaty provisions. Under Article 51(3) of API civilians enjoy this protection "*unless and for such time*" as they directly participate in hostilities. These participants remain civilians, but their protected status is temporarily suspended during periods of direct participation.[239] If this participation was truly limited to one-off, isolated or even sporadic hostile acts, there would be no 'revolving door' of protected status. However, the point under consideration is the situation where the civilian's hostile conduct amounts to *regular* and *persistent* participation; thus creating this 'revolving door' of protected status.

The ICRC Commentary on Article 51(3) of API provides that direct participation includes "preparations for combat and return from combat, but that once he ceases to participate the civilian regains his right to the protection…".[240] Consider the ubiquitous 'fighter by night and farmer by day' example, with the accompanying opting in and out

[239] Boothby, "And for such time as"…, 754.
[240] API Commentary, para 1944.

of protected status. This narrow interpretation creates a 'revolving door', through which the directly participating civilian passes when he begins an operation. For this limited time he becomes a lawful target but when the operation ceases, he uses the 'revolving door' again to exit into protected status.[241]

The core of the issue is whether the civilian, who persistently participates directly in hostilities, regains protected status *during intervals* between specific engagements.

1. For the policy reasons, the revolving door upsets the balance between military necessity and humanity and should be rejected.

International Humanitarian Law infuses the violence of war with humanitarian considerations.[242] The participation of this civilian in the conflict is inconsistent with and contrary to this civilian's protected status as a *civilian.* This represents a significant danger to opposing forces. No state which sends its forces to the battlefield would or should accept norms that place its military success or survival at risk and therefore there has to be a proper balance between military necessity and humanity.[243] This puts a commander in the position of having to devote disproportionate resources to real-time intelligence gathering so he can assess, minute by minute which civilians are protected and which are not. This puts an enormous drag on the commander's ability to focus on the task at hand; namely to weaken the enemy. The notion of a revolving door has no place in the targeting analysis, whether the conflict is a Common Article 2 or Article 3 Conflict.

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[241] Schmitt, Targeting and International Humanitarian Law …, 318.
[242] Schmitt, Interpretive Guidance…, 6.
[243] Ibid.

The revolving door of protection badly distorts the military necessary/humanitarian equilibrium upon which international humanitarian law is founded. While cooks in the regular armed force may be targeted at any time, his or her counterpart in an insurgent organized armed group, according to the Interpretive Guidance, may only be attacked if there is "direct participation" and only for such time as that participation lasts. Since direct participation in hostilities is not defined in international humanitarian law, this phrase must 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 light of its object and purpose".[244]

Schmitt clearly rejects the 'revolving door' theory and argues that the door is firmly locked after exit and the civilian remains a lawful target. In other words, once the civilian has opted into hostilities that civilian remains a lawful target until "unambiguously opting out".[245] Opting-out can occur either by extended non-participation, demonstrating an intention to desist from further hostilities, or some affirmative act of actually withdrawing from directly participating in hostilities. This view has much merit.

Since the civilian started out with what one could term as 'gold standard protected status', that person had no authority or privilege to engage in hostilities in the first place.[246] Civilians must refrain from directly participating in hostilities and are subject to risks of attack if they do during that time.[247] Therefore, it is reasonable for that civilian to

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[244] *Vienna Convention on the Law of Treaties* Article 31(1), May 23, 1969, 1155 U.N.T.S.331.
[245] Schmitt, Interpretive Guidance …, 6.
[246] Ibid.
[247] Deter Fleck, ed, *The Handbook on Humanitarian Law in Armed Conflict*, (Oxford University Press: Oxford, 1995), 32.

bear the risk that the opposing forces are unaware of the civilian's withdrawal from the contest. Schmitt proposes the following:

> This is the better interpretation of direct participation. In the International Humanitarian Law, grey areas must be interpreted in light of the law's underlying purpose – achieving balance between military necessity and humanitarian concerns. A revolving door would throw off this balance. It would frustrate combatants charged with combating the direct participants and combatants frustrated with legal norms constitute a risk to civilian population.[248]

However, a combatant's frustration with the law of armed conflict is only a supplemental argument as to why there should be no 'revolving door'. It is the unreasonableness of expecting combatants to dedicate themselves to knowing which side of the 'revolving door' the civilian is on at any given time that is the primary reason. It is patently unreasonable, particularly since it is the civilian's decision to participate which pushes the door open. This analysis is supported by the basic premise that the Geneva Conventions protect civilians by encouraging combatants to distinguish themselves from non-combatants.

B. Legal and policy reasons against the 'revolving door' theory

1. The principle of distinction is ignored.

The reality of the modern battlefield is that battle blurs distinctions between regular armies, on the one hand, and insurgents who fight while living and blending in with the civilian population, on the other. In that delicate balance between military necessity and humanity, it is therefore essential "that a bright line be drawn between

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[248] Ibid.

combatants and the rest of the population".[249] This allows the average soldier to tell the difference between those individuals that pose a threat to him (and are therefore legitimate targets) and civilians who possess both a right not to be intentionally targeted and the corresponding obligation not to participate in fighting.[250]

There are clear functional reasons why civilians who take direct part in hostilities should assume the risks of becoming an unlawful combatant, especially in modern armed conflict occurring in an urban environment. A civilian who participates directly in hostilities is an unlawful combatant, and as outlined in Chapter II above, neither entitled to combatant immunity nor the protections of prisoner of war status. The simple truth is that unlawful combatants on the battlefield are not only a threat to the armed forces on the other side but also a threat to innocent civilians. Insurgents in both Afghanistan and Iraq are illustrative of this fact. In those conflicts, coalition forces were often not able to distinguish between insurgents and civilians and the resultant consequence was unintended collateral damage amongst the civilian population.[251] The alternative consequence would lead to operational paralysis and no state would accept this compromise to its right to exercise military necessity.

As alluded to above, given the blurring of lines between civilian and unlawful combatant, a civilian who persistently takes direct part in hostilities, must demonstrate – to regain protected status – an "affirmative disengagement" from hostilities.[252] How disengagement is determined should be based on objective and verifiable criteria, using a

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[249] Callen, Unlawful Combatants …, 1063.
[250] Ibid.
[251] Ibid., 1029
[252] Watkins, Opportunity Lost …, 692.

standard of good faith and reasonableness, having regard to all prevailing circumstances.[253] This reinforces the distinction principle so as not to undermine the protections associated with civilian status.[254] According to the Interpretive Guidance, members of the organized armed groups with a continuous combat function remain continuously targetable, unless they make some positive act of disengagement, failing which, they can be attacked. This position is supported by one of the US military detention cases, which requires evidence of an affirmative disengagement to establish that a person is no longer a direct participant in the hostilities.[255]

Commanders always have the duty to take feasible precautions to verify the objectives to be attacked are military objectives and not civilians or civilian objects.[256] However, consider the situation of a civilian, who was formerly a direct participant, and was attacked in circumstances where it turns out he was actually no longer participating in the conflict. Assume the error was made even though the intelligence relied upon was the best information prevailing at the time. The commander would not be criminally liable, as the mistake of fact will likely negate intent and knowledge.[257] The risk associated with a mistake of fact lies with the civilian who chose to directly participate in hostilities. Article 8(2)(b)(i) of the *Rome Statute* defines a war crime as the "intentional

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[253] Boothby, "And for such time as"…, 759.
[254] Watkins, Opportunity Lost …, 693.
[255] Boothby, "And for such time as"…, 759.
[256] Article 57(2)(a)(i) API.
[257] *Rome Statute of the International Criminal Court,* Article 30(1) UN Doc. A/CONF.183/9,37 ILM 1002(July 17th, 1998).

direction of an attack against civilians" and applies only to those civilians "not taking direct part in hostilities."[258]

The most compelling argument against the Interpretive Guidance's structural distortion of the 'revolving door' is that it makes no sense from a military perspective. In an asymmetrical armed conflict, individual insurgents typically plant an IED at night to avoid detection when seeking to attack opposing forces on a convoy route the next day, and depart the area and then return to their civilian home and occupation. In Afghanistan, coalition forces were continuously trying to locate insurgent hideouts through human intelligence and to target those hideouts and IED assembly and storage compounds. Yet under the Interpretive Guidance's approach, once the insurgent returns home from planting the IED, he becomes a protected person, safe from attack, until he prepares and deploys again for another military operation. This interpretation throws "the military necessity/humanitarian balance wildly askew."[259]

2. The notion of mutual responsibilities is distorted by the 'revolving door'.

The principle of discrimination under the law of war is based upon mutual responsibilities.[260] Articles 51(2) and (3) of API require military forces to refrain from directly attacking the civilian population. In return there is a concomitant obligation on the part of civilians not to use their protected status in a treacherous way to participate in hostilities. This is also known as "equal application principle" in the law of war.[261]

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[258] Ibid.
[259] Schmitt, The Interpretive Guidance …, 38.
[260] Parks, Part IX of the ICRC …, 772.
[261] Adam Roberts, The Equal Application of the Laws of War: A Principle Under Pressure, *International Review of the Red Cross,* 90 (2008), 931.

Failing to observe the equal application principle puts the individual civilian and the civilian population as a whole at significant risk.[262] The doctrine of reciprocal obligations is acknowledged in Article 58 of API, which spells out the duty that parties are to "avoid locating military objectives within or near densely populated areas."

While an attacker must take reasonable steps to discriminate between military and civilian objects, the defender must take steps to make that discrimination possible. This is what one Canadian armoured officer observed about how the Taliban used human shields against coalition forces in Afghanistan:

> While every effort must be made to minimize damage to local infrastructure, there have been and will continue to be occasions when we must be prepared to use the destructive capabilities of our armoured forces to dislodge insurgents from complex terrain. While we would want nothing more than to meet the enemy in the middle of an open desert, *the Taliban find sanctuary amongst dense vineyards and urban compounds. They frequently use women and children to shield themselves from coalition attack*, rendering the use of close air support, aerial bombardment and artillery fire risky.[263] (Emphasis added.)

Insurgents should respect the reasonable care rule and avoid practices such as using human shields to protect military targets. This is a reciprocal duty that should be imposed upon civilian, as well as government forces. This is yet another policy reason for putting the onus and burden of mistakes on a civilian if the civilian directly participates in hostilities.[264]

Insurgents bizarrely benefit by violating international humanitarian law, because by virtue of their unlawful operations that they are not legitimate targets under the law,

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[262] Parks, Part IX of the ICRC …, 773.
[263] Major Trevor Cadieu, "Canadian Armour in Afghanistan", *Canadian Army Journal*, 10.4 Winter (2008), 11.
[264] Matthew C. Waxman, Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists, *Columbia Law Review* 108 (2008) 1393.

unless, and then for only as long as those members directly participate in hostilities.[265] Therein lies the inherent unfairness in granting revolving door protected status.

Insurgents, for the most part, do not comply with the Law of Armed Conflict. They do not wear a distinctive emblem; nor do they generally carry their arms openly. In fact, one author observes that: “employing the protections offered by civilians is a tactic lying at the very centre of insurgent operations.”[266] Not only do insurgents blend in to the civilian population, but they use civilian infrastructure and cultural and religious objects, such as churches, mosques and schools to store weapons and plan operations.[267] Elliott posits that International Humanitarian Law exists to mitigate the suffering that results from armed conflict but does not exist to “level the playing field.”[268] Even though insurgents would stand little hope of success were they to refrain from operating within heavily-populated areas, this is not relevant to the application of International Humanitarian Law. Insurgent civilians are choosing to participate in hostilities. Acknowledging this fact, any blame for putting at risk the civil population to should those responsible – namely, the insurgents.[269] States are put in the unenviable position of being blamed for civilian deaths damage. This is because International Humanitarian Law places the onus to prevent collateral damage upon the attacking state and not on the terrorists or insurgents who put the civilian population at risk by their very conduct.[270] States would find it intolerable for their lawful combatants to be held to a standard of

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[265] Michael Elliott, “Where Precision is The Aim: Locating: The Targeted Killing Policies of the United States and Israel, Within International Humanitarian Law”, *The Canadian Yearbook of International Law* 2009, 135.
[266] Ibid., 137
[267] Ibid.
[268] Ibid., 139.
[269] Ibid.
[270] Ibid., 139.

perfection (or near perfection), with no corresponding standard at all for insurgents, whether in organized armed groups or those individuals civilians acting independently.

B. The analogous loss of protected status for medical personnel – no 'revolving door' either.

1. Status of medical personnel under the law of armed conflict.

Like civilians, medical personnel who carry out their unique humanitarian functions to care for the sick and wounded as a result of armed conflict are protected persons and may not be the object of attacks.[271] Attacking medical personnel constitutes a war crime.[272] However, medical personnel relinquish this keystone protection going forward if they take "direct part in hostilities."[273] There is no corresponding notion that once they cease taking a direct part in hostilities, they regain their protected status. Since there is no 'revolving door' for medical personnel, civilians should not be afforded the benefit of opting and out of protected status.

API attempts to simplify the definitions of military and civilian medical personnel. Medical personnel are now defined as "persons, whether military or civilian, who are assigned exclusively to medical purposes by a party to the conflict."[274]Permanent medical personnel are those assigned exclusively to medical purposes for an indefinite period, while temporary personnel are those assigned to medical duties for a limited period.[275]These categories protect not only doctors and nurses but other health care professionals as well. This protection also extends to those involved in the administration

[271] GCI, Arts. 24-26, GCII, Art 36, GCIV, Art. 20 and API, Art. 15.
[272] *Rome Statute*, Article 8, para 2(b)(xxiv).
[273] A.P.V. Rogers, *Law on the Battlefield,* 3rd ed. (Manchester: Manchester University Press, 2012), 85.
[274] API, Article 8.
[275] Ibid.

of medical units or the operation of medical transports, such as clerks, stretcher-bearers, cleaners belonging to medical units and drivers.[276] Temporary medical personnel have the same protections only while carrying out their medical duties.

The history of protection to medical personnel dates back to the 1899 Hague Convention. This Convention mainly concerned hospital ships; however in 1906 the Red Cross determined that it was time to bring this Convention up to date. Hence, in 1906, a conference in Geneva was held for that purpose, which resulted in a convention much more detailed with regard to medical establishments, personnel and material. The following provisions are relevant to the discussion here:

> Article 6. Mobile Sanitary Formations [i.e., those which are intended to accompany armies in the field] and fixed establishments belonging to the sanitary service shall be protected and respected by belligerents.
>
> Article 7. Protection due to sanitary formations and establishment *ceases if they are used to commit acts injurious to the enemy*.[277](Emphasis added.)

Today protection extends not only to medical personnel but medical establishments on land, hospital ships and medical aircraft, which must be respected and protected at all times and not made the object of attack. In addition, it is widely accepted that this immunity ceases if these medical establishments are used for purposes hostile to the adverse party outside their humanitarian purpose.[278]

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[276] Ibid., Article 8(e).
[277] L.C. Green, *Essays on the Modern Law of War* (New York: Transnational Publishers Inc., 1985), 109.
[278] Lesley C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed. (Manchester: Manchester University Press, 2008), 248-249.

2. Medical personnel must not take part in hostilities.

To preserve this immunity from attack, medical personnel must not engage in any hostile conduct that a regular combatant would undertake.[279]While medical personnel are permitted to carry small arms for their own protection and the protection of their patients, these weapons must not be used in an offensive fashion.

GC I and API, both of which apply to Common Article 2 Conflicts, provide that medical units and transports will lose their protection if they are used to commit, outside their humanitarian functions, acts harmful to the enemy. [280] However, AP2, which applies to Common Article 3 Conflicts, stipulates a loss of protection where medical units are used to commit open "hostile acts, outside the humanitarian function."[281] Though there appears to be a variation in the terminology, these provisions seem to apply expressly to medical units and transports rather than directly to medical personnel.[282]

According to the Commentary on the Additional Protocols, the meaning of both terms is the same and, by analogy, the rule and the loss of protection can be applied to medical personnel as well. Therefore, medical personnel who take a direct part in hostilities outside of their humanitarian function are considered an act harmful to the enemy. In the event that medical teams are incorporated into combat units, and their

[279] Ibid., 249.
[280] GCI, Art. 21, API, Art 13.
[281] APII, Art 11.
[282] Peter De Waard & John Tarrant, "Protection of Military Medical Personnel in Armed Conflicts", 35 *UWA Law Review* (2010), 170.

medical personnel bear arms and take a direct part in the hostilities, they are no longer entitled to protection.[283]

In addition, the ICRC Commentary on Article 21 of the Geneva Convention suggests that:

> The use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition dump, or as a military observation post or the deliberate sitting of a medical unit in a position where it would impede an enemy attack would all be "acts harmful to the enemy".[284]

Therefore, under this interpretation, the definition of "harmful" is broadened to include not only "direct participation" but would also include harmful acts which impede or hinder the military operations of the enemy.[285]

3. No 'revolving door' of protection for medical personnel.

There is no 'revolving door' protection for medical personnel because medical personnel lose their protection if they engage in any conduct that is harmful to the enemy.[286]

If a military commander has insufficient combatants to guard the perimeter of the military establishment, and orders medical personnel to assume perimeter force protection duties, those medical personnel would lose their protected status. Indeed, it would be treacherous for them to display their protective emblem or even carry their

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[283] J-M Henckaerts & L. Doswald-Beck *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) 1, Rule 25.
[284] J.S. Pictet (Ed), Commentary to Article 28 *Convention (1) For The Amelioration of the Condition of the Wounded and Sick in Armed Forces In the Field* (Geneva: ICRC, 1952), 200-01.
[285] De Waard & Tarrant, Protection of Military Medical …, 171-172.
[286] Ibid., 174.

identity card.[287]Therefore, even if a small number of medical personnel take part in hostilities without formally being reassigned, this jeopardizes the protective status of the entire medical unit.[288]

De Waard and Tarrant conclude as follows:

> Where permanent military medical personnel engage in non-medical tasks that can be characterized as acts harmful to the enemy and inconsistent with their humanitarian functions, those personnel will not be entitled to protection while completing those tasks unless they are permanently reassigned to combat roles. … Formal reassignment from medical category to a non-medical category would also be required. If these conditions are not strictly complied with, any permanent medical member of the armed forces will be taking direct part in the hostilities without combatant immunity. The consequences are that such persons can be prosecuted for acts they commit, including murder.[289]

The regular reassignment of medical personnel, by a commander, would only serve to introduce ambiguity and mistrust regarding the protection of medical personnel, units and transports.[290]

The analogy to a civilian directly participating in hostilities is strikingly similar. Medical personnel live and serve amongst the armed forces of a belligerent party and they are at risk from attack even if not deliberately targeted. Similarly, insurgents live with and blend into the innocent civilian population. The rationale for applying a one-way turnstile instead of a revolving door is the impossibility of trying to determine, moment by moment, whether an insurgent is a lawful target or innocent civilian. If there is no 'revolving door' for "permanent medical personnel", then there should be no

[287] Ibid., 176. In fact, De Waard and Tarrant argue that even where there is a reassignment of medical personnel as non-combatants to combatant roles, this does not mean that they gain combatant immunity. Because, if a person loses protection from attack, his status does not change from a non-combatant to a combatant entitled to combatant immunity.
[288] Ibid., 178.
[289] Ibid., 182.
[290] Ibid., 179.

'revolving door' for civilians. When civilians opt-in and opt-out of protected status, they make a mockery of the principle of distinction, which is one of the bedrock principles upon which protected status for civilians is founded. If medical personnel lose their protected status for participating in hostilities and do not benefit from combatant immunity, the doctrine of reciprocity dictates that insurgents should receive no greater protections.

C. Practical reasons to reject the 'revolving door' theory

1. Common sense approach.

The 'revolving door' should be rejected for practical reasons. It would flout common sense to prohibit government forces from attacking an identified fighter unless he was actively engaged in an attack and it is "militarily unrealistic as it would oblige them to react purely reactively while facilitating hit and run operations by the rebel group."[291]

The AP1 Commentary states as follows:

> If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked.[292]

The phrase "for as long as his participation lasts" implies a longer period of time and actually contradicts the Interpretive Guidance notion that the loss of protection comes and goes with each individual act.[293] The API commentary interpretation makes sense

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[291] Marco Sassoli, "The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?", *Israel Yearbook on Human* Rights, 39, (2009), 441.
[292] Boothby, "And For Such Time" …, 756.
[293] Ibid.

because during a civilian's persistent participation "that civilian has chosen to become part of the fight."[294]

The better question to ask is "when does persistent participation end"? The Interpretive Guidance acknowledges that the notion of the 'revolving door' makes it more difficult for opposing armed forces to respond effectively to the direct participation of civilians in hostilities.[295]This uncertainty creates legal inequality between opposing parties, "thus eroding the international assumption that the law applies equally to each party to the conflict."[296] It is certainly logical to assume that a civilian who persistently participates in hostilities is prone to continue. Furthermore, between intervals of participation, he is likely preparing himself for the next attack, namely checking his equipment and obtaining additional supplies. More importantly, he is probably communicating with like-minded individuals, or indeed his superiors, to de-brief them on his last mission and obtain orders or instructions for the next one. Therefore, in assessing that persistent conduct against the conduct of a civilian who never takes direct part in any combat operations, is to place at risk the respect based on the law accorded to the civilian population.[297]

The Interpretive Guidance says that its interpretation achieves greater protection of innocent uninvolved civilians. The contrary is likely true. A civilian who persistently and repeatedly participates in hostilities; contrasted with an innocent, uninvolved civilian increases the risk of attack on the latter group. It is difficult not to draw the conclusion

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[294] Ibid.
[295] Meltzer, The Interpretive Guidance … , 71.
[296] Boothby, "And For Such Time …", 757.
[297] Ibid., 766.

that the ICRC's approach creates an imbalance that erodes respect for international humanitarian law and enhances the long-term risk to the very civilians that this body of law was crafted to protect.[298]

In an armed conflict, there is no presumption that civilians will refrain from taking direct part in hostilities. A reasonable commander can only make a determination regarding direct participation on information from all sources that are reasonably available to him at the time of making that determination.[299] A commander, who makes the targeting decision must formulate the assessment based on available information and, inevitably, there will be information gaps and inaccuracies because of the 'fog of war'. Targeting judgments should be assessed for whether they were made in good faith and based on reasonable intelligence available at the prevailing time. The benefit of hindsight might prove later that the information was unreliable but this ought not to negate the original decision. This standard puts too great an onus on those who are charged with making these time-sensitive and difficult choices, often made under intense pressure.[300] This approach is inherently recognized by the precautions mandated when targeting decisions are made as outlined in Article 57(2) of AP1.

The Interpretive Guidance stands for the proposition that between operations the direct participant cannot be attacked because, at that time, he no longer participates in hostilities. However, this interpretation places members of a state's armed forces at a

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[298] Ibid., 767.

[299] Ibid. Boothby observes that when the United Kingdom ratified API, it made a reservation, which states the following:

> Military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.

[300] Ibid.

serious disadvantage, since their combatants may be attacked at any time. Further, this interpretation upsets the balance between military necessity and humanity, but the Interpretive Guidance claims that this is an integral part and not a malfunction of international humanitarian law because it prevents attacks on civilians who do not, at the time, represent a military threat.[301] The very reason why civilians lose their protection under these circumstances is because they have chosen to take up the fight and, until they categorically renounce that participation in hostilities, they continue to represent a real and substantial threat.

Again, the IED example is critical to this analysis. As Operation Enduring Freedom continued in Afghanistan, NATO casualties from IEDs increased and arguably far out-weighed casualties resulting from troops-in-contact scenarios with the Taliban.[302] There is a long support chain before and after the IED is deployed. These include obtaining the IED's constituent parts, assembly, storage, concealment prior to the operation, transportation to a convoy route and placing it in the road or culvert. Observers will be posted to detect and report convoys and gather intelligence on road movement and defensive measures or protocols. Aside from the actual detonator, there are likely other personnel who collect the battle damage assessment data. This data, along with the road movement assessments and reports on the success or failure of the deployment are then transmitted to a superior who analyzes the data for use on the next mission. All these individuals in the - pre and post - deployment phase feature prominently and play important and integral roles in how this IED was effectively used. If Coalition forces

[301] Melzer, Interpretive Guidance on the Notion of …, 70.
[302] Online:http://afghanistan.blogs.cnn.com/2010/05/06/Combating-the-no-1-killer-of-troops-in-afghanistan**.**

were able to detect and target these direct participants in this IED deployment – withdrawal chain, especially where the IED was stored or while it was being assembled, they could eliminate a real and substantial threat. However, the Interpretive Guidance would offer the protection of Article 51(3) of AP I to a number of these so-called protected civilians.

D. Why disciplined soldiers do not engage in the treachery that the 'revolving door' represents.

The rule of law and ethics play a critical part in one of the reasons why disciplined soldiers rarely engage in perfidious conduct. Insurgents, on the other hand, do not concern themselves with ethical standards. The insurgent is likely not bound by any code of conduct or disciplinary system. There is not even an attempt to comply with the law of armed conflict. This is evident in the intrinsic and inherent danger the 'revolving door' theory represents. Contrast this with the rule of law that governs most soldiers. The threat of trial and actual criminal punishment, or even execution is the primary motivator to ensure that a soldier's conduct complies with the laws of war.[303]

Ethics also plays a critical role. This is because soldiers respect the rule of law, including the law of armed conflict and customary international law because it is "the right and honorable thing to do."[304] John Keegan, the famous British military historian, supports this notion that honour plays a key role in a soldier's adherence to the laws of armed conflict when he wrote: "There is no substitute for honour as a medium of

[303] Glazier, "Playing by the Rules …", 999.
[304] Solis, *The Law of Armed* …, 186.

enforcement on the battlefield, never has been and never will be. There are no judges, more to point, no policemen at the place where death is done in combat... ."[305]

The Canadian Forces' publication *Duty with Honour* states that the essential function of a military professional is the ordered application of military force in defense of the state and its interests.[306] At the core of the military ethos is the warrior's honour. Members of the profession of arms must conduct military operations in a manner that earns them honour. Honour also comes with adhering fully to the law of armed conflict, especially in the humane treatment of detainees or prisoners of war. It also requires that all non-combatants, namely civilians, their property and protected places be accorded the full protection set out in all four Geneva Conventions.

As Michael Ignatieff so eloquently stated in *The Warrior's Honour*:

> …[A] warrior's honour is the slender hope, that it may be all there is to separate war from savagery. And a corollary hope is that men can be trained to fight with honour. Armies train men to kill but they also teach restraint and discipline; they channel aggression into ritual. War is redeemed only by moral rules… . [307]

[305] John Keegan, review of *The Laws of War: Constraints of Warfare in the Western World*., by Michael Howard, George Andrepoulos and Mark Shulman, *The Times Literary Supplement*, Issue 4834 (November 1995), 11.

[306] Department of National Defense, 2003, *Duty with Honour: the Profession of Arms in Canada*, 7.

[307] Michael Ignatieff, *The Warrior's Honour*, (Toronto: Viking, 1998), 157.

CHAPTER VI - ALTERNATIVE METHODS OF DETERMINING 'DIRECT PARTICIPATION'

This chapter will outline alternative strategies for determining direct participation. The includes a contextual framework analysis using the case by case method. This method is already used in some countries' operational law handbooks. Different cumulative criteria than suggested in the Interpretive Guidance will be advanced, incorporating the principle of distinction to supplement this criteria.

A. A case by case analysis should be used to define direct participation in hostilities

1. The contextual framework must be considered.

Direct participation determinations should be contextual, meaning the test should be a case by case analysis. This type of determination balances military requirements and humanitarian ends, rather than a mechanical application of set formulae.[308] The International Criminal Tribunal for the Former Yugoslavia in the *Tadic* decision adopted a contextual framework as follows:

> 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 circumstance, that person was actively involved in hostilities in the relevant time.[309]

The Israeli Supreme Court also adopted a case-by-case approach in the Targeted Killings case.[310] A case-by-case approach favouring direct participation would include the following examples: a person who collects intelligence on an army position; or a

[308] Schmitt, Humanitarian Law and the Direct Participation …, 16.
[309] *Prosecutor v. Dusko Tadic*, Case ICTR IT-94-1, Opinion and Judgment, 7 May 1997, para 616.
[310] *Pub. Comm Against Torture in Israel v. Government of Israel…, 29.*

person who transports unlawful combatants to or from a place where hostilities will take place. The Court contrasted this with a person who sells food or medicine to an unlawful combatant and characterizes this support as not taking direct part.[311]

2. Operational Law of War Manuals Provide for a Case by Case Analysis.

As noted by the ICRC and its *Customary International Humanitarian Law* study, a clear and uniform definition of "direct participation in hostilities" has not been developed in state practice.[312]The following are examples of where state practice may be inferred. Various countries' law of war manuals (where these states have actually engaged insurgents in asymmetrical warfare) have adopted case by case guidelines to address what constitutes 'direct participation' by civilians. These manuals serve as guidance for forces in the field. The case by case analysis adopted by these states could arguably be interpreted as having achieved the status of customary international law.

The first of these is the *Commanders' Handbook on the Law Naval Operations* which states as follows:

> Unlawful combatants who are not members of forces or parties declared hostile but who are taking a direct part in hostilities may be attacked while they are taking a direct part in hostilities unless they are *hors de combat*. Direct participation in hostilities must be judged on a case-by-case basis. Some examples include taking up arms or otherwise trying to kill, injure or capture enemy personnel or destroy enemy property. Also, civilians serving as look-outs or guards, or intelligence agents for military forces may be considered to be directly participating in hostilities. Combatants in the field must make an honest determination as to whether a particular

[311] Ibid.

[312] 24 Customary International Law Rules, ICRC, Customary International Humanitarian Law; Vol. 1, Rule 3 (2005) prepared by Jean-Marie Heckaerts and Louise Doswald-Beck (Customary International Law Rules).

> person is or is not taking direct part in hostilities, based on the person's behavior, location, attire and other information available at the time.[313]

The UK's manual on the law of armed conflict offers a similar guidance:

> Whether civilians are taking a direct part in hostilities is a question of fact. Civilians manning an anti-aircraft gun or engaging in sabotage of a military installation are doing so. Civilians working in military vehicle maintenance depots or munitions factories or driving military transport vehicles are not, but they are at risk from attack on those objectives since military objectives may be attacked whether or not civilians are present.[314]

Neither manual though, offers any criteria for making the referenced case-by-case determination.

B. Cumulative factors approach

Schmidt outlines the following three key alternative cumulative factors, which he draws from the Interpretive Guidance's constitutive elements, as a basis for establishing criteria essential to determining when a civilian is taking direct part in hostilities. They are as follows:

> 1. The act must be capable of either adversely affecting, or enhancing the military operations, or military capacity of a party to a conflict. The inclusion of harm to persons or objects is a reasonable extension of this norm.
>
> 2. The act must constitute an integral part of the conduct that adversely harms one party or benefits another militarily. In other words, there must be a close relationship between the act and the harm or benefit. The phrase "integral part" encompasses both acts that, in themselves, cause the harm or benefit and those which contribute in a relatively direct sense to the causation of such harm or benefit.

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[313] U.S. Navy, U.S. Marine Corps and U.S. Coast Guard Doc., NWP 1-14M/MCWP 5-12.1/COMDTPUB P5600.7A, Chapter 8.2.2.

[314] United Kingdom: Ministry of Defense, *A Manual on the Law of Armed Conflict* (2004) Chapter 5.3.3.

3. There must be a nexus between the act in question and the ongoing hostilities. It is not enough that the act merely occurred during the hostilities.[315]

(the "Three Cumulative Factors")

These Three Cumulative Factors can be used in the decision making process about whether a civilian, directly participating in hostilities, can and should be targeted. In this analysis, what are paramount are the principles of distinction and proportionality. If criteria similar to the concept of "likely identifiable threat (LIT) are applied in conjunction with the Three Cumulative Factors, this will likely eliminate the temporal anomaly created by the Interpretive Guidance's analysis of the phrase, "for such time". LIT was the threshold used in Afghanistan for identifying individuals subject to "status" based targeting.[316] The Three Cumulative Factors, combined with criteria similar to LIT, enables the targeting authority to identify and validate when an association with a hostile group justifies designating the individual as a lawful military objective. This analysis eliminates the need to critically assess a person's conduct, location or activity at the time that fighter is targeted.

Even the Commentaries recognize that it would be fundamentally inconsistent with what Corn and Jensen describe as the "implicit invocation of targeting authority of the LOAC to limit the lawful objects of attack to only those individuals posing a direct and imminent threat or those causing actual harm".[317]

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[315] Michael Schmidt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements", *International Law and Politics*, 42 (2010), 739.
[316] Corn and Jensen, Transnational Armed Conflict …, 20.
[317] Ibid.

The Interpretive Guidance restricts the beginning and end of direct participation to the immediate execution phase, including acts in preparation of the carrying out the hostile act, as well as deployment to and from the scene by the civilians involved.[318] Therefore 'direct participation' should not be linked to a temporal and immediate notion of direct participation in hostilities but on whether the civilian's participation, on a case by case analysis, demonstrates a belligerent *animus*.

A more effective question should be framed as follows:

> Does the civilian's role, as part of the organized armed group or otherwise, amount to conduct which is, in terms of a threat analysis, integrally harmful to the enemy?[319]

C. Examples of how the principle of distinction can be used to determine 'direct participation'

In asymmetrical conflicts, whether under a Common Article 2 or a Common Article 3 Conflict, it is virtually impossible to distinguish between innocent civilians and insurgents who take direct part in hostilities. In these counterinsurgency operations, command authorities rely heavily on rules of engagement and other use of force guidelines, which set out the exact parameters of when and how fighters may be attacked for such time as they directly participate in hostilities.

As outlined in Chapter III in the discussion on the law of targeting, using the test adopted in Afghanistan, the insurgent had to represent a 'likely identifiable threat' (LIT)

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[318] Watkins, Opportunity Lost …, 661.

[319] This would of course exclude the notion of a civilian working at a munitions factory. The munitions factory itself it a lawful military target, whereas a civilian working there, keeping in mind the principle of proportionality, would in such circumstances be seen as collateral damage.

before being attacked.[320] The use of LIT requires the positive identification (PID) of a target as a threat justifying the attack. PID requires there be reasonable certainty that the proposed target is a legitimate military target.[321] The likely and identifiable threat standard is actually a component of direct participation in hostilities, however, it does not contain the express "for such time" element, because it assumes the fighter remains a threat until he manifests an intention to withdraw from the conflict.

Complementing the LIT and the PID analysis to confirm whether a particular act amounts to direct participation in hostilities, is assessing the "criticality of the act" to the direct application of violence against the enemy.[322] Examining the conduct as an integral component of the application of force against a particular target can be a useful tool. This tool can be applied to both the 'upstream' and 'downstream' conduct to assess whether the activity is critical to the mission or is otherwise harmful to the enemy. For instance, those involved in the creation, analysis and dissemination of tactical intelligence to the "shooter" are all critical and integral to the act and would definitely fall under the notion of "direct participation in hostilities".[323]

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[320] Ibid., 315.
[321] Ibid., 316.
[322] Schmitt, Humanitarian Law and the Direct Participation …, 16.
[323] Ibid.

CONCLUSION

Fighting an insurgency presents the commander with unique challenges. The dictates of military necessity require that the commander accomplish the mission decisively and within the operational constraints that are typically imposed by foreign policy or national political concerns and limited resources. The law of armed conflict seeks to balance these military-necessity imperatives by regulating armed conflict to reduce unnecessary suffering. The goal of this paper was to focus on the battlefield status of insurgents who are in reality civilians and who have decided, for political or religious reasons, to take direct part in the conflict and engage in conduct harmful to the opposing forces.

Determining whether the conflict is a Common Article 2 Conflict or Common Article 3 Conflict provides a legal framework for assessing the individual battlefield status of these insurgent fighters. In a Common Article 2 Conflict, part of the analysis centers on whether these insurgents benefit from combatant immunity and whether they are entitled to prisoner of war status. These considerations will determine what type of treatment they will receive upon detention or capture and whether they will be prosecuted according to domestic criminal law for unlawfully participating in the armed conflict.

In Common Article 3 Conflicts, the issue moves away from combatant status concerns, because designating a person as a prisoner of war, or considerations of whether that person is entitled to combatant immunity, is no longer the primary issue. The question shifts to determining under what circumstances a civilian, who takes direct part in hostilities, can be lawfully targeted. As outlined in this paper, the debate centers on

Art. API 51(3) which mandates that civilians enjoy protected status “unless and for such time as they take a direct part in hostilities”. The minute parsing of this phrase has generated much scholarly debate, which came to a head when the ICRC began its study on the notion of direct participation in hostilities in 2003 and culminated in the release of the Interpretive Guidance in 2009. Much criticism was leveled at the Interpretive Guidance’s conclusions regarding “continuous combat function” and how membership in an organized armed group is characterized by linking only tactical functions to direct participation.

However, the real focal point was on whether the civilians can be a “fighter by night and a farmer by day”; thus continuously benefitting from a ‘revolving door’ of protected status. This paper has sought to prove that there are a plethora of legal, policy and practical military reasons as to why civilians should not benefit from the revolving door of protected status. These include the fact that this concept distorts both the (1) delicate balance between military necessity and humanity; and (2) the principle of distinction, because it eliminates that ‘bright line’ that separates the fighter from the innocent civilian.

The revolving door concept is impractical from a military perspective. It prevents a commander from attacking the insurgent who persistently engages in hostilities while they are temporarily waiting for their next hostile engagement. This revolving door also represents an inherent unfairness, as soldiers are lawful targets even when they are at rest and not actually conducting operations. Insurgents, such as al Qaeda members, generally do not comply with the laws of armed conflict. The ‘revolving door’ enables this treacherous offensive posture because insurgents are able to shield themselves among the

civilian population. Contrast this behaviour with regular armed forces who are held to the higher standard of distinguishing themselves by wearing a uniform or distinctive sign and carrying their weapons openly when conducting operations.

For humanitarian reasons, medical personnel are protected persons and may not be the object of attacks. However, these protections are lost if they become combatants and take direct part in the hostilities. If medical personnel lose their protected status, then by analogy, insurgent civilians who take direct part in the hostilities should also lose their protected status and become lawful targets until they withdraw from the conflict. If medical personnel cannot benefit from the revolving door, then the reciprocity dictates that neither should civilians who persistently change their status.

This paper also offered alternative methods for evaluating when civilians are taking direct part in hostilities. As the *Tadic* decision held, the analysis involves contextual case by case determinations of whether civilians are taking direct part in the conflict. A number of states have published military manuals which require commanders to use a case by case analysis in making that determination. This paper has highlighted alternative cumulative criteria, which at its core, is similar to but different from, the three criteria put forward in the Interpretative Guidance. The focus of these alternative criteria is on whether the conduct is capable of adversely affecting or enhancing the military operations or capacity of the other party to the conflict. These cumulative factors also examine not just the practical immediate result of the conduct, but whether the civilian's act is an integral part of the conduct which actually causes the harm, or contributes to the causation of that harm.

Operationalizing the principle of distinction can be leveraged by using tests like "Likely Identifiable Threat" and, through intelligence, the positive identification of the civilian taking direct part in the conflict. The purpose of the analysis is to identify whether the insurgent has either persistently engaged in hostilities; or is a member of an organized armed group, where that person's combat function contributes to the military harm that results from a belligerent act.

The evaluation of how an IED is deployed was offered as a classic example. As explored, taking direct part in hostilities is not limited to the simple act of placing an IED. The focus should not be on the tactical result but on the series of the participants' acts or material contributions to the deployment of the IED. The "the criticality of the act" is proposed to determine whether the civilian is taking a direct part and not a temporal time frame from when the operation to plant the IED begins and ends. The attention therefore should be on whether the participants involved in, and contributing to, the conduct which is harmful to the party to the conflict. Until the civilian unambiguously opts out, or withdraws from the conflict for a considerable period of time, that civilian should remain a lawful target.

The real focus of the analysis should be a holistic approach to determine whether that civilian's conduct contributes to harm or hindrance of the military operations of the opposing force. By applying a comprehensive analysis, which not only considers the civilian's capacity to harm, but how the belligerent act integrates into the chain of hostilities as well, the inimitable balance between military necessity and humanity is restored.

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