

**THE COMBATANT STATUS OF NON-STATE ACTORS IN INTERNATIONAL
ARMED CONFLICTS, IN LIGHT OF THE NOTION OF DIRECT PARTICIPATION
IN HOSTILITIES**

An analysis of relief workers, journalists, voluntary human shields, private military
and security contractors, and under-aged child soldiers recruited into non-State
organized armed groups

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DECLARATION

This thesis has not previously been submitted for a degree in this, or any other university, and it is wholly my own original work.

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*In loving memory of:
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ABSTRACT

The increased outsourcing of many traditionally military functions, together with the fact that international armed conflicts are increasingly being fought in predominantly civilian locations, is contesting the international humanitarian law (IHL) presumption that civilians are necessarily non-participatory spectators in the theatre of war. The legal lacunae which surrounds non-State actors like: private military and security contractors (PMSCs), under-aged child soldiers, voluntary human shields (VHSs), relief workers and journalists, is complicating the legal assessment of their primary IHL status, obscuring crucial determinations around whether their actions amount to direct participation in hostilities, and confounding certainty around the legal regime applicable to them upon capture. Through critical analysis of customary and treaty based IHL, this project explores the primary IHL status of each of these types of non-State actors. Thereafter it seeks, through practical application of the ICRC's Interpretive Guide on the Notion of Direct Participation in Hostilities, to draw specific conclusions on the range of activities that might compromise their civilian immunity against direct targeting. In the final analysis the study concludes that engaging in combat functions, operating weapons systems, participating in direct support functions, conducting training for predetermined hostile acts, sabotaging military capacity, guarding captured military personnel, gathering intelligence for use in marking targets, divulging tactical information or acting as a lookout will amount to direct participation in hostilities. Through similar investigation, the study concludes that mere interference, defensive guarding or shielding of civilian or other dual-use sites, and the defense of military installations against criminal elements, fails to rise to the threshold required to compromise a civilian non-State actor's immunity against attack. While dispelling the misconception that civilian status itself can be

legally forfeited, the project explores the practical legal consequences of civilian direct participation in hostilities: including legitimate direct targeting of these non-State actors for so long as their participation or membership of the combative group persist, and their criminal prosecution upon capture.

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CHAPTER 1

INTRODUCTION

Present day international humanitarian law (IHL), was born out of ‘a number of ancient and widely embraced codes’¹, which had at their core the motivation to alleviate ‘as much as possible the calamities of war’², by limiting human suffering and ‘sparing civilians from the brutality of warfare’³. At its core, IHL operates from the position that ‘armed conflict is a contest between the opposing armed forces’⁴, and that the civilian population (who are precluded from engaging in hostilities) are consequently protected from attack. Maintaining this delicate balance between ‘the dictates of military necessity’⁵ and humanitarian considerations, requires that ‘a clear distinction’⁶ [be] made between combatants and civilians’⁷.

This principle of distinction was born out of the humanistic philosophy which posits that ‘the least that can be done in order to make wars more humane is to exclude as many persons as possible from the scope of belligerence’⁸. The principle was alluded to in the preamble of the 1868 St Petersburg Declaration, which specified that ‘the only legitimate object which States could endeavour to accomplish during war is to weaken the military force of the enemy, not civilians who support the enemy or their property (objects), but the enemy’s military force’⁹. And in 1863 the Lieber Code endorsed its importance in clear terms: ‘all enemies in regular war are divided into two general classes – that is to say, into combatants and non-

¹ Daphné Richemond-Barak (2011) ‘Non-State Actors in Armed Conflict’ in William C. Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* at 2407-16. Columbia University Press: New York.

² Yoram Dinstein (2004) *The Conduct of Hostilities Under the Law of International Armed Conflict* Cambridge University Press at 5.

³ Richemond-Barak ‘Non-State Actors in Armed Conflict’ at 2407-16; Mahmoud Cherif Bassiouni ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’ (2008) 98:3 *Journal of Criminal Law and Criminology* 711 at 726.

⁴ Who are disciplined to ‘respect the laws and customs of warfare’ (Won Kidane ‘The Status of Private Military Contractors Under International Humanitarian Law’ (2010) 38:3 *Denver Journal of International Law and Policy* 361 at 380).

⁵ Nils Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ (2010) 42 *International Law and Politics* 831 at 833; Michael N Schmitt ‘Deconstructing Direct Participation in Hostilities: the Constituent Elements’ (2010) 42 *International Law and Politics* 697 at 713.

⁶ ‘The principle of distinction requires that ‘military objects be distinguished from civilian objects prior to attack’ (Jefferson D Reynolds ‘Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict and the Struggle for a Moral High Ground’ (2005) 56 *Air Force Law Review* 1 at 24).

⁷ Anthony P V Rogers ‘Unequal Combat and the Law of War’ (2004) 7 *Yearbook of International Humanitarian Law* 3 at 11.

⁸ Shlomy Zachary ‘Between the Geneva Conventions: Where does the Unlawful Combatant Belong?’ (2005) 38 *Israel Law Review* 378 at 380.

⁹ Gary Solis (2010) *The Law of Armed Conflict: International Humanitarian Law in War*. Cambridge University Press: New York at 251.

combatants, or unarmed citizens of the hostile government'¹⁰. Every IHL treaty (from Hague law¹¹ to Geneva law¹²) subsequent to the Lieber code was drafted on the foundation¹³ of the principle of distinction 'between civilians and combatants'¹⁴. As Jensen asserts:

'It [the principle of distinction] is the foundation on which the codification of the laws and customs of war rest: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives'¹⁵.

¹⁰ In particular 'article XXII invokes distinction when it documents the turn from warring on non combatants' (Richemond-Barak 'Non-State Actors in Armed Conflict' at 2459-69).

¹¹ 1988 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (the Hague) available at <http://www.icrc.org/ihl.nsf/INTRO/150?OpenDocument> (accessed 12 September 2012); 1907 Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V) (1908) 2 *American Journal of International Law* Supplement 1117; 1907 Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention IV of 18 October 1907 (Hague Regulations 'HR') 1910 *U.K. Treaty Series* 9 also available at <http://www.icrc.org/ihl.nsf/full/195> (accessed 14 July 2012).

¹² 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) of August 12 1949 (1950) 75 *U.N. Treaty Series* 31; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) of August 12 1949 (1950) 75 *U.N. Treaty Series* 8; 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GC III) of August 12 1949 (1950) 75 *U.N. Treaty Series* 135; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) of August 12 1949 (1950) 75 *U.N. Treaty Series* 287; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1979) 1125 *U.N. Treaty Series* 1391.

¹³ Toni Pfanner 'Military Uniforms and the Law of War' (2004) 86 *International Review of the Red Cross* 93 at 104.

¹⁴ Richemond-Barak 'Non-State Actors in Armed Conflict' at 2459-69.

¹⁵ Eric T Jensen (2011) 'Direct Participation in Hostilities' in William C Banks (ed) '*New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia' (Columbia University Press: New York) (ebook version) at 1879-88. 'Many of the rules governing the conduct of war stem from this absolute principle, such as the types of targets that are legitimate' (Richemond-Barak 'Non-State Actors in Armed Conflict' at 2318-26; David M Crane and Daniel Reisner (2011) 'Jousting at Windmills' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia University Press: New York (ebook version) at 1492-99; Pilloud C, Sandoz Y and Zimmermann B (1987) *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* Martinus Nijhoff Publishers: Geneva at 598; Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 252. There are other principles which also form part of the core concepts upon which IHL is built, including:

1. Military necessity requires that the legal use of military force must be justified and that the unintentional killing or injuring of civilians and their property is an accepted and justified corollary to a valid and legal military actions' (Crane and Reisner 'Jousting at Windmills' at 1499-1508).
2. Proportionality according to AP I article 52(2) restricts attacks 'to those objects whose partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 4). The principle of proportionality concedes that 'at times collateral damage to civilians may be inescapable, but as long as civilian losses are not inflicted deliberately or indiscriminately, and as long as they are not excessive in relation to the concrete and direct military advantage anticipated these losses cannot be branded as a breach of the principle of distinction'.

Despite widespread acceptance that the principle of distinction amounted to customary international law, ‘the principle of distinction *per se* went unmentioned in IHL conventions and treaties until 1977 when it was expressly stated in Additional Protocol I (AP I):

‘in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives’¹⁶.

The cardinal¹⁷ importance of this principle has been confirmed by the International Court of Justice (ICJ), who referred to it as an ‘intransgressible principle of international customary law’¹⁸. In view of the Court’s statements, the International Law Commission considered it ‘justified to regard the principle of distinction as part of *jus cogens*’¹⁹. As Dinstein puts it: ‘marking out separate status groups constitutes the very bedrock of IHL... this is the hallmark of IHL: remove the “principle of distinction” and the entire IHL system collapses’²⁰. So important is this principle of assigning either combatant or

(Yoram Dinstein (2007) ‘The System of Status Groups in International Humanitarian Law’ in Wolff Heintschel von Heinegg and Volker Epping (eds) *International Humanitarian Law Facing New Challenges* Springer: Berlin at 147).

¹⁶Article 48. According to Fenrick ‘insofar as people are concerned, lawful targets include combatants, participants in a *levée en masse* and civilians taking a direct part in hostilities’ (William J Fenrick ‘ICRC Guide on Direct Participation in Hostilities’ (2009) 12 *Yearbook of International Humanitarian Law* 287 at 287); Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 252; Fritz Kalshoven and Liesbeth Zegveld (2011) *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th ed) Cambridge University Press: Cambridge at 99. Several other provisions in AP I also refer to the principle of distinction: article 44(3) ‘requires combatants to distinguish themselves from the civilian population’ by wearing a uniform (Pfanner ‘Military Uniforms and the Law of War’ at 104) or distinguishing sign (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 254). AP I article 51(4) prohibits indiscriminate attacks which ‘strike military objectives and civilians or civilian objects without distinction’. AP I article 52 entitled ‘General Protection of Civilian Objects’ also makes reference to the fact that:

- ‘1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used’.

¹⁷ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 33 and 124.

¹⁸ *Legality of the Threat on Use of Nuclear Weapons* (Advisory Opinion) 1996 *International Law Reports* 100 at 163 ss78ff.

¹⁹ Nils Melzer (2009) *Targeted Killings in International Law* Oxford University Press: Oxford at 301; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 82.

²⁰ Dinstein ‘The System of Status Groups in International Humanitarian Law’ at 146.

civilian²¹ status, that according to IHL there is no 'intermediate status'²² and every person who falls into enemy hands 'must have some status under international law'²³, either combatant or civilian. 'Nobody in enemy hands can be outside the law'²⁴. Moreover, when there is doubt as to an individual's status, he is presumed to 'be a civilian until indicated otherwise'²⁵.

While classification as a combatant affords a person the privilege to participate in hostilities and to target military objectives²⁶ with a certain degree of immunity²⁷ from prosecution, it is also the sanctity of the principle of distinction which motivates severe punishments and strips combatants of their privileges (such as POW status²⁸ and legal immunity from prosecution for their hostile acts²⁹) when they disguise themselves as civilians in order to mislead the opposition³⁰. Similarly, the principle of distinction also lies behind the principle that civilians who participate directly in hostilities will face prosecution, since to date 'the waging of war by other private persons' (who do not enjoy combatant status) remains outlawed³¹. The rights, privileges, obligations and legal consequences extended to individuals in the theatre of

²¹ Under IHL, a civilian is defined as any person who is not a combatant (AP I article 50(1)).

²² Jean Pictet (ed.) (1958) *Commentary: Geneva Convention IV Relative to the Protection of Civilians* ICRC: Geneva at 51.

²³ Pictet *Commentary: Geneva Convention IV Relative to the Protection of Civilians* at 51.

²⁴ *Ibid.* The IHL treaties operate in such a way that those individuals who fail to satisfy the POW status requirements set out in GC III (captured combatants), will automatically fall within the ambit of protected civilian status under GC IV (provided that the article 4 requirements which define a protected person are satisfied (*Prosecutor v Delalic et al (Celebici case)* (1998) ICTY IT-96-21-T at para 271; Luisa Vierucci 'Prisoners of War or Protected Persons Qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees are Entitled' (2003) *Journal of International Criminal Justice* 284 at 299; Silvia Borelli 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"' (2005) 87:857 *International Review of the Red Cross* 39 at 49. According to Solis 'there no longer are statuses of "quasi-combatant" or "semi-civilian"' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 188).

²⁵ Crane and Reisner 'Jousting at Windmills' at 1527-35.

²⁶ Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 105.

²⁷ Because it is the State and not the individual who is the enemy, the individual combatants themselves, while subject to being targeted legitimately during hostilities, cannot be punished for their participation in the hostilities. Moreover, once they are rendered *hors de combat*, or fall into enemy hands, they are no longer deemed to be a threat to the enemy and are thus afforded necessary medical treatment and secondary POW status (Kurt Ipsen (1995) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 65-67).

²⁸ Kurt Ipsen (2008) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 79. 'A primary status is a status that the particular individual possesses as a matter of his or her assignment by his or her State as a combatant or a non-combatant. A secondary status is a status that arises out of the primary status but attaches as a result of a change in circumstances... the prisoner of war status can then be considered a secondary status that emanates from the primary status of being a lawful combatant' (Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 377).

²⁹ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 377.

³⁰ *Idem* at 380.

³¹ Pfanner 'Military Uniforms and the Law of War' at 110.

armed conflict are directly linked to their primary IHL status as a civilian³² or a combatant, and to their observance of the principle of distinction³³.

The substance of the IHL principle of distinction remains as pertinent today as it was in 1949, however this strong reliance on a distinction between the two groups assumes that it is easy to establish who are combatants³⁴ and who are civilians³⁵. The reality is that 'modern combatants look increasingly unlike the army regulars around whom the Geneva Conventions were drafted'³⁶. And it is painfully obvious that 'the Conventions and Protocols contain significant fault lines that limit their effectiveness in restraining the excesses of contemporary war'³⁷ – one of these being their ability to apply the principle of distinction. The distinction between combatants and civilians may have been easily applied on the sterile battlefields which characterised wars fought prior to 1949, where civilian participation in hostilities was considered exceptional³⁸. However in modern warfare the principle of distinction is complicated by the reality that 'fighters purposefully dress and live as civilians but fight as combatants'³⁹ without 'uniforms, identification cards, or formal affiliation procedures'⁴⁰. Sadly the humanitarian usefulness of the principle of

³² Civilians are inherently immune from targeted attack and are to be respected and protected (Marco Sassòli and Antoine Bouvier (2006) *How Does Law Protect in War?* Vol 1 (2nd ed) ICRC: Geneva at 203; Ipsen (1995) 'Combatants and Non-combatants' at 65, Ipsen (2008) 'Combatants and Non-combatants' at 79).

³³ Mirko Sossai (2011) 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' in Francesco Francioni and Natalino Ronzotti (eds) *War By Contract: Human Rights, Humanitarian Law and Private Contractors* Oxford University Press at 197.

³⁴ It is also worth stating that once an individual has been classified as either a combatant or civilian, there is no room for additional classifications such as 'unprivileged' or 'unlawful enemy combatant' which is currently employed by the U.S. to deny IHL rights to the Guantanamo Bay detainees (Michael Cowling and Shannon Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' (2009) 42 *Comparative and International Law Quarterly of South Africa* 1). In the words of the Justice Barak 'terrorists should be classified as civilians taking a direct part in hostilities' (Crane and Reisner 'Jousting at Windmills' at 1668-77). While it must be said that there are 'deficiencies in the existing law that grant unreasonable advantages to non-law-abiding non-State actors', the 'international community... are extremely hesitant to accept radical changes to existing international humanitarian legal structures' (Crane and Reisner 'Jousting at Windmills' at 1728-35).

³⁵ Richard Baxter 'So-Called Unprivileged Belligerency: Spies, Guerillas and Saboteurs' (1951) 28 *British Yearbook of International Law* 323.

³⁶ Christopher Kutz 'The Difference Uniforms Make: Collective Violence in Criminal Law and War' (2005) 33:2 *Philosophy & Public Affairs* 148 at 155.

³⁷ Anthony Dworkin 'Guerilla War, "Deadly Deception", and Urban Combat' (26 March 2006) *Crimes of War Project* available at <http://www.crimesofwar.org/print/onnews/iraq-guerilla-print.html> (accessed August 2007).

³⁸ Dale Stephens and Angeline Lewis 'The Targeting of Civilian Contractors in Armed Conflict' (2006) 9 *Yearbook of International Humanitarian Law* 25 at 27.

³⁹ 'When individuals are not wearing uniform or carrying arms openly, the soldier is required to assess their status on the basis of supporting information, such as location, behavior, or intelligence' (Crane and Reisner 'Jousting at Windmills' at 1551-59).

⁴⁰ Fenrick 'ICRC Guide on Direct Participation in Hostilities' at 291; Richemond-Barak 'Non-State Actors in Armed Conflict' at 2326-33.

distinction is 'only as effective as the accuracy with which... the line between combatant and civilian is drawn'⁴¹.

When one appreciates that over the last century and a half conflicts have played out in predominantly civilian locations⁴² which naturally results in 'increased intermingling of civilians with armed actors'⁴³, it is not surprising that civilians have constituted 'an increasing proportion of the casualties in armed conflict'⁴⁴. Moreover, while previously civilian participation in conflict was seen as exceptional, in recent years it 'has become commonplace'⁴⁵ and 'the prevalence today of civilians on the battlefield and their increasing participation in conflicts presents one of the greatest challenges to armed forces'⁴⁶. The result of greater civilian involvement in armed conflicts brings with it not only a greater risk that truly innocent 'civilians are more likely to fall victim to erroneous or arbitrary targeting', but also greater hazards for combatants who are 'unable to properly identify their adversary', and consequently 'run an increased risk of being attacked by persons they cannot distinguish from the civilian population'⁴⁷.

Not only are civilians playing a greater role in modern international armed conflicts, but modern warfare also feature an increasing 'array of non-State'⁴⁸ participants playing central roles in hostilities⁴⁹ and undertaking a

⁴¹ Kenneth Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' (2005) 2 *Program on Humanitarian Policy and Conflict Research: Harvard University Occasional Paper Series* at 10.

⁴² Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 1. 'New warfare generally involves States in combat with non-State forces and fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects.' (Laurie R Blank 'Updating the Commander's Toolbox: New Tools for Operationalising the Law of Armed Conflict' (2010) 1:3 *PRISM* 59 at 61); ICRC (2009) *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL (Interpretive Guide)* available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609> (accessed 7 August 2011) at 11.

⁴³ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 11.

⁴⁴ Bill Boothby "'And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 741 at 741; Geraldine Van Beuren 'The International Legal Protection of Children in Armed Conflicts' (1994) 43 *International and Comparative Law Quarterly* 809 at 809.

⁴⁵ Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 27.

⁴⁶ Crane and Reisner 'Jousting at Windmills' at 1515-19.

⁴⁷ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 11.

⁴⁸ 'Non-State actors are those actors on the international plane that are not members of the United Nations'. This category includes 'inter-governmental organisations, NGO's, and individuals – natural and juridical' (Richemond-Barak 'Non-State Actors in Armed Conflict' at 2333-41).

⁴⁹ *Ibid.* According to Kritsiotis, 'that non-State actors have assumed increased significance in the authorship and perpetration of acts of violence is not an undisputed fact of international life' (Dino Kritsiotis (2009) 'International Law and the Violence of Non-State Actors' Chapter 14 in Kaiyan Homi Kaikobad and Michael Bohlander (eds) *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* Martinus Nijhoff Publishers: Leiden at 344). In 2004, of the nineteen major conflicts documented by the Uppsala Conflict Data Programme all nineteen involved 'at least one non-State actor', moreover between 1989 and 2008, 401 conflicts were recorded which were fought entirely between non-State actors (Caroline Holmqvist (2005) 'Engaging Armed Non-State Actors in Post-Conflict Settings' Chapter 3 in Alan Bryden and Heiner Hänggi (eds) *Security*

range of traditionally military functions⁵⁰. These non-State actors appear well suited to adopting both civilian and combative functions ‘without existing international legal instruments having been formally adopted to respond to these evolutions’⁵¹. ‘The hybrid nature of non-State entities’ makes an application of the principle of distinction to these entities extremely difficult⁵².

While the principle of distinction is intended to assist commanding officers in making legally defensible targeting decisions by locating a specific target in one of two IHL categories (lawful combatants⁵³ or civilians who take no part in hostilities⁵⁴) the reality is that these supposedly clear-cut categories⁵⁵ cannot provide clear cut answers in modern international armed conflicts. The dilemma with modern day conflicts is that these new non-State actors seem to inhabit the grey middle ground, somewhere between these two categories, where IHL is ‘at best – blurred’⁵⁶, and ‘the application of the current laws of war to these actors often leads to absurd or inconsistent outcomes’⁵⁷. This uncertainty has given rise to ‘the deliberate targeting of non-combatants’ as a ‘key characteristic of modern day conflicts’⁵⁸, and a myriad of human rights abuses⁵⁹ at the hands of detaining powers who simply do not know what legal regime applies to those who they have detained. This uncertainty not only adversely affects the interests of non-State participants,

Governance in Post-Conflict Peacebuilding Geneva Centre for the Democratic Control of Armed Forces: Geneva 45 at 45).

⁵⁰ Fenrick ‘ICRC Guide on Direct Participation in Hostilities’ at 288; ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 11). Since the end of the Cold War many States have opted to ‘downsize’ the armed forces, and in so doing have ‘outsourced... many of the functions performed by military personnel... to civilians’ (Fenrick ‘ICRC Guide on Direct Participation in Hostilities’ at 291). ‘While this practice offers substantial benefits to States... it brings with it the risk of violating the law of war by inappropriately involving civilians in combat operations’ (John Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ (2005) 57 *Air Force Law Review* 155 at 157). By late 2009 the U.S. ‘central command was contracting for the services of 242,230 civilians and while many performed relatively benign functions, such as cooking or participating in reconstruction projects... others accomplished military logistics and intelligence duties, and well over 10,000 provided security to the Coalition forces and associated personnel’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: the Constituent Elements’ at 700).

⁵¹ International Law Association ‘Second Report of the Committee on Non-State Actors in International Law: Lawmaking and Participation’ 2012 Sofia Conference at 11.

⁵² For the most part non-State actors cannot be party to IHL conventions as they are not a high contracting parties, ‘having said that the Application of IHL and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties Resolution adopted at the Berlin Session 25 August 1999, states that ‘all parties to armed conflicts in which non-State entities are parties, irrespective of their legal status... have the obligation to respect IHL as well as fundamental human rights’ (article ii) (Andrew Clapham (2006) *Human Rights Obligations of Non-State Actors* Oxford University Press: Oxford at 276; ILA (2010) Report of the 74th Conference (the Hague) 1st report of the Committee at page 631).

⁵³ Who always constitute a legitimate target.

⁵⁴ Who are completely immune against attack.

⁵⁵ Richemond-Barak ‘Non-State Actors in Armed Conflict’ at 2341-47.

⁵⁶ Blank ‘Updating the Commander’s Toolbox: New Tools for Operationalising the Law of Armed Conflict’ at 59.

⁵⁷ Richemond-Barak ‘Non-State Actors in Armed Conflict’ at 2355-47.

⁵⁸ Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict (8 September 1999) S/1999/957.

⁵⁹ Garth Abraham ‘“Essential Liberty” Versus “Temporary Safety”: The Guantanamo Bay Internees and Combatant Status’ (2004) 121 *South African Law Journal* 829 at 832-5.

'but also (and perhaps most importantly) hurts the civilian population, whose protection cannot be properly ensured'⁶⁰.

The sum total of all of this is that international armed conflicts are not the beast that they once were, and new non-State actors are clamouring to lay claim to some form of protected IHL status, thus demanding the principle of distinction to offer an almost impossible solution.

1.1 Research hypothesis and rationale

- i. Hypothesis and rationale for selecting these five particular non-State actors

Recent international and non-international armed conflicts have witnessed greater levels of involvement by a variety of non-State actors. Amongst these are five particular actors, which have shown an increase in both their prevalence, and their degree of participation in recent armed conflicts, and which I have chosen to examine in this thesis. They are:

1. under-aged child soldiers recruited by non-State armed groups (chapter 5);
2. private military and security contractors (PMSC) (chapter 6);
3. voluntary human shields (VHS) (chapter 7);
4. journalists (chapter 8) and
5. relief workers (chapter 9).

Some of these actors, like VHS and PMSC, are relatively new to the theatre of hostilities. Others, like child soldiers; journalists and relief workers, have already featured in past conflicts, but their more recent activities reveal a new level of involvement that is peculiar to contemporary armed conflicts.

The emergence of these actors, and their new levels of involvement in recent armed conflicts, has raised questions around how IHL deals with actors which either were simply not contemplated at the time the various IHL conventions were drafted, or whose degree of involvement in the hostilities was never anticipated. So for example, while there is ample evidence of IHL provisions limiting the recruitment of children into the armed forces, 'relatively less attention has been directed at reconsidering the legal status of children participating directly in hostilities, and the rules for their targeting'⁶¹. Similarly, while the drafters of the IHL conventions included provisions aimed at outlawing mercenarism, they simply never envisaged a 300 billion US dollars private security industry, which might circumvent the mercenary definition⁶². Likewise, there is evidence that those tasked with drafting the IHL treaties appreciated the plight of the human shield, and consequently outlawed their

⁶⁰ Richemond-Barak 'Non-State Actors in Armed Conflict' at 2792-99.

⁶¹ Hilly Moodrick-Even Khen 'Children as Direct Participants in Hostilities' in William C Banks (ed) (2011) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia Studies in Terrorism and Irregular Warfare at 2867-74 (ebook version).

⁶² Renée De Nevers 'Private Security Companies and the Laws of War' (2009) 40 *Security Dialogue* available at <http://sdi.sagepub.com/content/40/2/169> (accessed 10 July 2012) at 175; Jennifer K Elsea, Moshe Schwartz and Kennon H Nakamura 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' (2008) available at <http://www.fas.org/sgp/crs/natsec/RL32419.pdf> (accessed 10 July 2012) at 9-11; Andrew Clapham 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88:863 *International Review of the Red Cross* 491 at 498.

use in armed conflicts, but they never considered the possibility, or intended for these treaty provision to be applied⁶³ to individuals who might *voluntarily* choose to shield an object from direct targeting. In the same manner, the degree to which journalists and relief workers would be present and involved in the theatre of hostilities, and the extent to which they would face deliberate targeting⁶⁴, and consequently need to employ the services of their own PMSCs⁶⁵, was never fully comprehended when the IHL conventions were drafted.

In spite of these deficiencies in the existing legal regime, IHL is and must 'remain, responsive to the evolving nature of warfare'⁶⁶. If these non-State actors are present in contemporary armed conflicts then IHL needs to:

- a. clarify the primary status of these actors under IHL;
- b. advise these actors of the legal obligations, and the legal limitations upon their actions, pursuant to the notion of direct participation in hostilities;
- c. guide belligerent commanders tasked with making targeting decisions in the face of such actors; and
- d. advise belligerents parties of their legal obligations, in the event that these non-State actors are captured or detained.

- ii. Hypothesis and rationale for limiting this analysis to the legal regime applicable to international armed conflicts

IHL is divided into two legal regimes, one that applies to international armed conflicts, and another vastly different legal regime that applies to non-international (or internal) armed conflicts⁶⁷. While there is certainly a degree of

⁶³ Rewi Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' (2008) 9 *Melbourne Journal of International Law* 313 at 315.

⁶⁴ In a study undertaken by the Humanitarian Policy Group (HPG) in 2008, it was found that 'relatively speaking, the rates of attacks directed at aid workers had increased by sixty-one percent' (Peter Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' in Victoria Wheeler and Adele Harmer (eds) *Resetting the Rules of Engagement: Trends and Issues in Military–Humanitarian Relations* (2006) 22 HPG Report at 6).

⁶⁵ Not surprisingly relief workers are 'choosing to arm themselves' (Kjell Bjork and Richard Jones 'Overcoming Dilemmas Created by the 21st Century Mercenaries: Conceptualising the Use of Private Security Companies in Iraq' *Reconstructing Post-Saddam Iraq: A Quixotic Beginning to the 'Global Democratic Revolution'* (2005) 26:4/5 *Third World Quarterly* 777 at 785) and PMSCs are increasingly being contracted as a 'matter of routine' to 'provide security to humanitarian NGOs' (Åse Gili Østensen 'U.N. Use of Private Military and Security Companies' (2011) 3 *SSR Paper* available at <http://www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies> (accessed 4 September 2012) at 49); Christopher Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism' (2008) 39 *Security Dialogue* at 363.

⁶⁶ *Ibid.*

⁶⁷ Cherif Bassiouni 'The New Wars and the Crisis of Compliance with the Law of Armed conflict by Non-State Actors' at 728. 'Some armed conflicts are in part international and in part non-international; some mutate from non-international to international; and some, like "wars of national liberation" in the context of colonialism and settler regimes, covered by article 1(4) of AP I, are deemed to be of an international character, even though one set of combatants are non-State actors' (Cherif Bassiouni 'The New Wars and the Crisis of Compliance with the Law

commonality between these two legal regimes⁶⁸, there is also much which distinguishes them, beginning with the fact that each regime is regulated by a distinct set of treaties and specific treaty provisions. International armed conflicts are defined and regulated primarily by GC I-IV⁶⁹ and AP I⁷⁰, while non-international armed conflicts are regulated only by common article 3 found in the Geneva Conventions I-IV and APII⁷¹.

Not only is the source of each regime to be found in distinct treaties, but more fundamentally there are far fewer treaty provisions which deal with non-international armed conflicts⁷². While APII was intended to supplement the basic standards contained in common article 3 to the four Geneva Conventions, it did so in a meager fifteen articles, and with much less detail than the eighty articles found in its sister treaty, API, which governs international armed conflicts⁷³.

Moreover the levels of State ratification of those treaties regulating non-international armed conflicts is much lower than the levels achieved in respect of treaties governing international armed conflicts⁷⁴. Consequently, where ratification of APII is lacking, States engaged in non-international armed conflicts are governed solely by the 'rudimentary framework of minimum standards'⁷⁵ contained in common article 3 to the four Geneva Conventions and customary international law.

Given the lower levels of State ratification, and the paucity of treaty provisions dealing specifically with conflicts of a non-international nature, it comes as no surprise that the legal regime applicable to conflicts of an international nature is widely regarded as being better established and less

of Armed conflict by Non-State Actors' at 713; Rikke Ishøy (2008) *Handbook on the Practical Use of International Humanitarian Law* (Revised edition) Danish Red Cross: København at 45-46).

⁶⁸ So for example both regimes are founded upon the principle of distinction, and consequently the notion of only targeting those who participate directly in hostilities is common to both regimes (ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 70).

⁶⁹ Common article 2, found in all four of the 1949 Geneva Conventions, defines what constitutes an 'international armed conflict' as, 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the State of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'.

⁷⁰ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1979) 1125 *U.N. Treaty Series* 1391

⁷¹ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (AP II) (1979) 1125 *U.N. Treaty Series* 609

⁷² Jean-Marie Henckaerts and Louise Doswald-Beck (2005) *Customary International Humanitarian Law Volume 1: Rules* Cambridge University Press: Cambridge at xxxiv. These include only common article 3 to the four Geneva Conventions; APII; the Convention on Certain Conventional Weapons; the Rome Statute; the Ottawa Convention banning anti-personnel landmines, the Chemical Weapons Convention, the Hague Convention for the Protection of Cultural Property and its Second Protocol (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at xxxv.).

⁷³ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at xxxv.

⁷⁴ *Ibid.*

⁷⁵ *Idem* at xxxiv.

controversial⁷⁶. While the legal regime applicable to non-international armed conflicts suffers from 'a lack of rules, definitions, details and requirements in treaty law'⁷⁷. In fact some of the principles which form the very bedrock of IHL, like the principles of distinction and proportionality, which are extensively defined and regulated in AP I (and applied in conflicts of an international nature), are not even regulated or defined in AP II⁷⁸, which is applicable to non-international armed conflicts.

Another important aspect which distinguishes these two legal regimes is the manner in which individuals are categorised under each regime. The legal regime applicable in situations of international armed conflict is peculiar in that the regime has at its foundation the notion that every individual in the theatre of international armed conflict has a specific primary status under IHL: as either a combatant⁷⁹ or a civilian. Moreover, it is this primary status that determines one's secondary POW status upon capture. It is uncontroversial that this notion of primary and secondary status is a feature of 'common article 2 conflicts only'⁸⁰, and consequently is an issue that is peculiar to international armed conflicts⁸¹. This status classification, which is recognised under both customary and conventional IHL, 'is strictly limited to international armed conflicts'⁸². As Solis notes, 'there are no "combatants", lawful or otherwise, in common article 3 conflicts' (i.e. non-international conflicts)⁸³. Consequently 'a person who would otherwise qualify as a lawful combatant in a conflict of an international character becomes a common criminal in a conflict of a non-international character'⁸⁴.

⁷⁶ *Ibid.*

⁷⁷ *Idem* at xxxv.

⁷⁸ *Ibid.*

⁷⁹ Or 'belligerent', as is sometimes referred to in older texts dating back to the 1874 Brussels Conference, the 1899 and 1907 Hague Peace Conferences and codified in the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 169).

⁸⁰ Common article 2 refers to conflicts of an international nature, while common article 3 refers to conflicts of a non-international nature (De Nevers 'Private Security Companies and the Laws of War' at 173; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 11; Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 238; Robert Goldman and Brian Titemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' (2002) *ASIL Task Force Paper* available at www.asil.org/taskforce/goldman.pdf (accessed 21 February 2012) at 23, Pictet *Commentary: Geneva Convention IV Relative to the Protection of Civilians* at 23).

⁸¹ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 238; Goldman and Titemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 23, Pictet *Commentary: Geneva Convention IV Relative to the Protection of Civilians* at 23; Blank 'Updating the Commander's Toolbox: New Tools for Operationalising the Law of Armed Conflict' at 64; David Whippman 'Redefining Combatants' (2006) 39 *Cornell International Law Journal* 699 at 701.

⁸² Goldman and Titemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 1.

⁸³ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 191.

⁸⁴ Cherif Bassiouni 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' at 727.

While there is certainly academic value in assessing the activities of these five new actors in the light of both legal regimes, such an exercise would render enough material for two full dissertations. In short, an analysis which attempted to assess all five groups in terms of *both* legal regimes simultaneously, would no doubt end up compromising a thorough rendering on the topic, and settling for a superficial analysis across both of the legal regimes. For this reason I believe that it would be a more beneficial exercise to conduct these two studies separately, and that the first analysis should be in respect of the legal regime which is commonly felt to be the most settled and least uncontroversial – that being the regime applicable in international armed conflicts. It is worth noting at this juncture that although the legal regime applicable in conflicts of an international nature is more established and less contested, an analysis of these five groups of non-State actors has not yet been the subject of extensive legal scrutiny and remains contested and in need of evaluation.

For these reasons I have elected to proceed with the analysis of these five new groups of actors in terms of only one of these legal regimes: the regime applicable in conflicts of an international nature⁸⁵, as defined by common article 2 of the four Geneva Conventions (GC I-IV), and as later amended by AP I article 1(4)⁸⁶. In short this will cover ‘all hostilities directed against the armed forces or the territory of one State by forces representing another State or acting *de facto* under the direction or control of another State’⁸⁷. This will include instances of internal armed where ‘(i) another State intervenes in that conflict through its troops⁸⁸, or alternatively if (ii) some of the participants in the internal armed conflict, act on behalf of that other State’⁸⁹. International armed conflicts can also arise in situations of an occupied territory, when ‘an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character’ are engaged in an armed conflict⁹⁰, as was the finding of the Israeli High Court of Justice in *Public Committee*

⁸⁵ Françoise J Hampson (1996) ‘Legal Protection Afforded to Children Under International Humanitarian Law’ *Report for the Study on the Impact of Armed Conflict on Children by University of Essex* available at http://www.essex.ac.uk/armedcon/story_id/000578.html (accessed 12 September 2012). What is beyond the scope of this piece is situations which do not amount to armed conflict (e.g. ‘armed force by criminal or organised terrorist activities’), since in these instances IHL does not apply (Rogers ‘Unequal Combat and the Law of War’ at 7).

⁸⁶ AP I article 1(4), includes within the parameters of an international armed conflict, ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination’.

⁸⁷ Marco Sassòli (2007) ‘Transnational Armed Groups and International Humanitarian Law’ (9-10 March 2007) *Program on Humanitarian Policy and Conflict Research at Harvard University* available at http://www.tagsproject.org/_data/global/images/Sassoli.pdf (accessed 12 September 2012) at 4. ‘Similarly and more controversially, the law of international armed conflict applies when a State is directing hostilities against a transnational armed group on the territory of another State without the agreement of the latter State’ (*Idem* at 5).

⁸⁸ For example the US and Northern Alliance in Afghanistan.

⁸⁹ *Prosecutor v Dusko Tadic* ICTY IT-94-1-A at para 34. Goldman and Tittlemore conclude that this would include the Taliban in 2001 Afghanistan or possibly Hezbollah in 2006 in Lebanon (Goldman and Tittlemore ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 23).

⁹⁰ Antonio Cassese (2005) *International Law* Oxford University Press: Oxford at 420.

*against Torture in Israel ('PCATI') v Government of Israel*⁹¹.

In conducting this analysis I hope to establish a innovative and useful baseline for understanding the status and consequent legal obligations of these new actors in light of a legal regime which is relatively uncontested⁹², well supported by extensive treaty and customary IHL, and which has at its core a strong focus on the importance behind determining the primary status of all those found in the theatre of international armed conflicts.

iii. Hypothesis and rationale for addressing the issue of status under IHL

As already mentioned, every individual in the theatre of an international armed conflict must be classified as either a combatant or a civilian. The body of IHL which deals with how we assign combatant or civilian status in international armed conflicts is relatively well established, and will be spelt out further in chapters 2 and 3. While the law may be settled, the application of the law and the determination of one's primary status under IHL, has life and death consequences, and has not yet been undertaken in respect of these five groups of non-State actors. One's legal status dictates not only whether one is immune from attack, and how one is to be treated upon capture, but crucially whether one is authorised to participate in the hostilities. In short, it is imperative that every actor in an international armed conflict know, not only their own primary IHL status, but also the primary status of those individuals they encounter during hostilities. Moreover, once individuals fall into enemy hands their primary status will determine whether they can be detained, how they are to be treated whilst in detention, and whether they qualify for secondary POW status during their period of detention.

As the presence of these new actors becomes more prevalent in the theatre of international armed conflicts, the legal regime is placed under strain to assign primary status to these new actors, whose recent involvement in armed conflict was not envisaged at the time the IHL conventions were drafted. While these new actors appear to occupy a hybrid 'grey area' between the two mutually exclusive IHL categories of: combatant and civilian, legally speaking no such grey-area can exist. There is an urgent need for the status of these new actors to be clarified so that their status can be accurately factored into any targeting decisions, and so that they can understand the parameters and limitations placed upon their actions. The legal quagmire which surrounded the Guantanamo Bay detainees⁹³ provides a warning as to what can result when confusion surrounds the legal status of new actors in international armed conflicts. It is this lacuna, in the application of the existing legal regime of assigning combatant or civilian status, which I seek to elucidate in respect of under-aged child soldiers recruited by non-State armed groups; PMSCs; VHS; journalists and relief workers.

⁹¹ (2006) HCJ 769/02 available in English from <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008) at para 18.

⁹² This basis would then form a useful starting point for a later analysis of these new actors in light of the more controversial and less settled legal regime applicable to conflicts of a non-international character.

⁹³ Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 1.

iv. Hypothesis and rationale for canvassing the notion of direct participation in hostilities

It is un-contested that serious legal ramifications flow from a determination that a civilian has participated directly in hostilities⁹⁴. First and foremost civilians can be made the target of a direct attack, for so long as their participation persists, and upon capture they can face criminal prosecution for participating in the hostilities without combatant authority. At the heart of this important assessment is understanding when one's actions amount to 'direct participation in hostilities'. Until very recently IHL had failed to provide a 'clear definition of what constituted direct participation in combat'⁹⁵ in either the four Geneva Conventions or their two additional protocols⁹⁶. States had exploited this lacuna in the law, and had 'taken advantage of this ambiguity to further increase civilian participation'⁹⁷, by contracting out previously military functions to civilians.

The controversy surrounding what activities amount to 'direct participation in hostilities' prompted the ICRC to convene a series of expert meetings, and to publish *The Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*. The Interpretive Guide addresses the notion of direct participation in both international and non-international conflicts synonymously⁹⁸. However that synonymous interpretation of the notion of 'direct participation in hostilities' is applied to two different definitions of what constitutes a 'civilian'. In the legal regime applicable in international⁹⁹ armed conflicts,

'civilians are defined negatively as all persons who are neither members of the armed forces of a party to the conflict nor participants in a levé e en masse'¹⁰⁰.

This definition reflects the customary IHL position in situations of international armed conflict¹⁰¹. While in non-international armed conflicts, the guide refers to civilians as:

'all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non- international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat

⁹⁴ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

⁹⁵ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 157.

⁹⁶ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

⁹⁷ *Ibid.*

⁹⁸ *Idem* at 44.

⁹⁹ 'For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a levé e en masse are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities' (*Idem* at 16).

¹⁰⁰ *Idem* at 21.

¹⁰¹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 5.

function”’).

These diverse definitions of civilian status, endorsed by the Interpretive Guide, once again provide further justification for separating the analysis of these actors in light of the two distinct legal regimes applicable to international and non-international armed conflict. For this added reason I will restrict my focus to an analysis of these new actors in terms of the definition of what constitutes a civilian in an international armed conflict, and then proceed to assess their actions against the guide’s test for ‘direct participation in hostilities’.

As the presence of new actors has become more prevalent in international armed conflicts, questions have emerged around the legal effect of their actions in light of their primary status under IHL and the notion of ‘direct participation in hostilities’. When one appreciates that under IHL ‘civilians... were never meant to participate directly in hostilities on behalf of a party to the conflict’¹⁰², one can appreciate the legal confusion which results when actors like child soldiers, PMSC, VHS and the like enter the fray. Not only is there confusion as to whether these actors are susceptible to direct targeting on the basis that their actions compromise their civilian immunity, but the confusion persists when they are detained, and it is unclear whether they should face prosecution for their unauthorised actions.

The rationale for this study is to not only assist those who must assess the primary status of these new non-State actors, but also to elucidate the types of activities which they may perform in international armed conflicts without compromising their civilian immunity from attack. In addition I will spell out which activities do constitute ‘direct participation in hostilities’, and which will potentially compromise their civilian immunity against direct targeting, and expose them to potential prosecution upon capture.

1.2 Research framework

i. Literature review

I will begin my exploration by giving a brief overview of the existing literature which form the basis for my analysis. In chapter 2 I will explain the IHL concept of combatant status, exploring: who qualifies under IHL for combatant status; what privileges and legal consequences attach to combatant status; and whether combatant status can, legally speaking, be forfeited. In chapter 3 I explain the IHL notion of primary civilian status, and in doing so consider the special protections afforded civilians, the limitations placed upon their participation in hostilities, and whether individuals can forfeit their civilian status. In chapter 4 I will explore the notion of direct participation in hostilities and the impact this has upon civilians. I explore the treaty and customary law precursors to the ICRC’s interpretation of the concept, and then explain the ICRC’s test set out in the recently released Interpretive Guide, as a means to determine when a specific hostile act amounts to direct participation in hostilities. In exploring the Interpretive Guide I discuss the criticisms leveled at the test for direct participation, the revolving door of protection and the notion

¹⁰² ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 38.

of ‘continuous combat function’. While this review of the existing literature forms the basis for my analysis, it must be noted that the five types of non-State actor upon which I focus my writings are currently either not mentioned at all, or are only given a very cursory treatment in existing IHL treaty and customary law. It is this lacunae in the law which I seek to address in a series of published chapters.

ii. Published chapters

I then turn to offer a chapter dedicated to each of the five non-State actors in turn. Within each chapter I interrogate two key issues in respect of each type of non-State actor: first, I apply the existing IHL regime to determine their primary IHL status. Second I apply the test set out in the ICRC’s Interpretive Guide in order to ascertain whether, and if so when, their actions amount to direct participation in hostilities.

These chapters, which have been updated and reproduced here with the kind permission of the publishing journals, are based on ten original articles¹⁰³. Five of these have been published in peer-reviewed SAPSE accredited journals¹⁰⁴, and a further two have been accepted for publication in a peer-reviewed SAPSE accredited journals in 2013¹⁰⁵. One article is still undergoing review for 2013 publication, while the remaining two articles are ready for submission for publication in peer-reviewed and SAPSE accredited journals for publication in 2013 and 2014. Eight of the ten articles were written under supervision, subsequent to my registration for the degree of PhD by publications in 2009.

Chapter 4, which is entitled ‘Understanding And Observing The International Humanitarian Law Notion of Direct Participation In Hostilities: A Literature Review’, is based on one article:

- Shannon Bosch ‘The International Humanitarian Law Notion Of Direct Participation in Hostilities – A Review of the ICRC Interpretive Guide and Subsequent Debate’ (ready for submission for publication)¹⁰⁶.

Chapter 5, which is entitled ‘The Combatant Status of ‘Under-aged’ Child Soldiers Recruited by Non-State-armed Groups in International Armed Conflicts, in Light of the International Humanitarian Law Notion of Direct Participation in Hostilities’, is based on two articles:

- Shannon Bosch ‘Targeting and Prosecuting ‘Under-Aged’ Child Soldiers in International Armed Conflicts, in Light of the International Humanitarian Law Prohibition Against Civilian Direct Participation in Hostilities’ (2012) *XLV:3 Comparative and International Law Quarterly of South Africa* 324-364¹⁰⁷; and

¹⁰³ With a total word count of 90748 words.

¹⁰⁴ With a total word count of 42019 words.

¹⁰⁵ Bringing the total word count for published work to 61369 words.

¹⁰⁶ Word count 11635.

¹⁰⁷ Word count 9824. In hindsight and after reconsideration, I concede that the use of the word prohibition should more accurately be replaced with the term ‘notion’.

- Shannon Bosch 'The Combatant Status of 'Under-aged' Child Soldiers Recruited by Non-state Armed Groups in International Armed Conflicts' (2013) *African Yearbook of International Humanitarian Law* (forthcoming)¹⁰⁸.

Chapter 6, which is entitled 'The Combatant Status of Private Military and Security Contractors in International Armed Conflicts, in Light of the International Humanitarian Law Notion of Direct Participation in Hostilities' is based upon two articles:

- Shannon Bosch 'Private Security Contractors and International Humanitarian Law – a Skirmish for Recognition in International Armed Conflicts' (2007)16:4 *African Security Review* 34¹⁰⁹; and
- Shannon Bosch 'Private military and security contractors: a face-off with the notion of direct participation in hostilities, in international armed conflicts' (2013) *Journal for Juridical Science* (forthcoming)¹¹⁰.

Chapter 7, entitled 'Assessing the Combatant Status of Voluntary Human Shields in International Armed Conflicts, in Light of the Notion of Direct Participation in Hostilities' is based upon two articles:

- Shannon Bosch 'Voluntary Human Shields: Status-less in the Crosshairs?' (2007) XL:3 *Comparative and International Law Quarterly of South Africa* 322¹¹¹ and;
- Shannon Bosch 'Targeting Decisions involving Voluntary Human Shields in International Armed Conflicts: in Light of the Notion of Direct Participation in Hostilities' submitted for publication to the *Comparative and International Law Quarterly of South Africa* (undergoing review)¹¹².

Chapter 8, entitled 'Assessing the Combatant Status of Journalist in International Armed Conflicts, in Light of the Notion of Direct Participation in Hostilities' is based on the following article:

- Shannon Bosch 'Journalists: Shielded from the Dangers of War in their Pursuit of the Truth' (2009) 34 *South African Yearbook of International Law* 70¹¹³.

Chapter 9, which is entitled 'Assessing the Combatant Status of Relief Workers in International Armed Conflicts, in Light of the Notion of Direct Participation in Hostilities' is based on two articles:

- Shannon Bosch 'Relief Workers: the Hazards of Offering Humanitarian Assistance in the Theatre of War' (2010) 35 *South African Yearbook of International Law* 56¹¹⁴.
- Shannon Bosch 'Private Security Contractors and Neutral Relief Workers – An Unlikely Marriage' (submitted to *AYIHL* for peer review)

¹⁰⁸ Word count 9602.

¹⁰⁹ Word count 6485.

¹¹⁰ Word count 8930.

¹¹¹ Word count 8594.

¹¹² Word count 7196.

¹¹³ Word count 9784.

¹¹⁴ Word count 7614.

and possible publication in 2013/2014)¹¹⁵.

¹¹⁵ Word count 10548

CHAPTER 2

THE INTERNATIONAL HUMANITARIAN LAW CONCEPT OF COMBATANT STATUS: A LITERATURE REVIEW

2.1 Introduction

As already mentioned, at the heart of international humanitarian law (IHL) is the concept that every individual in the theatre of war possesses a recognised primary status: as either a combatant or a civilian¹. There is no middle ground between these two status², and ‘you are either a combatant or a civilian, you cannot be both’³.

Consequently, combatant or civilian status forms one of the chief enquiries around which the laws of war are organised. Not only does one’s primary status determine what legal regime applies to one’s actions⁴, but it also determines what legal consequences flow from one’s actions⁵ and the IHL obligations imposed upon one’s captors⁶. Given the seriousness of the consequences which flow from a determination that an individual is either a privileged combatant or an immune civilian, it is of fundamental importance that IHL give clear directives as to how one assigns such status. It is not surprising, therefore, that at almost every conference convened to codify IHL, the subject of who should be afforded combatant versus civilian status has proved to be the sticking point.

¹ Knut Ipsen (1995) ‘Combatants and Non-combatants’ in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* (1st ed) Oxford University Press: Oxford at 65.

² Gary Solis (2010) *The Law of Armed Conflict: International Humanitarian Law in War* Cambridge University Press: New York at 235. ‘If an individual is not entitled to the protections of GC I-III he or she necessarily falls within the ambit of GC IV, provided that its article 4 requirements are satisfied’ (Garth Abraham ‘“Essential Liberty” Versus “Temporary Safety”: The Guantanamo Bay Internees and Combatant Status’ (2004) 121 *South African Law Journal* 829 at 847). The so-called nationality requirement of article 4 affords ‘protected persons status’ to all detained individuals who are of a different nationality to their captors. The ‘nationals of the detaining State, neutrals and co-belligerents, could resolve their detention problems through the available diplomatic offices of the detainees own State’ (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 235). However the ICTY Appeals Chamber has said that article 4 ‘may now be given a wider construction so that persons may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors’ (*Prosecutor v Tadic* ICTY (15 July 1999) IT-94-1-A at para 164 and 169). Being the tribunal’s minority view it is not binding on other tribunals (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 236).

³ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 233; *Prosecutor v Delalic et al (Celebici case)* ICTY Judgement (16 November 1998) IT-96-21-T available at http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf (accessed 18 September 2012) at para 271.

⁴ Anthony PV Rogers ‘Unequal Combat and the Law of War’ (2004) 7 *Yearbook of International Humanitarian Law* 3-34 at 27.

⁵ One’s primary status can make the ‘difference between a criminal trial for murder in a domestic court’ (for example when a civilian kills someone during hostilities) and POW status with full immunity from prosecution for the very same act when it is committed by a combatant (Ipsen (1995) ‘Combatants and Non-combatants’ at 65; Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 186).

⁶ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 238; Ipsen (1995) ‘Combatants and Non-combatants’ at 65.

2.2 Defining the term 'combatant'

The term 'combatant' (or 'belligerent', as is sometimes referred to in older texts⁷) is used to 'denote a particular status in international armed conflicts'⁸. In IHL the term combatant 'is a term of art'⁹, it brings with it very particular privileges and obligations. Although 'there is no consensus definition of the term combatant in international law'¹⁰, 'most international law scholars agree ... that at least the class of persons who are lawful combatants is fairly clear'¹¹. If put on the spot to provide a working definition¹², most academics refer to article 4A(2) of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GC III)¹³, which provides a 'criteria for determining Prisoner of war (POW) status'¹⁴, which in turn they would argue is a secondary IHL status which is only conferred upon those who already have primary combatant status¹⁵. However, the ICRC is correct to point out that strictly speaking the requirements set out in GC III article 4A(2) 'constitute conditions for the post-capture entitlement of irregular armed forces to combatant privilege and prisoner- of-war status'¹⁶, and are not *per se* a definition of combatant status.

It is important to note that 'no one is born a combatant... without being a civilian first'¹⁷. Once a civilian becomes a 'member of the armed forces of a

⁷ Dating back to the 1874 Brussels Conference, the 1899 and 1907 Hague Peace Conferences and codified in the 1907 Hague Convention Respecting the Laws and Customs of War on Land (John Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' (2005) 57 *Air Force Law Review* 155 at 169).

⁸ Laurie R Blank 'Updating the Commander's Toolbox: New Tools for Operationalising the Law of Armed Conflict' (2010) 1:3 *PRISM* 59 at 64; David Whippman 'Redefining Combatants' (2006) 39 *Cornell International Law Journal* 699 at 701.

⁹ Whippman 'Redefining Combatants' at 701.

¹⁰ Eric T Jensen (2011) 'Direct Participation in Hostilities' in William C Banks (ed) '*New Battlefields Old Laws: Critical Debates on Asymmetric Warfare*' (Columbia University Press: New York) (ebook version) at 1888-97. While some argue that a definition can be found in the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1979) 1125 *U.N. Treaty Series* 1391 articles 43 and 44. This 'definition is disputed by a number of nations, including the U.S.' (Jensen 'Direct Participation in Hostilities' at 1888-97; Whippman 'Redefining Combatants' at 701). 'As James Spaight stated in 1911, the delegates to the 1907 Conference had "almost shirked their task — a task of great difficulty, it must be admitted" in attempting to define combatant status' (Kenneth Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' (2005) 2 *Program on Humanitarian Policy and Conflict Research: Harvard University Occasional Paper Series* at 3-4).

¹¹ Jensen 'Direct Participation in Hostilities' at 1888-97.

¹² Whippman 'Redefining Combatants' at 701.

¹³ (1950) 75 *U.N. Treaty Series* 135.

¹⁴ Whippman 'Redefining Combatants' at 701.

¹⁵ As Ricou-Heaton points out 'POWs are, in most circumstances, simply combatants who fall into the hands of the enemy, the definition of who is entitled to POW status is all but synonymous with who is a combatant' (Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 169).

¹⁶ ICRC (2009) *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL (Interpretive Guide)* available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609> (accessed 7 August 2011) at 21-22.

¹⁷ Shlomy Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' (2005) 38 *Israel Law Review* 378 at 390.

belligerent party'¹⁸, they are presumed to acquire primary combatant status, and with that the potential for acquiring secondary prisoner of war (POW) privileges upon capture¹⁹. Moreover, this combatant status is granted irrespective of the 'specified task assigned to an individual within the military apparatus'²⁰, be it a combative task (i.e. fighting on the frontlines) or one that does not involve engaging in combat (i.e. cooking)²¹. The rule that combatant status derives from one's mere membership in the armed forces, rather than one's function²², is widely acknowledged without any State practice to the contrary²³.

i. Non-combatant members of the armed forces

While for most combatants they will be 'trained to engage in combat and fire weapons', a substantial proportion of the membership of the armed forces 'serve in auxiliary or administrative positions (ranging from legal advisors to cooks)', and do not engage in combat operations²⁴. Consequently, within the conglomerate²⁵ classification of 'combatant', one finds 'cooks, court reporters, judges, government officials, blue-collar workers'²⁶, medics and chaplains. These service personnel within the ranks of the armed forces are 'denied authorisation to use a weapon or a weapons system'²⁷ and are consequently called non-combatant²⁸ members of the armed forces²⁹. Since this limitation on their authorisation to participate in combat stems from national legislation, it has no impact on the international law position which affords blanket combatant status to *all* members of the armed forces³⁰.

Moreover, even though these members of the armed forces play a non-combatant role, they remain subject to the 'dangers arising from military

¹⁸ This is irrespective of whether they are 'regular or irregular' and 'including paramilitary units incorporated *de facto* in the armed forces' (Robert Goldman and Brian Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' (2002) *ASIL Task Force Paper* available at www.asil.org/taskforce/goldman.pdf (accessed 21 February 2012) at 11).

¹⁹ *Ibid*; GC III article 4A (1) and (3).

²⁰ Yoram Dinstein (2004) *The Conduct of Hostilities Under the Law of International Armed Conflict* Cambridge University Press: Cambridge at 33.

²¹ David M Crane and Daniel Reisner (2011) 'Jousting at Windmills' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia University Press: New York (ebook version) at 1535-44.

²² Crane and Reisner 'Jousting at Windmills' at 1595-1604.

²³ Dale Stephens and Angeline Lewis 'The Targeting of Civilian Contractors in Armed Conflict' (2006) 9 *Yearbook of International Humanitarian Law* 25 at 30.

²⁴ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 33.

²⁵ Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 30.

²⁶ Knut Ipsen (2008) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 99.

²⁷ *Idem* at 81; AP I article 43(2).

²⁸ The 1907 Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention IV of 18 October 1907 (Hague Regulations 'HR') 1910 *U.K. Treaty Series* 9 available at <http://www.icrc.org/ihl.nsf/full/195> (accessed 14 July 2012) at article 3.

²⁹ Nevertheless, 'non-combatants, too, have the right to defend themselves or others against any attacks... the attack activates the latent combatant status irrespective of whether the attack was in contravention of the laws of war' (Ipsen (2008) 'Combatants and Non-combatants' at 103-104).

³⁰ *Idem* at 99.

operations'³¹. The 'general protection against the dangers arising from military operations which API article 51... affords to the civilian population and to individual civilians'³² does not extend to non-combatant members of the armed forces because their membership of the armed forces precludes them from enjoying primary civilian status³³. Since they are not civilians, and the actions of these non-combatants do contribute to the 'effective military operations'³⁴, the opposition forces are relieved of the burden of having 'to differentiate during their attack between combatant and non-combatant members of the adverse armed forces'³⁵.

ii. *Hors de combat*

Within the sub-category of 'non-combatants' we also find 'those who, but for their injuries, would be classified as ordinary combatants (the wounded, sick and shipwrecked)'³⁶. When a combatant 'becomes *hors de combat*... he does not become a civilian; but he is entitled to special protections and he must be accorded privileges of POW'³⁷.

iii. Military and religious personnel

Medical and religious personnel enjoy the protection of a distinct legal regime, with their own unique primary IHL status, dating back to 1864 and developed through subsequent Geneva conventions³⁸. They form a peculiar sub-category of non-combatant members of the armed forces. They are 'expressly prohibited from participating directly in hostilities and enjoy special protection as a result of this limitation'³⁹. In order to highlight their unique status in the theatre of operations, they are issued with special armbands⁴⁰ to 'mark the wearers as non-combatants and not lawful targets'⁴¹. Unlike other non-

³¹ *Ibid.*

³² *Ibid.*

³³ API article 50(1) provides a negative legal definition: 'a civilian is any person who does not belong to one of the categories of persons referred to in articles 4A(1), (2), (3) and (6) of GC III and article 43 of API' (*Ibid.*).

³⁴ *Idem* at 100.

³⁵ Provided that no medical or religious personnel are present at the location (*Ibid.*).

³⁶ A combatant is rendered *hors de combat* 'through surrender or incapacitation' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 34). The protections afforded these non-combatants are explored comprehensively in GC I (1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) of August 12 1949 (1950) 75 U.N. *Treaty Series* 31) and GC II (1974 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) of August 12 1949 (1950) 75 U.N. *Treaty Series* 85).

³⁷ Yoram Dinstein (2007) 'The System of Status Groups in International Humanitarian Law' in Wolff Heintschel von Heinegg and Volker Epping (eds.) *International Humanitarian Law Facing New Challenges* Springer: Berlin at 148.

³⁸ Ipsen (2008) 'Combatants and Non-combatants' at 102; GC III article 4(c) states: 'this article shall in no way affect the status of medical personnel and chaplains as provided for in article 33 of the present Convention'.

³⁹ GC I articles 24, 26 and 27; Dinstein 'The System of Status Groups in International Humanitarian Law' at 147.

⁴⁰ These bear a red cross or crescent on a white background.

⁴¹ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 192.

combatant members of the armed forces, military and religious personnel cannot be made the target of a legitimate attack. Moreover, were they to fall into enemy hands, they would not hold POW status *strictu sensu*, 'although they are POWs to all outward appearances'⁴². Technically their legal status is one of 'retained personnel'⁴³.

2.3 The privileges attached to the authorisation to participate in hostilities: immunity from prosecution and secondary POW status

At the heart of any understanding of combatant status is an appreciation for the fact that combatants are for the most part authorised to participate in hostilities⁴⁴. This international law authorisation does not vest in them on an individual level⁴⁵, 'but results from the affiliation of the combatant to an organ (i.e. the armed forces) of a party to the conflict, which is itself a subject of international law'⁴⁶. It is the fact that they act for the 'sovereign', which clothes them with authorised combatant status⁴⁷ and distinguishes them as *lawful* belligerents. Since the 1864 Geneva Convention declared in article 1 that 'privateering is, and remains, abolished'⁴⁸, the legal position is that in order to enjoy lawful combatant status one needs to act on behalf of a sovereign⁴⁹.

Since combatants are acting as 'agents of a sovereign' they are exempt from personal liability for their 'authorised acts'⁵⁰. It is the State and not the individual combatant which is the enemy, thus individual combatants, while subject to being targeted legitimately during hostilities, cannot be punished for their participation in the hostilities, on account of the fact that they were specifically authorised to participate in hostilities. Their lawful authorisation to engage in combat precludes them from being 'criminally prosecuted for their belligerent acts'⁵¹. Without this combatant status, they

⁴² *Idem* at 191.

⁴³ 'Retainees include dentists, surgeons and other medical doctors' but exclude 'medical orderlies and chaplain's assistants' (*Ibid*). However 'if a physician or a chaplain refuses to employ his professional abilities... he will be removed from the category of retained personnel and be detained as an ordinary POW' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 42).

⁴⁴ Although in terms of national legislation that authorisation may be limited, as is the case with non-combatant members of the armed forces.

⁴⁵ Ipsen (1995) 'Combatants and Non-combatants' at 66-67.

⁴⁶ It is worth mentioning at this juncture that in an armed conflict, only a recognised subject of international law can clothe their armed forces with authorised combatant status.

⁴⁷ Jensen 'Direct Participation in Hostilities' at 2020-28.

⁴⁸ Won Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' (2010) 38:3 *Denver Journal of International Law and Policy* 361 at 381.

⁴⁹ 'Private citizens and independent armed groups have always been excluded from entitlement to the combatant privilege and POW status' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 197). 'There is no room for hostilities in an international armed conflict being conducted by individuals on their own initiative' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 43).

⁵⁰ Jensen 'Direct Participation in Hostilities' at 1897-1906 and 1906-14.

⁵¹ GC II article 87 gives expression to the customary international law principle that a detaining power cannot try 'POW's for acts which do not violate the laws of war' (Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' at 380; Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 4).

would otherwise be criminally liable for killing 'enemy combatants'⁵². That said, their authorisation does come with the caveat that they are required to observe the laws of war⁵³.

The privilege of being an authorised combatant also brings with it the benefit of presumptive⁵⁴ secondary POW status in the event that the combatants 'become *hors de combat*, surrender⁵⁵, or fall into enemy hands whilst participating'⁵⁶ in hostilities. The rationale for this progression of their primary combatant status into secondary POW status, is based on the fact that as a detained combatant 'their ability to fight is limited and they are no longer deemed to be a military threat to the enemy'⁵⁷. Since they were authorised combatants they cannot as POWs be regarded as criminals for their participation in the hostilities⁵⁸. Neither is their detention seen as punitive, it is simply a preventative 'way of putting combatants *hors de combat* for the duration of the conflict'⁵⁹. At the cessation of hostilities those lawful combatants (held as POWs) are repatriated 'to their own country, free to continue life unimpeded by their lawful hostile acts'⁶⁰.

2.4 The consequences attaching to combatant status: continuous lawful targeting and prosecution for violations of IHL

In exchange for the immunity combatants enjoy from prosecution by virtue of their combatant status, they also 'accept the risks associated with identifying themselves openly as members of the party to the conflict'⁶¹. Probably the most daunting consequence flowing from one's status as a combatant is that a combatant can be the legitimate target of an attack by opposing forces at all times and at all locations⁶², a position which is undisputed according to the Israeli High Court of Justice in *Public Committee against Torture in Israel*

⁵² Michael Brough 'Combatant, Noncombatant, Criminal: The Importance of Distinction' (2004) 11 *Ethical Perspectives* 176 at 177.

⁵³ Ipsen (2008) 'Combatants and Non-combatants' at 67 and 86; Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 2. The 'breach of the laws of war does not, however, result in the forfeiture of their secondary POW status, unless they also breached the fundamental obligation of distinction' (AP I article 44 (4); Ipsen (1995) 'Combatants and Non-combatants' at 81).

⁵⁴ 'Should any doubt arise as to whether a person who has taken part in hostilities and fallen into the hands of the adversary shall be deemed a combatant or civilian, that person shall continue to be treated as a POW until such time as his or her status has been determined by a competent tribunal' (Ipsen (2008) 'Combatants and Non-combatants' at 95-96).

⁵⁵ Crane and Reisner 'Jousting at Windmills' at 1535-44.

⁵⁶ Provided they are not 'nationals of the national holding them' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 197; Ipsen (1995) 'Combatants and Non-combatants' at 65-6; HR article 3(2); GC III article 4A(1-3) and (6); AP I articles 43 and 44(1).

⁵⁷ Ipsen (1995) 'Combatants and Non-combatants' at 65-66.

⁵⁸ Brough 'Combatant, Noncombatant, Criminal: The Importance of Distinction' at 177.

⁵⁹ Nathaniel Berman 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 *Columbia Journal of Transnational Law* 1 at 5; Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' at 380.

⁶⁰ Jensen 'Direct Participation in Hostilities' at 1906-14.

⁶¹ *Idem* at 2020-28.

⁶² Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 34.

('PCATI') v *Government of Israel*⁶³. 'Whether eating, washing, watching television, or even sleeping, a lawful combatant is targetable by an opposing force at any time, regardless of his actions'⁶⁴. Moreover, since their combatant status flows from their membership of the armed forces, they remain legitimate military targets whether in or 'out of uniform'⁶⁵, 'even when they are not on active duty'⁶⁶. They remain a 'continuing lawful target'⁶⁷ for as long as they retain membership of the armed forces, until they retire from the military⁶⁸ or 'gain immunity from attack by becoming hors de combat'⁶⁹.

A second consequence which attaches to their combatant status, is that their authorisation to participate in hostilities comes with the condition that they observe the laws of war. Lawful combatants can be prosecuted for their failure to observe the laws of war although such failure to observe the laws of war does not result in the loss of their primary 'combatant status or [their] right to be treated as a POW'⁷⁰. They shall nevertheless 'be called to account in accordance with the military or military penal law of their party to the conflict'⁷¹. IHL views seriously each party's 'obligation to punish such violations' of the laws of war committed by combatants.⁷²

2.5 Forfeiture of POW status and exposure to criminal prosecution

As mentioned in the introductory comments, the objective of 'insulating civilians from the prospect of attack in war'⁷³ can only be achieved if it is clear to the belligerents who are combatants and who are civilians. The principle of distinction dictates that 'combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in military operations preparatory to an attack'⁷⁴. If combatants attempt to disguise themselves as civilians they erode the 'the lawful combatant's presumption' that individuals who do not identify themselves as combatants, can be assumed to be civilians who present no danger to him⁷⁵.

It has generally been assumed that the 'agreed practice of States was that members of regular armed forces would wear their uniform'⁷⁶, while

⁶³ (2006) HCJ 769/02 available in English from <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008) at para 29.

⁶⁴ Jensen 'Direct Participation in Hostilities' at 2020-28.

⁶⁵ Dinstein 'The System of Status Groups in International Humanitarian Law' at 150-151.

⁶⁶ *Ibid*; Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 188.

⁶⁷ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 188.

⁶⁸ Once they have been fully discharged from duty or made a 'deactivated reservist' they are rendered once again a civilian (ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 23).

⁶⁹ Jensen 'Direct Participation in Hostilities' at 2197-2204.

⁷⁰ Claude Pilloud, Yves Sandoz and Bruno Zimmermann (1987) *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* Martinus Nijhoff Publishers: Geneva at 511; Ipsen (2008) 'Combatants and Non-combatants' at 95.

⁷¹ Ipsen (2008) 'Combatants and Non-combatants' at 82.

⁷² *Idem* at 95; AP I articles 85 and 86.

⁷³ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 35.

⁷⁴ AP I article 44(3).

⁷⁵ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 209-210.

⁷⁶ AP I article 44(7). It must be stated at this juncture that camouflage is not prohibited. '[T]he issue is not whether combatants can be seen, but lack of desire on their part to create the false impression that they are civilians' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 38). What is important is 'whether members of the adversary

irregular armed groups were required to identify themselves as combatants 'by wearing a fixed distinctive emblem, recognisable at a distance perhaps on an armband'⁷⁷. Interestingly, as a result of the assumption that the State's armed forces⁷⁸ would always be uniformed⁷⁹, the IHL conventions make no reference to the need for the traditional armed forces to be uniformed. Pfanner, after an extensive survey of the relevant literature and research, concludes that although there is a 'practice to wear uniforms in armies, there is not an obligation in IHL to wear them'⁸⁰. Consequently, under Geneva law, the State's armed forces enjoy full combatant and POW status without any requirements or proof of uniform⁸¹.

Since many provisions in IHL depend on the principle of distinction being observed, there is a very serious sanction⁸² imposed on those 'seeking to abuse the standing of a civilian while in fact he is a disguised combatant'⁸³. Whether a combatant abandons his uniform or distinctive emblem, or if he fails to observe 'the obligation of minimal distinction' (i.e. that of carrying his armaments openly⁸⁴), the net result is the same: he will forfeit⁸⁵ his POW status and be deprived 'of the privileges of a POW'⁸⁶ if captured while participating in hostilities⁸⁷.

While the sanction imposed on combatants who feign protected civilian status is harsh, it has not been uncommon for armies to send their 'combatants behind enemy lines disguised as civilians'⁸⁸. However, they do so knowing that if captured they will be classified as combatants without POW

forces are able to recognise the person concerned as a combatant, and therefore a legitimate target, rather than a civilian who is protected under international law' (Rogers 'Unequal Combat and the Law of War' at 11).

⁷⁷ Rogers 'Unequal Combat and the Law of War' at 11; Ipsen (2008) 'Combatants and Non-combatants' at 89.

⁷⁸ This includes the volunteer and militia forces who are part of the State's armed forces.

⁷⁹ Toni Pfanner 'Military Uniforms and the Law of War' (2004) 86 *International Review of the Red Cross* 93 at 103.

⁸⁰ *Idem* at 104.

⁸¹ Michael Cowling and Shannon Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' (2009) 42 *Comparative International Law Quarterly of South Africa* 1 at 11; Pfanner 'Military Uniforms and the Law of War' at 94.

⁸² The imposition of the sanction is recognised 'under customary international law' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 35).

⁸³ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 209-210.

⁸⁴ AP I article 44(3) 2nd sentence.

⁸⁵ Interestingly, while GC III article 85 stipulates that 'POW's prosecuted for acts committed prior to capture shall retain benefits of the convention, this provision cannot assist a soldier captured while feigning civilian status, since he never achieved POW status to retain' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 223).

⁸⁶ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 35.

⁸⁷ *Idem* at 37; AP I article 44 (4); Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 223.

⁸⁸ So for example, in Iraq it was not uncommon to find the American Army Delta and Special Forces soldiers in jeans, t-shirts and baseball caps, whilst in Afghanistan American Special Forces 'wore flowing *abak*', and grew their hair and beards so as to better blend in with the local Afghan male (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 221). While it is not considered a war crime 'to remove one's uniform or other fixed distinctive sign in favour of civilian garb', it does come with the risk that 'if an otherwise lawful combatant engages in combat without a uniform... and is captured, they are not entitled to POW status' (*Idem* at 221 and 224).

privileges⁸⁹. It is worth re-stating that at no time do they lose their combatant status since they remain members of the armed forces. Some use the term 'unprivileged combatant'⁹⁰ to refer to these combatants who disguise themselves as civilians⁹¹. But I would argue it is more accurate to say that they are combatants who have forfeited their POW privileges. So for example, even if military spy was captured whilst behind enemy lines and feigning civilian status, he would nevertheless remain a 'member of the armed forces' although he would not 'have the right to POW status'⁹² and would be 'liable for punishment'⁹³.

A further consequence which flows from the failure to distinguish oneself as a combatant, is that these individuals (despite being combatants) forfeit their 'combatant immunity from prosecution for acts undertaken whilst they failed to distinguish themselves as a combatant'⁹⁴. While the act of wearing 'non distinguishing clothing is not prohibited under IHL', it is considered perfidious and a prosecutable⁹⁵ violation of IHL⁹⁶, to 'engage in combat while doing so'⁹⁷.

2.6 Combatant status prior to the IHL conventions

The idea that those fighting on behalf of a sovereign in armed conflicts enjoyed 'privileged combatancy' was already recognised as customary law even before IHL was codified in the Hague and Geneva conventions⁹⁸. The Lieber code of 1863 already prohibited a detaining power from punishing⁹⁹, or 'targeting for revenge'¹⁰⁰, those combatants which they had captured¹⁰¹,

⁸⁹ 'Each belligerent party is at liberty to factor in a cost/benefit calculus... if members of Special Forces units are fighting behind enemy lines, and if the enemy has a demonstrably poor track record in... the protection of hors de combat enemy military personnel, the conclusion may be arrived at that on the whole it is well worth assuming the risk of (potential) loss of POW status upon capture while benefitting from the (actual) advantages of disguise' (*Idem* at 224).

⁹⁰ Included under the category "'unprivileged combatants" would be spies and mercenaries' (Abraham "'Essential Liberty" Versus "Temporary Safety": The Guantanamo Bay Internees and Combatant Status' at 847).

⁹¹ Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 10.

⁹² Ipsen (2008) 'Combatants and Non-combatants' at 110.

⁹³ *Idem* at 110 and 113; HR article 29; Rogers 'Unequal Combat and the Law of War' at 22.

⁹⁴ Blank 'Updating the Commander's Toolbox: New Tools for Operationalising the Law of Armed Conflict' at 64.

⁹⁵ Although subject to 'regular judicial procedures' (Ipsen (2008) 'Combatants and Non-combatants' at 108; Abraham "'Essential Liberty" Versus "Temporary Safety": The Guantanamo Bay Internees and Combatant Status' at 847).

⁹⁶ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 222.

⁹⁷ *Ibid.*

⁹⁸ Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 3. For example, GC II article 87 prohibits a detaining power from trying POWs for their actions prior to detention (provided those acts did not violate the laws of war).

⁹⁹ On account of 'their pre-capture warlike acts' (*Ibid.*).

¹⁰⁰ Article 56: 'A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity'.

because once 'a man is armed by a sovereign government... his warlike acts are not individual crimes or offences'¹⁰². These principles have not only been re-iterated by various war crimes tribunals¹⁰³ but are also reflected in many States' municipal laws¹⁰⁴.

2.7 Combatant status under the Hague Conventions of 1899 and 1907

The Hague Conventions of 1899 and 1907 and their regulations (collectively referred to as Hague law), were an attempt to codify existing customary law applicable in situations of armed conflict. Already under Hague Law it was acknowledged that 'a State's armed forces may consist of combatants and noncombatants'¹⁰⁵ and it was up to States to determine which members of its armed forces would carry out combative functions, and which were limited to non-combative activities¹⁰⁶.

Those who qualify to perform combative functions are defined in article 1 of the Hague Conventions¹⁰⁷. The tenor of the Hague law was to focus on the 'activity performed by the soldier', 'particular whether they bore arms and were involved in combat'¹⁰⁸ as crucial for the purposes of determining who could be a legitimate military target¹⁰⁹. 'Subsequent legal instruments abandon this activity-based approach to combatant status in favor of one

¹⁰¹ Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863 available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (accessed 12 September 2012).

¹⁰² Article 57: 'So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organised as soldiers, will not be treated by him as public enemies'.

¹⁰³ For example *U.S. v List* (the hostage case) Nuremberg Military Tribunal 1228 (1950) at 1238.

¹⁰⁴ U.S. (1951) Manual for Courts-Martial ss351.

¹⁰⁵ HR article 3; Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 169.

¹⁰⁶ Rogers 'Unequal Combat and the Law of War' at 14. HR article 13 states that 'individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as POWs, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.' This provision gives expression to the present day understanding that not all individuals who accompany the armed forces participate in combative functions (Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 34).

¹⁰⁷ 'The laws, rights, and duties of war apply not only to armies, but 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 recognisable at a distance;
 3. To carry arms openly; and
 4. To conduct their operations in accordance with the laws and customs of war.
- (conditions 1 and 2 are dispensed with in the case of the *levée en masse*)

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army".

¹⁰⁸ Daphné Richemond-Barak (2011) 'Non-State Actors in Armed Conflict' in William C. Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia University Press: New York at 2469-77.

¹⁰⁹ *Ibid.*

based upon membership'¹¹⁰. Nevertheless from the Hague law definition we see that distinguishing themselves by use of an emblem and carrying their arms openly are conditions for their being awarded combatant privilege, once again highlighting the importance of the principle of distinction.

2.8 Combatant status under the Geneva Conventions of 1949

When a conference was called to draft the four Geneva Conventions (GC I-IV)¹¹¹ in 1949, the drafters were once again guided by the rationale underpinning the 'principle of distinction... protecting innocent, harmless, individuals'¹¹². In GC III article 4A the drafters listed 'the categories of those entitled to POW status'¹¹³.

'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:

(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 organised 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 organised 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 recognisable 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 recognised by the Detaining Power.

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

¹¹⁰ *Idem* at 2469-77

¹¹¹ 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) of August 12 1949 (1950) 75 U.N. *Treaty Series* 31-83; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) of August 12 1949 (1950) 75 U.N. *Treaty Series* 85; 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GC III) of August 12 1949 (1950) 75 U.N. *Treaty Series* 135; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) of August 12 1949 (1950) 75 U.N. *Treaty Series* 287.

¹¹² Richemond-Barak 'Non-State Actors in Armed Conflict' at 2517-25.

¹¹³ *Idem* at 2372-79. The criteria set out in GC III article 4A(2) are sometimes termed 'the "legal test for POW status"' (Pfanner 'Military Uniforms and the Law of War' at 115).

armed forces, provided that they have received authorisation, 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’.

This provision has been ‘widely held as defining¹¹⁴ the meaning of “combatant”¹¹⁵ (in the absence of an explicit definition)¹¹⁶, since only a combatant can qualify for POW privilege. While the criteria for POW status set out in CG III article 4A is strongly reminiscent of the definition found in the Hague regulations¹¹⁷, there is one important respect in which Geneva law and Hague law differ. Instead of adopting an approach that focuses on the individual’s activities in assessing his combatant status, GC III shifted the focus to a membership-based understanding wherein ‘all members of the armed forces are combatants, regardless of what their function within the armed forces might be’¹¹⁸. Put another way ‘membership in an identifiable and organised armed force’ is what determines whether one qualifies for combatant status¹¹⁹ under Geneva law.

i. Regular armed forces

Legally speaking, the list of criteria set out in article 4A(2) is applicable to irregular armed forces seeking combatant status. That said, a cursory examination of GC III article 4A suggests that there appears to be a strong presumption which operates so as to automatically¹²⁰ clothe members of the regular armed forces with secondary POW privilege¹²¹ (and, by implication, also primary combatant status). As Goldman explains, according to the

¹¹⁴ Albeit in a rather inconvenient place, in a convention dealing with the rights of POWs (Richemond-Barak ‘Non-State Actors in Armed Conflict’ at 2477-85).

¹¹⁵ *Idem* at 2372-79.

¹¹⁶ *Idem* at 2517-25.

¹¹⁷ Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 169. Geneva law incorporated the four requirements set out in the HRs and then added a fifth and sixth requirement: that of being organised and belonging to a belligerent party (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 43).

¹¹⁸ Richemond-Barak ‘Non-State Actors in Armed Conflict’ at 2477-85.

¹¹⁹ *Idem* at 2386-94; Pfanner ‘Military Uniforms and the Law of War’ at 115; Ipsen (2008) ‘Combatants and Non-combatants’ at 86.

¹²⁰ Pfanner notes that based on an ‘ordinary reading of GC III article 4A(1) and the *travaux préparatoires*, it is clear that the regular armed forces (including members of militia and volunteer corps forming part of them) do not have to formally fulfil the four criteria in order to qualify as POW’ (Pfanner ‘Military Uniforms and the Law of War’ at 115).

¹²¹ Which is activated when they fall into enemy hands.

Geneva Conventions of 1949, the right of the members of the regular armed forces to 'combatant and POW status is "unconditional if not absolute"'¹²². The reality is such that the regular armed forces 'by their very nature', and with very little additional effort, are presumed to 'meet the conditions of eligibility to POW status, but the presumption can definitely be rebutted'¹²³. In dealing with this issue, the Privy Council in the *Mohamed Ali* case of 1968 established that 'even members of the armed forces must observe the conditions imposed on irregular armed forces, notwithstanding the fact that it is not stated *expressis verbis* in the GC or the HR'¹²⁴. Pfanner concurs: 'State parties are expected to take the requisite steps to give effect to these implied elements' (i.e. the conditions of eligibility for POW status)¹²⁵. Pfanner goes on to say that any member of the armed forces who falls into enemy hands will in any event have to comply with 'every individual criterion indicated in GC III article 4A(2) in order to qualify as POW, as only those elements describe properly a member of the armed forces'¹²⁶.

One of those unspoken requirements is that members of the regular armed forces are to observe the principle of distinction. Traditionally the State's armed forces have distinguished their members by making use of uniforms¹²⁷. Since it was simply assumed that the regular armed forces would always be uniformed¹²⁸, it is not surprising that the drafters of GC III make no explicit reference to any IHL obligation upon states to ensure that their regular armed forces wear uniforms¹²⁹. 'In fact the expectation that combatants would be uniformed was so unquestioningly assumed that no effort was made in any of the IHL treaties to define what constitutes a uniform'¹³⁰ for the purpose of conferring combatant status. Pilloud *et al* argue that this omission has left the term uniform being used very loosely to apply to any myriad of 'distinguishing symbols' and even to camouflage dress¹³¹. As Dinstein points out, the 'special

¹²² Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 10. The one exception arises in the case of members of the regular armed forces who are caught spying while out of uniform.

¹²³ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 43.

¹²⁴ *Idem* at 42.

¹²⁵ Pfanner 'Military Uniforms and the Law of War' at 114.

¹²⁶ *Idem* at 114. However, there is ample practice to endorse the conclusion that the State's armed forces can 'fail as a collective to comply with the four requirements' (like for example failing to observe the laws of war), without fear of being 'deprived of POW status' (*Idem* at 117).

¹²⁷ The only personnel who were exempted from this requirement were those individuals (like 'war correspondents, civilian contractors, civilian members of military aircraft crews; merchant marine and civil aircraft crews') who by their vocation were not authorised to participate in hostilities directly (*Idem* at 94).

¹²⁸ Moreover it was also assumed that they would always be subject to an organised hierarchy and compliant with the laws of war (Jean Pictet (1960) *ICRC Commentary on Geneva Convention III* ICRC: Geneva at 63; Pfanner 'Military Uniforms and the Law of War' at 103).

¹²⁹ Pfanner 'Military Uniforms and the Law of War' at 104; Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 9-11.

¹³⁰ Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 9-11.

¹³¹ Which clearly calls into question the requirement that the 'uniform' is recognisable at a distance (Pilloud *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* at 566). 'Combatants seeking to stay alive do not have to

forces often wear non-standard uniforms, a phenomenon which is unobjectionable provided that the combatants retain some distinctive feature telling them apart from civilians¹³². And as Watkin correctly points out, 'camouflage and disguise as an "ordinary civilian going about his normal pacific activities are different"¹³³. It is worth remembering that the principle of distinction is not concerned so much with whether 'combatants can be seen, but whether (if observed) they are likely to be mixed up with civilians'¹³⁴.

ii. Irregular armed forces

As war evolved and other militia¹³⁵ and voluntary groups¹³⁶ began to participate more regularly in the theatre of war (often without the luxury of clothing their militia men and women in a traditional military uniform), the question of 'whether and under what conditions irregular combatants, not members of the regular armed forces, would be entitled to privileged combatant and POW status'¹³⁷ became paramount. In response to the tales of poor treatment received by organised resistance movements during WWII¹³⁸, the provisions relating to irregular combatants were re-stated in GC III article 4 A(2)¹³⁹, with a few changes. Amongst the changes made to the Hague law, GC III sought to 'explicitly recognise independent irregular militias, volunteer corps' and now also organised resistance movements¹⁴⁰, on condition that they could prove that they belonged to a party to the conflict¹⁴¹. Secondly, GC III sought to extend the protections of privileged combatancy to instances where these irregular combatants operated 'both within and outside their own territory irrespective of whether the territory was occupied'¹⁴², doing away with any limitation that linked their combatant privilege to situations of territorial occupation.

Whenever States have gathered to discuss the issue of who should be granted combatant and POW status, there has been resistance to proposals which might expand the pool of those who could claim combatant status. For the most part, those opposed to extending the granting of combatant status have raised the fact that relaxing the uniform requirement would undermine the longstanding IHL principle of distinction, which in effect would increase the risk to ordinary civilians¹⁴³. Given this sort of resistance it was not surprising

attempt to draw attention to themselves, and even soldiers in uniform are allowed to use camouflage. This is a lawful ruse of war' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 44).

¹³² Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 43.

¹³³ Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' at 29-30.

¹³⁴ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 44.

¹³⁵ In terms of GC III article 4 A(2).

¹³⁶ *Ibid.*

¹³⁷ Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 7.

¹³⁸ Who were denied POW status and treated as unlawful combatants.

¹³⁹ GC III article 4(A)(1) set out the law as it applied to the traditional regular armed forces.

¹⁴⁰ Rogers 'Unequal Combat and the Law of War' at 14.

¹⁴¹ Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 9.

¹⁴² *Ibid.*

¹⁴³ *Idem* at 7.

that irregulars and non-State armed groups ('who fight alongside or as part of the armed forces of a High Contracting Party to the GC's in a conflict of an international character') had to meet more stringent criteria¹⁴⁴ before they could be afforded full combatant status, while it was 'simply presumed that their colleagues who served as members of the traditional armed forces would fulfill these requirements as a matter of course'¹⁴⁵.

Firstly, irregulars had to show that they belonged¹⁴⁶ to an organised group. Once irregulars could show even the 'most rudimentary elements of military organisation'¹⁴⁷ the second requirement was to prove that, as a group, they belonged to or were fighting on behalf of a State party to an international armed conflict¹⁴⁸. According to the commentary, any form of tacit authorisation, or control by the party to an international armed conflict¹⁴⁹, or a 'de facto'¹⁵⁰ relationship between the resistance organisation and the State¹⁵¹ is sufficient to satisfy this requirement¹⁵². Richemond-Barak maintains that the belonging requirement set out in article 4A(2) did not require either 'formal incorporation into the State's forces nor the authorisation of all the armed group's activities by the State'¹⁵³. In short it was included as a requirement to ensure that the 'customary law proscription against individuals or groups engaging in "private warfare" against a State party involved in an armed conflict'¹⁵⁴, would be observed¹⁵⁵.

Thirdly, 'irregulars had to show that they belonged to a group which was commanded by a person responsible for his subordinates'¹⁵⁶, and

¹⁴⁴ *Idem* at 11.

¹⁴⁵ *Idem* at 9 and 11, Mahmoud Cherif Bassiouni 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98(3) *Journal of Criminal Law and Criminology* 711 at 750-751.

¹⁴⁶ Elsea suggests that "'belonging to" a party is a less exacting standard than "forming part of" its armed forces... it may be that informal and even temporary cooperation between the militia or volunteer group and regular troops suffices to bring militia members under the protection of combatant status' (Jennifer Elsea 'Treatment of "Battlefield Detainees" in the War on Terrorism' (2007) January *CSR Report* at 27).

¹⁴⁷ Thomas Mallison and Sally Mallison 'The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict' (1977) 9 *Case Western Journal of International Law* 39 at 50; Pictet *ICRC Commentary on Geneva Convention III* at 58.

¹⁴⁸ As per GC I-IV common article 2. 'State recognition, however, is not essential, and an organisation may be formed spontaneously and elect its own officers' (Elsea 'Treatment of "Battlefield Detainees" in the War on Terrorism' at 30).

¹⁴⁹ For example 'by delivery of weapons to the irregulars' (*Prosecutor v Tadić* ICTY Appeals Chamber (1999) 38 *International Legal Materials* 1518 at 1537).

¹⁵⁰ According to the ICTY Appeals chamber in *Tadic*, 'a relationship of dependence and allegiance of these irregulars vis-à-vis that party to the conflict will satisfy this requirement' (*Prosecutor v Tadić* ICTY Appeals Chamber at 1537). This 'implicitly refers to 'a test of control... by co-ordinating or helping in the general planning of [the associated group's] military activity' (Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 32).

¹⁵¹ Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12.

¹⁵² *Prosecutor v Tadić* ICTY Appeals Chamber at 1537.

¹⁵³ Richemond-Barak 'Non-State Actors in Armed Conflict' at 2534-41.

¹⁵⁴ Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12.

¹⁵⁵ 'Such unaffiliated fighters always have been forbidden by LOAC' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 196).

¹⁵⁶ 'Although the leaders qualification or how he obtained his authority is not specified – the leader must be responsible for the action taken on his orders – requires disciplining his

fourthly, that the group members had ‘a fixed, distinctive sign recognisable at a distance’¹⁵⁷. There is little by way of guidance in either treaty law or soft law as to what ‘constitutes a distinctive sign’¹⁵⁸. What is clear however is that there is certainly ‘no treaty based or customary norm that requires that irregulars... wear traditional military dress’¹⁵⁹ ... with a proper insignia’¹⁶⁰. Goldman suggests that provided ‘the dress or sign worn be such that it is visible during daylight, and detectable at a distance by the naked eye’¹⁶¹, the requirement would be satisfied. The rationale behind the requirement is that ‘it must identify and characterise the armed force using it’ and ‘the armed force is not allowed to confuse the enemy by ceaselessly changing its distinctive emblem’¹⁶². From various legal opinions, it is probably safe to conclude that the following items are sufficient to constitute a distinctive sign recognisable at a distance: a helmet, headdress, cap, scarf, coat, shirt, badge, emblem, armband, ‘coloured sign worn on the chest’¹⁶³ or brassard permanently affixed to clothing¹⁶⁴. Once the armed group has adopted its ‘identifying emblem’¹⁶⁵, it is then ‘up to the individual to wear the emblem as required, his failure to do so will not contaminate the other members of the group’¹⁶⁶.

The fifth requirement is also motivated by the principle of distinction, and requires that the group ensure that its members carry their arms openly. In essence this is meant to ensure that the opposition are not unfairly taken by surprise by irregulars ‘who approach with pistols concealed beneath their clothing’¹⁶⁷.

Lastly the group must ‘ensure that its members conduct their operations in accordance with the laws of war’. Very briefly this would require the observance of the basic principles on which IHL is based: observing civilian immunity against attack and not causing ‘disproportionate civilian casualties’ or ‘unnecessary suffering and destruction’¹⁶⁸. The rationale behind

members to ensure compliance with the laws of war’ (Goldman and Tittmore ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 12).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Idem* at 13.

¹⁵⁹ *Ibid.*

¹⁶⁰ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 43.

¹⁶¹ Goldman and Tittmore ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 13. While Dinstein notes that ‘it is not clear whether visibility is determined solely by the naked eye or if it also includes observation by means of binoculars and even infra-red equipment’ (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 53).

¹⁶² *Idem* at 43.

¹⁶³ Provided it is worn constantly, in all circumstances (Pictet *ICRC Commentary on Geneva Convention III* at 60).

¹⁶⁴ Pictet *ICRC Commentary on Geneva Convention III* at 60; U.S. Department of the Army Field Manual 27-10 *The Law of Land Warfare* at 27 para 64(b); Goldman and Tittmore ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 13.

¹⁶⁵ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 49-50.

¹⁶⁶ *Ibid.*

¹⁶⁷ Goldman and Tittmore ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 13.

¹⁶⁸ *Idem* at 14. Immediately we can appreciate that ‘those engaging in terrorist acts aimed at spreading fear amongst the civilian population, would immediately fall foul of this criteria and would not be classified as combatants in terms of GC III’ (*Idem* at 7).

this provision was to ensure that combatants who did not observe IHL were 'estopped from relying on that body of law when desirous of reaping its benefits'¹⁶⁹.

Authorities generally agree that all six conditions¹⁷⁰ are applicable to the irregular group as a collective. More specifically the first three conditions (that the armed group as a whole is organised, belongs to a belligerent party and has a responsible commander) are addressed to the irregular group collectively and not to any members personally, whereas the last three conditions (a fixed distinctive sign recognisable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war) are also applicable to individual members, and must be met 'continuously and not intermittently'¹⁷¹. However, if irregular members 'generally meet all six conditions all the of the time then an individual member who fails to observe any of the last three requirements will not lose his privileged combatant or POW status upon capture'¹⁷².

While the actions of a few 'bad apples' in a group will not strip the entire group of its combatant status (provided the majority of the group observe IHL¹⁷³), it will certainly expose those rogue combatants to 'individual judicial or administrative prosecution' for their violations of IHL¹⁷⁴. Although, according to Commander Fenrick, if 'a majority of the members of the group fail to meet all or any of the six conditions at any time, then all of the members will not qualify as privileged combatants' and will instead be classified as civilians participating directly in hostilities¹⁷⁵. Similarly, if the group is in the

¹⁶⁹ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 45.

¹⁷⁰ Yoram Dinstein has 'distilled the requirements of a lawful combatant to seven general-cumulative-conditions for lawful combatancy:

- (i) subordination to a responsible command,
 - (ii) a fixed distinctive emblem,
 - (iii) carrying arms openly,
 - (iv) conduct in accordance with jus in bello...
 - (v) organisation,
 - (vi) belonging to a party to the conflict...[and]
 - (vii) lack of duty of allegiance to the Detaining Power'
- (Jensen 'Direct Participation in Hostilities' at 1914-21).

¹⁷¹ Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14-15; Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 25.

¹⁷² Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 50.

¹⁷³ 'If there is no conclusive evidence on the group's compliance, each individual will be judged on his own compliance' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 50).

¹⁷⁴ *Ibid*; Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 30; Evan Wallach 'Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?' (2003) November *Army Lawyer* at 5; Arfan Khan 'International and Human Rights Aspects of the Treatment of Detainees' (2005) 69:2 *The Journal of Criminal Law* 168 at 178; Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12; Jensen 'Direct Participation in Hostilities' at 1929-36.

¹⁷⁵ William J Fenrick (1998) 'Combatant and POW status' *ICRC Seminar on IHL* (Lecture delivered at New York University Law School); Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 19.

habit of flouting IHL, 'each individual will have to answer for the group's misdeeds - the group's general pattern of behaviour will be extrapolated to him',¹⁷⁶.

When one looks at the criteria for POW status set out in article 4A(2) as applicable to irregular armed forces, it is obvious that 'these conditions are fashioned on the operations of regular armed forces: who are organised, are subject to hierarchical discipline and normally belong to a belligerent party, they have a proud tradition of wearing uniforms and carrying their arms openly, they are trained to respect LOIAC, and the issue of allegiance scarcely arises'¹⁷⁷. Richemond-Barak argues that the 'highly formalistic, membership based' notion of combatant status 'excludes a number of non-State entities from the definition'¹⁷⁸.

Given this argument, one can appreciate that it becomes extremely problematic to assess compliance with these six requirements in order to grant combatant status to irregular armed forces in the theatre of conflict. Not only is the matter complicated for the forces who face irregular armed groups, but it is apparent that providing the evidence necessary to satisfy the stringent criteria might very well endanger the rest of the group's security by giving up 'their individual identities and the group location'¹⁷⁹. Over time the requirements of article 4A(2) have proved 'extremely difficult if not, in fact, impossible for irregulars to comply with without jeopardising their military operations'¹⁸⁰.

It therefore seems especially harsh to expect irregulars to satisfy the second criteria, that of belonging to a party to the conflict, when this requirement is easy for the opposition to dispute, particularly if the irregulars are fighting on 'behalf of a government in exile'¹⁸¹. As for the requirement that irregulars must wear a distinctive sign at all times, it seems unduly exacting to demand this of fighters who are only engaged on a part time basis. In fact, Goldman states that 'it would be suicidal for irregular's to wear their distinctive emblem when not engaged in fighting, yet it is expected of them'¹⁸². Lastly the fact that irregular forces will lose their combatant status on account of any non-compliance with IHL seems a particularly onerous requirement, when one appreciates that regular soldiers can breach the laws of war without losing combatant and POW status (although they can be tried in a court martial for these breaches)¹⁸³. In short there is very little, if any, incentive for irregular fighters to observe the principle of distinction if in the end it is near impossible to adhere to the demands of the six criteria, without seriously endangering

¹⁷⁶ Although Dinstein argues that if an 'individual has behaved in compliance with IHL, the poor IHL record of the group should not result in his being tagged an combatant' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 47).

¹⁷⁷ *Ibid.*

¹⁷⁸ Richemond-Barak 'Non-State Actors in Armed Conflict' at 2364-72.

¹⁷⁹ Especially in order to satisfy the 1st and 3rd requirements (Goldman and Titemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14).

¹⁸⁰ *Idem* at 16. As Richemond-Barak notes, 'it is virtually impossible for non-State actors to meet these criteria and thus to become lawful combatants under IHL' (Richemond-Barak 'Non-State Actors in Armed Conflict' at 228-35).

¹⁸¹ Goldman and Titemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14-15.

¹⁸² *Idem* at 15.

¹⁸³ *Ibid.*

one's own life and the security of the group. The net result is likely to involve a greater risk to the civilian population¹⁸⁴.

iii. Persons accompanying the armed forces

GC III article 4A(4) includes under the umbrella of those enjoying POW status:

'Persons who accompany the armed forces without actually being members thereof, such as civilian members of 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 authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model'.

This is an interesting category to find in a discussion on combatant status since these 'persons accompanying the armed forces' lack the membership link to the armed force necessary to clothe them with combatant status. They are, however, given POW status in the event that they fall into enemy hands. So while it is possible to contend that all POWs coming from the regular and irregular armed forces must necessarily have enjoyed primary combatant status, this is not the case for the category of POWs who were classified as 'persons accompanying the armed forces'. These essentially civilian contractors enjoy primary civilian status¹⁸⁵ as a consequence of the non-combative function which they carry out in armed conflicts. I will discuss this category further under in chapter three where I review the literature pertaining to those with civilian status.

iv. Merchant mariners, civil aviators and the *levée en masse*

For sake of completeness it is worth mentioning that POW status is also extended to:

'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'¹⁸⁶,

and:

'the 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'¹⁸⁷.

¹⁸⁴ George Aldrich 'Guerilla Combatants and Prisoner of War Status' (1982) 31 *American University Law Review* 871 at 873.

¹⁸⁵ GC III article 4A(4); Ipsen (1995) 'Combatants and Non-combatants' at 65 and 79.

¹⁸⁶ GC III article 4A(5).

¹⁸⁷ GC III article 4A(6).

I will not explore these two categories any further here since they are not relevant to my discussion of the five groups of non-State actors (voluntary human shields, private military and security contractors, relief organisations, journalists and under-aged child soldiers recruited in organised armed groups) which are the focus of this dissertation.

2.9 Combatant status under Additional Protocol of 1977

It became apparent that irregular forces found it especially difficult to comply with the stringent criteria set out in GC III article 4(A)(2), prompting some to label the GC III article 4(A)(2) requirements unworkable¹⁸⁸. At the same time, there was an increased appreciation (based upon the right to self determination), that those individuals fighting wars of national liberation were entitled to international recognition and IHL protections¹⁸⁹. When the ICRC convened a diplomatic conference in the 1970s on IHL applicable in armed conflict¹⁹⁰, the issue of relaxing the requirements for combatant status for 'freedom fighters' was at the top of the list¹⁹¹. The conference was tasked with 'fashioning new rules applicable to irregular forces that would strike a compromise'¹⁹² between the two distinct legal regimes which characterised the Geneva Conventions, thereby creating 'a single and non-discriminatory set of rules applicable to all combatants regular and irregular alike... and to provide presumptions and procedures to prevent abuse of the exceptions'¹⁹³.

The compromise is reflected in API, articles 43-47, under the heading 'combatant and POW status'. At the heart of API is the recognition that in modern warfare, irregular armed groups are comprised of mostly part time fighters. In essence these articles aim to 'relax the rigid requirements of the Hague and the Geneva standards sufficiently, to provide guerillas a possibility of attaining privileged combatant status without exposing the forces fighting them to the danger inherent in the use of civilian disguise in order to achieve surprise'¹⁹⁴.

i. Defining 'armed forces'

In article 43(1) we find a new definition of 'armed forces'¹⁹⁵, described as

¹⁸⁸ Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 16.

¹⁸⁹ AP I article 1(4) and article 44(3).

¹⁹⁰ The conference was tasked with drafting two additional protocols to the four 1949 Geneva Conventions. AP I was drafted to deal with international armed conflicts while AP II was limited in scope to non-international armed conflicts. Since this piece is focused on the combatant status of non-State groups in situations of international armed conflict, I shall restrict my subsequent discussions to the developments which arose in respect of AP I only.

¹⁹¹ Waldemar Solf 'A Response to Douglas J Feith's Law in the Service of Terror – the Strange Case of the Additional Protocol' (1986) 20 *Akron Law Review* 26 at 272.

¹⁹² Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 16.

¹⁹³ Aldrich 'Guerilla Combatants and Prisoner of War Status' at 874.

¹⁹⁴ Solf 'A response to Douglas J Feith's Law in the Service of Terror – the strange case of the Additional Protocol' at 273.

¹⁹⁵ Medical personnel and chaplains are specifically excluded from the application of AP I article 43(2).

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

In essence what this new activity or functionality¹⁹⁶ based definition of the armed forces achieved, was to do away with the previous ‘distinction between regular and irregular voluntary corps, militia and other organised groups (that existed in the HR and GC III)¹⁹⁷, thereby widening ‘the scope of actors’ who are afforded combatant status¹⁹⁸. Unlike the previous¹⁹⁹ membership based regime, now ‘an indirect or implicit relationship between a non-State entity and the State party’ is sufficient to establish combatant status²⁰⁰. The six onerous ‘rules for combatant status’ previously set out in GC III were replaced by two conditions:

- ‘1. responsible command under a party to the conflict and,
2. behaviour in accordance with the laws of war²⁰¹.

As Rogers points out: ‘it is a matter of organisation and discipline, which goes to the root of the definition of armed forces’²⁰². A simple ‘factual enquiry’ into the existence of a ‘measure of organisation, a responsible command’, and ‘an internal disciplinary system which enforces the laws of war’²⁰³ is demanded of all combatants, not only irregular combatants. The relationship of belonging may ‘be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes it clear for which party the group is fighting’²⁰⁴. A key element is that irregulars must ‘conduct hostilities on behalf and with the agreement of that party’²⁰⁵. While previously it was simply assumed that the regular armed forces would operate under command responsibility, now it is ‘an express prerequisite for their falling within the definition of an armed force in terms of API’²⁰⁶. Now, in light of the new definition given in API, ‘all members of armed forces are put on equal

¹⁹⁶ Richmond-Barak ‘Non-State Actors in Armed Conflict’ at 2509-17.

¹⁹⁷ Goldman and Tittmore ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 17.

¹⁹⁸ Richmond-Barak ‘Non-State Actors in Armed Conflict’ at 2495-2502.

¹⁹⁹ Which existed under HR and GC III.

²⁰⁰ Richmond-Barak ‘Non-State Actors in Armed Conflict’ at 2502-9.

²⁰¹ *Ibid.*

²⁰² Rogers ‘Unequal Combat and the Law of War’ at 14-15.

²⁰³ Fritz Kalshoven and Liesbeth Zegveld (2011) *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th ed) Cambridge University Press: Cambridge at 87.

²⁰⁴ Goldman and Tittmore ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 18.

²⁰⁵ *Ibid.*; ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 23.

²⁰⁶ Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 87.

footing²⁰⁷, and no longer do irregulars have to prove ‘use of a uniform²⁰⁸, that they carried their arms openly²⁰⁹ or that they enjoyed political recognition²¹⁰’.

ii. Combatant and POW status

Article 43(2) then goes on to state that: ‘all members of the armed forces (other than the medical personnel and chaplains) are combatants having the right to directly participate in hostilities’, effectively clothing all these newly defined ‘armed forces’ with full combatant status. Not surprisingly, given the link between combatant and POW status, article 44(1) confirms that ‘any combatant (as defined by article 43), who falls into the power of the adverse party, shall be a POW²¹¹. Consequently, there is no longer a burden on the irregular armed combatant to ‘disclose information pertaining to the structure of their group, the identity of his colleagues, or their compliance with the laws of war, in order to secure him his POW status²¹². This provision effectively shifts the burden to the detaining power to justify their denial of POW status in such instances.

iii. The inviolability of combatant and POW status

Given the importance which attaches to POW status upon capture, API article 44(2) stipulates that:

‘while all combatants are obliged to comply with the rules of international law applicable in armed conflicts, violation of these rules shall not deprive a combatant of his right to be a combatant, or... his right to be a POW²¹³’.

This is a remarkable change from the regime which used to pertain to irregular armed forces under GC III, where they were always at risk of losing their POW status, based on their failure to observe IHL²¹⁴. Prior to API, ‘if a member of the regular armed forces was captured while participating directly in hostilities, and was not wearing the appropriate uniform, or if a militia or

²⁰⁷ Goldman and Tittmore ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 18.

²⁰⁸ As Melzer points out, ‘visibility is no longer a collective defining element of the armed forces, but an individual obligation, the respect of which may be relevant for a member’s entitlement to POW status or combatant privilege, but not for his unit’s legal qualification as “armed force of a party to the conflict” (Nils Melzer (2009) *Targeted Killing in International Law* Oxford University Press: Oxford at 307).

²⁰⁹ Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 87.

²¹⁰ Goldman and Tittmore ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 18.

²¹¹ Abraham “‘Essential Liberty’ Versus “Temporary Safety”: The Guantanamo Bay Internees and Combatant Status’ at 844.

²¹² Goldman and Tittmore ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 19.

²¹³ Except as provided in API article 44(3) and 44(4).

²¹⁴ Christopher Greenwood (1991) ‘Customary Law Status of the 1977 Additional Protocols’ in Delissen JM Astrid and Tanja J Gerard (eds) *Humanitarian Law of Armed Conflict: Challenges Ahead* T.M.C Asser Instituut / Martinus Nijhoff Publishers: Netherlands at 107.

voluntary corps member does not wear a permanent distinctive sign, then a breach of the duty of distinction and additionally a charge of perfidy would be considered²¹⁵.

Now, under the new API regime, once an individual is clothed with combatant status they cannot lose that status, even by actions prior to their capture which might have violated IHL²¹⁶. Moreover, all armed forces are held to the same standard, and any failure to observe the rules of war will be an offence for which they can be court martialled and face punishment²¹⁷, but they will nevertheless continue to be treated as combatants and enjoy full POW privileges²¹⁸. Moreover, even if it is found that an individual has committed a war crime²¹⁹, that fact will not result in the revocation of their POW status²²⁰.

Having said that, the new API regime does take the obligation to observe the principle of distinction very seriously. Some academics have said that API article 48 (which requires that parties shall at all times distinguish between the civilian population and combatants), is API's 'most cardinal provision'²²¹. Moreover, API transfers the liability to observe the principle of distinction up the chain of command, 'thereby making commanders who elect not to court martial their soldiers for failing to distinguish themselves, *personally* liable for violating articles 86 and 87 of API'²²². In fact Rogers argues that a pattern of consistent violations of IHL (which goes unpunished) 'is strong evidence that the group does not qualify as "armed forces", since it fails to meet the criterion of an internal disciplinary system'²²³. In effect what Rogers proposes is that ill-disciplined forces might not enjoy full combatant status²²⁴.

iv. Forfeiture of POW status

While combatant and POW status seems more inviolable under the API guidelines²²⁵, the importance of the principle of distinction is still emphasised. API follows:

²¹⁵ Ipsen (2008) 'Combatants and Non-combatants' at 93.

²¹⁶ Abraham "Essential Liberty" Versus "Temporary Safety": The Guantanamo Bay Internees and Combatant Status' at 844.

²¹⁷ Ipsen (2008) 'Combatants and Non-combatants' at 93, AP I article 44(3).

²¹⁸ Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 20.

²¹⁹ 'Colonel Draper states bluntly that members of the armed forces who persistently violate the laws of war do not lose their POW status upon capture' (*Idem* at 10).

²²⁰ 'Any guerrilla who fails to distinguish himself during such military operations... can be punished only by applicable disciplinary or penal sanctions, not by forfeiture of his status as a lawful combatant or... as a POW' (George Aldrich 'New Life for the Laws of War' (1981) 75 *American Journal of International Law* 764 - 783 at 773).

²²¹ Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 86.

²²² Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 20 (emphasis added).

²²³ Rogers 'Unequal Combat and the Law of War' at 16.

²²⁴ *Ibid.*

²²⁵ As per AP I article 44(2). Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 87.

Article 44(3)

'Recognising, however that there are situations in armed conflicts where, owing to the nature of 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 visible²²⁶ to the adversary while he is engaged in a military deployment preceding the launch of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of article 37(1)(c)'.

Article 44(4)

'A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed'.

While the question of forfeiture of POW status was not mentioned in the Geneva Convention, the question of forfeiture appears to have crept into the language of API through article 44²²⁷. In short 'if a combatant falls into the power of the adversary "while failing to carry his arms openly during each military engagement and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launch of an attack in which is to participate" – he shall forfeit his right to be a POW'²²⁸. According to Pfanner there is both 'State practice and jurisprudence which indicate clearly that combatants who do not distinguish themselves from the civilian population while engaged in an attack or in a military operation prior to an attack shall forfeit their rights as POWs'²²⁹.

While the mention of forfeiture of POW status might be new to the API regime, the IHL prohibition against perfidy²³⁰ is one with a long history since it was recognised in Hague law²³¹ and under customary international law²³². In

²²⁶ At the time of signing up to the protocol some States 'made interpretative statements, for ... that "visible" included visibility due to electronic or other forms of surveillance', which 'would include binoculars and night sights' (Rogers 'Unequal Combat and the Law of War' at 12).

²²⁷ Pilloud *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* at 522.

²²⁸ Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 88.

²²⁹ Pfanner 'Military Uniforms and the Law of War' at 120.

²³⁰ The prohibition is set out in AP I article 37 (1)(c). 'A lawful combatant must abstain from creating the false impression that he is an innocent civilian... He must carry his arms openly in a reasonable way, depending on the nature of the weapon and the prevailing circumstances' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 39).

²³¹ Article 23.

essence perfidy is committed when combatants intentionally feign protected status (as a non-combatant/civilian), in order to betray the confidence of the opposition and thereby gain an advantage over the opposing forces²³³. The prohibition against perfidy has always operated to preclude certain activities from the realm of acts which are covered by the IHL understanding of combatant privileged.

So while 'API requires combatants to distinguish themselves in the best possible manner, and in traditional terms this means that participants should ordinarily wear military uniforms'²³⁴, 'in these exceptional and limited circumstances [described in API article 44(3)] the combatant's failure to observe the full requirements of distinction as set out in API, will not be seen as an perfidious act' ('which marks a significant change from the Hague and Geneva legal systems'²³⁵), and 'shall not have the affect of forfeiting him his POW status and making him liable to be tried for all his hostile acts'²³⁶.

In order to limit the potential scope of application of the API article 44(3) exception, some States maintained that it only pertained to 'occupied territories'²³⁷ and in armed conflicts of the kind described in API article 4(1) (i.e. wars of national liberation)²³⁸. Rogers maintains that such an interpretation is 'unduly narrow... since the exception would also be of use to special forces conducting long-range patrols in enemy-held territory'²³⁹. In fact, reading further in article 44(7) it is apparent that the drafters of API did contemplate that "regular, uniformed armed units of a Party to the conflict" may conduct operations while meeting the more relaxed standards of combatancy²⁴⁰.

It is however generally accepted that 'the exceptional rule will in practice only be applied to guerilla fighters... it does not change the generally accepted practice of States concerning the wearing of uniforms'²⁴¹. API article 44(7) points out that 'this article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the

²³² Jean-Marie Henckaerts and Louise Doswald-Beck (eds) (2005) *Customary International Humanitarian Law Volume 1: Rules* Cambridge University Press: Cambridge at rule 65 states that 'killing, injuring or capturing an adversary by resort to perfidy is prohibited'.

²³³ Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' at 63.

²³⁴ This conforms to the basic principle outlined in article 44(7) which refers to the 'generally accepted practice' of wearing uniforms (Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 13).

²³⁵ In such cases these fighters could face prosecution under the domestic legal system as a 'common criminal' (Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 20).

²³⁶ *Idem* at 22.

²³⁷ This was the U.K. position (Anthony Dworkin (2003) 'Guerilla War, "Deadly Deception", and Urban Combat' available at <http://www.crimesofwar.org/special/Iraq/brief-guerrilla.html> (accessed 20 August 2006)).

²³⁸ Ipsen (2008) 'Combatants and Non-combatants' at 91.

²³⁹ Rogers 'Unequal Combat and the Law of War' at 12. 'So a member of the special forces operating behind enemy lines, even if he does not carry his weapons openly in deployments and engagements, is entitled to POW status. However, he would be criminally responsible for any war crimes he may have committed in the process' (*Idem* at 13).

²⁴⁰ *Idem* at 12.

²⁴¹ Ipsen (2008) 'Combatants and Non-combatants' at 92.

conflict'²⁴². It was felt that an interpretation of this exception which allowed combatants to oscillate between combatant and civilian identifications²⁴³ would 'severely undermine any progress that this article has achieved'²⁴⁴. Even in these rare instances where the exception might apply, some measure of distinction is required, 'at the point where distinction becomes fundamental to an equitable armed engagement – in the act of attack'. The 'second sentence of API article 44(3) suggests that the open carrying of arms is the minimum requirement'²⁴⁵. As a pragmatic response to the realities of modern war, 'it appears that... the underlying standard is that participants on all sides should carry their arms openly in preparation for and during military operations'²⁴⁶ in order to enjoy secondary POW status.

As Watkin points out, this provision introduces 'a temporal element that was not present in the obligation to wear a fixed distinctive sign'²⁴⁷. The temporal aspect however is only applicable to an enquiry into whether, once captured, the belligerent is entitled to POW status. In terms of API article 44(5) a belligerent can only risk forfeiting his POW status if he 'falls into the power of an adverse Party' while failing to observe the minimum requirement of carrying his arms openly while 'engaged in an attack or in a military operation preparatory to an attack'²⁴⁸. If he carries out an 'unprotected attack' and escapes being captured, he will not, if captured during later hostilities, forfeit his right to POW status on account of these prior activities in violation of article API article 44(4)²⁴⁹. In short, combatants need only carry their armaments openly when 'engaged in an attack or in a military operation preparatory to an attack', and the consequences of forfeiture of POW status are limited to those captured during such times²⁵⁰.

All the other consequences which flow from combatant status, including legitimate targeting, are not limited by the temporal aspect of this provision. Consequently, even 'while off duty (i.e. while pursuing their civilian

²⁴² Moreover the exception only applies for so long as there is a conflict of an international character' (Cherif Bassiouni 'The New Wars and the Crisis of compliance with the Law of Armed conflict by Non-State Actors' at 750-751).

²⁴³ Pilloud *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* article 43.

²⁴⁴ *Ibid.*

²⁴⁵ Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 19; Michael Bothe, Karl Partsch and Waldemar Solf (1982) *New Rules for Victims of Armed Conflicts Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949* Martinus Nijhoff Publishers: The Hague at 253.

²⁴⁶ Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 13.

²⁴⁷ Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' at 33.

²⁴⁸ *Ibid.* The commentary suggests that the term 'military operations preparatory to an attack' should be 'broadly construed' to include 'logistical activities preparatory to an attack', since these are 'more likely to be conducted in a civilian environment', which necessarily entails greater risk for the immune civilian population and thus makes the observance of the principle of distinction all the more necessary (Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 21).

²⁴⁹ Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' at 33.

²⁵⁰ *Ibid.*

vocations) these part-time combatants may be lawfully targeted, much like regular uniformed combatants may be targeted prior to capture²⁵¹. That said, it would not be an IHL violation if a belligerent fell into enemy hands whilst in civilian clothing, 'provided he [had] not engaged in combat while in civilian clothing'²⁵². It is also worth noting that while these article 44(3) fighters 'might still enjoy POW status', they can nevertheless still 'be tried for breach of laws of war for failing to fully distinguish themselves as per the 1st sentence of article 44(3)'²⁵³. Similarly, not only would a combatant 'who acted perfidiously and failed even the minimum requirement of carrying their arms openly', forfeit his secondary POW status in the event that he fell into enemy hands, but he could also 'be tried for all his hostile acts'²⁵⁴ under 'the national criminal law of the detaining power'²⁵⁵. While the idea of forfeiting ones POW status has serious legal implications, the matter is somewhat fudged by a further reading of API article 44(4) which states that even once one's POW status is forfeited, one 'shall, nevertheless, be given protection's equivalent in all respects to those accorded to POWs by the Third Convention and by this Protocol.'²⁵⁶ Thus, 'on capture, although not a POW, such combatants enjoy the procedural and substantive protections enjoyed by POW'²⁵⁷.

While API articles 43 and 44 seem pragmatic, they have not been without controversy²⁵⁸. In fact it is these provisions which have 'been identified as the main reason why the United States decided not to ratify the protocol'²⁵⁹. The United States maintains that API 'article 44 does not reflect customary international law and that, by diminishing the distinction between combatants and civilians, it undercuts the effectiveness of LOIAC'²⁶⁰. Banks agrees that 'the insignia rule is central to the principle of distinction and the very reason that combatants garner special privileges, because by differentiating themselves they make themselves available as targets'²⁶¹.

²⁵¹ Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 21.

²⁵² Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 222.

²⁵³ Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 22.

²⁵⁴ *Ibid.*

²⁵⁵ Ipsen (2008) 'Combatants and Non-combatants' at 93.

²⁵⁶ Abraham "'Essential Liberty" Versus "Temporary Safety": The Guantanamo Bay Internees and Combatant Status' at 845.

²⁵⁷ *Ibid.*

²⁵⁸ Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' at 32.

²⁵⁹ Greenwood 'Customary Law Status of the 1977 Additional Protocols' at 107; Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 23; Kenneth Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' (2010) 42 *International Law and Politics* 641 at 669.

²⁶⁰ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 54; Pilloud *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* at 521. Some argue that AP I effectively 'offers protection to terrorist groups' (Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 170-171). However, as Heaton explains 'terrorists are not entitled to combatant status because the traditional criteria required for combatant status spelled out in GC III still apply' (*Ibid.*).

²⁶¹ William Banks (2011) 'Introduction' in William Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia University Press: New York (ebook) at 133-39.

Those States who have 'not ratified API often inaccurately refer to GCIII article 4A(1) and (2) in order to define armed forces or combatants under IHL²⁶². Melzer maintains that this is an incorrect interpretation and that 'when defining armed forces for the purposes of the principle of distinction'²⁶³ the GC do not provide a definition of armed forces, combatants or civilians which would be 'sufficiently precise for the purposes of distinction'²⁶⁴. He recommends that the proper means of analysis should be 'conducted based on universally recognised principles of IHL and not domestic legislation'²⁶⁵. Melzer argues that it is a 'highly unsatisfactory result' to adopt a position in which there can be 'two different standards of what constitutes lawful combatancy'²⁶⁶.

On the issue of whether one can truly forfeit one's *combatant* status, there are competing interpretations of the law. Ratner, for example, maintains that 'if a fighter does not carry his arms openly during the engagement as well as during the deployment before an attack while visible to the adversary, he is not a lawful combatant (entitled, for example to POW status)²⁶⁷. At the end of the day, the most important requirement of combatant status is membership of a particular group that is recognised as an armed force²⁶⁸ that is a party to a conflict²⁶⁹. 'Thereafter if individuals who claimed combatant status failed to distinguish themselves through uniforms, distinctive emblems or through carrying their arms openly in preparation for an attack' they are in effect breaching the laws of war and will forfeit their POW²⁷⁰ status and may face court martial for breaching the laws of war²⁷¹. 'They do not forfeit their combatant status on account of these breaches'²⁷². To suggest that a combatant (once clothed with combatant status) can forfeit that status 'flies in the face of IHL which dictates that once a detainee is afforded combatant status and that is confirmed by a tribunal, no actions on the part of the detainee during the conflict can give rise to the forfeiture of this status'²⁷³.

²⁶² The U.S. considers GC III article 4 to be the prevailing law regarding POW status in international armed conflicts involving the U.S. and other States (Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 23; Melzer *Targeted Killings in International Law* at 305).

²⁶³ Melzer *Targeted Killings in International Law* at 306.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ Steven Ratner 'Rethinking the Geneva Conventions' *Crimes of War Project* (30 January 2003) available at <http://www.crimesofwar/print/expert/gc-ratner-print.html> (accessed August 2004) at 6.

²⁶⁸ These need not necessarily be affiliated to States, as is the case with CG III article 4 A(2) 'other militias' and AP I article 1(4) liberation movements.

²⁶⁹ Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 35.

²⁷⁰ Article 44(4) then states expressly that any combatant who fails to carry arms openly in accordance with 'article 44(3) shall forfeit his right to be a POW'.

²⁷¹ Pfanner 'Military Uniforms and the Law of War' at 120. Despite the fact that they will be denied *de jure* POW status, they will nevertheless be 'be given protection's equivalent in all respects to those accorded to POW's by the Third Convention and by this Protocol' even while they face trial and punishment for their offences (API article 44(4)).

²⁷² Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 30.

²⁷³ *Ibid.*

Some academics argue that the concept of forfeiting combatant status is misconstrued.

v. Presumptive POW status

API article 45(1) establishes a presumption that 'a person who participated in hostilities is entitled upon capture to POW status if he claims that status, appears entitled thereto, or his party claims it for him'. Not only are captured combatants entitled to claim POW status, but article 45(2) now affords combatants the 'right to assert POW status before a judicial tribunal and have the issue adjudicated'²⁷⁴. API article 45(1) now affords irregular combatants the privilege which was always extended to their colleagues in the regular armed forces. Thus, the only determination that a detaining power can make concerning the status of a captured participant is establishing whether or not such person is a member of an armed group that is a party to a conflict. If this is the case then such person enjoys combatant status. If not, that person is classified as a civilian and may be punished for mere participation²⁷⁵.

2.10 Combatant status under customary international law

According to the ICRC's study into the customary status of these IHL provisions, the definition of the 'armed forces' contained in API article 43(2), including both regular and irregular armed forces, is considered a 'norm of customary international law applicable in international armed conflicts'²⁷⁶. Not only is this position 'reflected in numerous military manuals'²⁷⁷, but it is also supported by official statements and reported practice', and 'no official contrary practice was found'²⁷⁸.

Moreover the API article 43(1) requirement that 'the armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates', is also considered a 'norm of customary international law applicable in international armed conflicts'²⁷⁹. This understanding is reflected in the military manuals of many States²⁸⁰, and likewise 'is supported by official statements and reported practice'²⁸¹.

According to the ICRC study, it is accepted as customary IHL that 'it is therefore no longer necessary to distinguish between regular and irregular armed forces' and all those fulfilling API article 43's conditions are deemed to

²⁷⁴ Rogers 'Unequal Combat and the Law of War' at 27.

²⁷⁵ AP I article 50(1) suggests that anyone who does not qualify as a lawful combatant will be necessarily classified as a civilian.

²⁷⁶ *Idem* at rule 3.

²⁷⁷ Including those of 'Argentina, Australia, Belgium, Benin, Cameroon, Canada, Colombia, Croatia, the Dominican Republic, Ecuador, France, Germany, Hungary, Indonesia, Israel, Italy, Kenya, South Korea, Madagascar, the Netherlands, New Zealand, Russia, South Africa, Spain, Sweden, Togo, the United Kingdom and the United States' (*Ibid*).

²⁷⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 12.

²⁷⁹ *Idem* at rule 4. 'In essence, this definition of armed forces covers all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command' (*Idem* at 15).

²⁸⁰ Including those of Argentina, Australia, Canada, Croatia, Germany, Hungary, Italy, Kenya, the Netherlands, New Zealand, Nigeria, Russia, Spain, Sweden and the United Kingdom (*Ibid*).

²⁸¹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 14.

be 'armed forces'²⁸². Moreover, it is also considered customary that 'only the failure to distinguish oneself from the civilian population (see rule 106) or being caught as a spy (see rule 107) or a mercenary (see rule 108) warrants forfeiture of prisoner-of-war status'²⁸³.

2.11 Conclusion

Consequently we can conclude that as IHL stands at present, the two determinants for combatant status are:

1. membership of an armed force (which is subject to command responsibility and participating in an international armed conflict), and
2. observance of the requirement that combatants (at a minimum) carry their weapons openly during and in preparation for any military engagement.

Once these two conditions are met, the individual enjoys the legal authorisation to participate directly in hostilities, but will be exposed to continuous lawful targeting. This authorisation will ensure that they will be immune from prosecution for those lawful hostile acts, and will guarantee them secondary POW status should they fall into enemy hands. Once granted combatant status, that classification is inviolable and cannot be forfeited, even if their actions violate the laws of war. However, combatant status and secondary POW status does not shield them from criminal prosecution for violations of the laws of war.

In accordance with the cardinal principle of distinction, combatants are expected to distinguish themselves from the civilian population. While that does not require the use of a military uniform, it does require at a minimum that they carry their weapons openly in preparation for and during an attack. Failure to observe this minimum requirement will risk the forfeiture of their POW status, and expose them to criminal prosecution on the grounds of perfidy.

²⁸² *Idem* at 19.

²⁸³ *Ibid.*

CHAPTER 3

THE INTERNATIONAL HUMANITARIAN LAW CONCEPT OF CIVILIAN STATUS: A LITERATURE REVIEW

3.1 The historic emergence of the concept of civilian status

The concept of a 'civilian' is a relatively recent addition to the laws of war¹. The first inkling of a notion akin to civilian status can be found during the 'medieval Christendom', where it was acknowledged that there were individuals 'who did not have the occupation or social function of making war, and should not have war made against them'². These individuals were listed in the Canonical lists as including 'monks, pilgrims, travellers, peasants cultivating the soil, women, children, the infirm and aged, and those of unsound mind'³.

Despite this acknowledgement, many of the early multilateral treaties that codified the laws of war made no express mention of civilians as a distinct category, except to imply that their entitlement to immunity from the effects of war was linked to 'their peaceful behaviour'⁴. In the late 1800's and early 1900's the term civilian was used in 'contradistinction'⁵ to the notion of a soldier, and the first 'codification of the actual term "civilian" was used only in an article about spies'⁶. The term civilian is briefly mentioned in the Hague Regulations (HR) of 1907⁷ and the 1923 Hague Draft Rules of Aerial Warfare⁸, and in 1938 the International Law Association approved a Draft Convention for the Protection of Civilian Populations Against New Engines of

¹ Adam Roberts 'The Civilian in Modern War' (2009) 12 *Yearbook of International Humanitarian Law* 13-52 at 34.

² *Ibid.*

³ *Ibid.*

⁴ In the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864) available at <http://www.icrc.org/ihl.nsf/full/120?opendocument> (accessed 20 September 2012) the immunity of civilian inhabitants was attributed to their 'humane conduct'. In the 1880 Oxford Manual of The Laws of War on Land (9 September 1880) available at <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument> (accessed 20 September 2012) we read that 'it is forbidden to maltreat inoffensive populations' (Roberts 'The Civilian in Modern War' at 35).

⁵ Roberts 'The Civilian in Modern War' at 35.

⁶ The 'following are not considered spies: soldiers and civilians, entrusted with the delivery of despatches' (*Ibid.*). For the first time the civilian was perceived as being not only a 'peaceable inhabitant', but also an individual which might support one of the belligerents (*Ibid.*).

⁷ As 'inhabitants' in occupied territory (*Idem* at 36; The 1907 Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention IV of 18 October 1907 (Hague Regulations 'HR') 1910 *U.K. Treaty Series* 9 also available at <http://www.icrc.org/ihl.nsf/full/195> (accessed 14 July 2012).

⁸ The Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare Drafted by a Commission of Jurists at the Hague (December 1922 - February 1923) available at <http://www.icrc.org/ihl.nsf/FULL/275?OpenDocument> (accessed 20 September 2012) at article 22 prohibits 'aerial bombardment' intended to terrorise the 'civilian population' (Roberts 'The Civilian in Modern War' at 36).

War⁹, which was aimed at establishing 'safety zones for certain classes of non-combatants'¹⁰. During the inter-war years the International Committee for the Red Cross (ICRC) prepared a 'draft convention on the protection of civilians in war'¹¹, which was succeeded in 1934 by the ICRC's Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent¹². Sadly, 'the outbreak of the Second World War intervened before a new binding agreement could be reached'¹³. Finally in 1949 the IVth Geneva Convention¹⁴ (GCIV) became 'the first treaty devoted exclusively to the protection of civilians in time of war'¹⁵. GC IV focused chiefly on 'the treatment of civilians in the hands of the adversary, whether in occupied territory or in internment'¹⁶. GC IV was subsequently supplemented by the two Additional Protocols (AP I and AP II)¹⁷ in 1977 which in a series of detailed provisions address the 'protection of civilians against the effects of hostilities; relief in favour of the civilian population; and treatment of persons in the power of a party to the conflict'¹⁸.

3.2 Defining the term 'civilian'

In the Hague and Geneva law treaties, the term 'civilian' is not expressly defined¹⁹. What we do find, however, in both the Hague regulations (HR) and the four Geneva Conventions, is the suggestion that the concepts of civilian and combatant 'are mutually exclusive'²⁰, and that every person involved in, or

⁹ Available at <http://www.icrc.org/ihl.nsf/FULL/345?OpenDocument> (accessed 20 September 2012).

¹⁰ Roberts 'The Civilian in Modern War' at 36.

¹¹ However it failed to garner interest at the 1929 Geneva Diplomatic Conference, 'which revised the 1906 Geneva Convention on Wounded and Sick Armed Forces in Land Warfare and also adopted the Convention on POWs' (*Idem* at 37).

¹² Available at <http://www.icrc.org/ihl.nsf/INTRO/320?OpenDocument> (accessed 20 September 2012); Roberts 'The Civilian in Modern War' at 37.

¹³ Roberts 'The Civilian in Modern War' at 37.

¹⁴ 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) of August 12 1949 (1950) 75 *U.N. Treaty Series* 287.

¹⁵ Roberts 'The Civilian in Modern War' at 37.

¹⁶ GC IV deals with situations 'which arise when people fall into enemy hands in the course of an international war. It does not deal extensively with situations in which citizens are exposed to other hazards of war, nor does it (except in common article 3) address problems arising in non-international armed conflict, still less the protection of individuals abused by their own government' (Roberts 'The Civilian in Modern War' at 38).

¹⁷ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1979) 1125 *U.N. Treaty Series* 1391; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (AP II) (1979) 1125 *U.N. Treaty Series* 609.

¹⁸ API articles 48-78.

¹⁹ ICRC (2009) *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL (Interpretive Guide)* available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609> (accessed 7 August 2011) at 21.

²⁰ GCIV states that 'persons protected by the convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. It then goes on to note that those individuals 'protected by the other 1949 Geneva Conventions (the

affected by, the conduct of hostilities falls into one of these... categories'²¹. Moreover there 'is no intermediate category'²² and 'no body in enemy hands can be outside the law'²³. In 1977, AP I article 50(1) provided 'the first codified definition of "civilian"'²⁴ in IHL:

'A civilian is any person who does not belong to one of the categories of persons referred to in GC III article 4A(1), (2), (3) and (6) and API article 43'²⁵.

In short 'all persons who are not members of State armed forces, or organised armed groups of a party to the conflict, nor participants in a *levée en masse* are civilians'²⁶. It may seem unusual to see a term defined in the negative: AP I does not 'tell us who or what the protected persons and objects are. They tell us who or what the protected persons and objects are not'²⁷. However when one recalls that 'concepts of the civilian population and the armed forces are only conceived in opposition to each other'²⁸, as mutually exclusive, it is entirely appropriate that the definition be expressed in this way. More recent jurisprudence from the International Criminal Tribunal for the former Yugoslavia confirms that civilians are 'persons who are not, or no longer, members of the armed forces'²⁹. In 2006 the Israeli High Court of Justice, in *Public Committee against Torture in Israel ('PCATI') v Government of Israel*, also endorsed the definition of a 'civilian' being opposite to that of a combatant³⁰. The way the definition is expressed ensures that 'there is no undistributed middle between the categories of combatants (and military objectives), and civilians (and civilian objects)'³¹. Another notable characteristic of the AP I definition is that it 'omits the condition of being "in the hands of" a belligerent', which had characterised GC IV. At the heart of any IHL definition of a civilian are two characteristics: civilians are not 'members of

wounded and sick, shipwrecked, and POWs) would not be considered to be civilians' (Roberts 'The Civilian in Modern War' at 38).

²¹ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 21.

²² *Ibid.*

²³ 'He is either a POW and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention' (Roberts 'The Civilian in Modern War' at 38).

²⁴ Nils Melzer (2009) *Targeted Killings in International Law* Oxford University Press: Oxford at 310.

²⁵ David M Crane and Daniel Reisner (2011) 'Jousting at Windmills' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia University Press: New York (ebook) at 1604-12.

²⁶ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 20 and 27; Jean-Marie Henckaerts and Louise Doswald-Beck (2005) *Customary International Humanitarian Law Volume 1: Rules* Cambridge University Press: Cambridge at rule 5.

²⁷ Claude Pilloud and Jean Pictet (1987) *Commentary of the Additional Protocols: Article 50* Martinus Nijhoff Publishers: Geneva 609 at 610; ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 21.

²⁸ Pilloud and Pictet *Commentary of the Additional Protocols: Article 50* at 610; ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 21.

²⁹ *Prosecutor v Blaškić* ICTY (2000) IT-95-14-T at para 180.

³⁰ (2006) HCJ 769/02 available in English from <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008) at para 26.

³¹ Yoram Dinstein (2004) *The Conduct of Hostilities Under the Law of International Armed Conflict* Cambridge University Press: Cambridge at 123.

the armed forces', and they are not authorised to participate directly in hostilities³².

3.3 Presumptive civilian status

As a result of the mutual exclusivity of the IHL concepts of combatants vs civilians, IHL operated on the 'presumption that in cases of doubt whether a person is a civilian, that person shall be considered to be a civilian'³³. In practical terms, this means that a combatant may only fire upon persons of uncertain status if he is convinced that they are enemy combatants³⁴. Some have argued that this presumption gives 'non-State entities potential advantages over regular armies on the battlefield when non-State fighters choose not to wear uniforms or otherwise distinguish themselves from the civilian population'³⁵.

3.4 The privileges attached to civilian status: immunity against targeted attacks

One of the cardinal principles at the heart of IHL is that 'there is an absolute prohibition on the targeting of civilians'³⁶.

'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'³⁷.

As the ICTY Appeal Chamber noted, 'the prohibition is not subject to any exceptions, and military necessity cannot be invoked as a justification'³⁸ for violating the principle. This view was endorsed by the Israeli High Court of Justice in *Public Committee against Torture in Israel ('PCATI') v Government*

³² *Idem* at 121 and 34.

³³ AP I article 50(1).

³⁴ Fritz Kalshoven and Liesbeth Zegveld (2011) *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th ed) Cambridge University Press: Cambridge at 101.

³⁵ Crane and Reisner 'Jousting at Windmills' at 1544-51; Laurie R Blank 'Updating the Commander's Toolbox: New Tools for Operationalising the Law of Armed Conflict' (2010) 1:3 *PRISM* 59 at 65; Kenneth Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' (2010) 42 *International Law and Politics* 641-695 at 667.

³⁶ *Prosecutor v Blaškić* ICTY Appeals Chamber Judgment (29 July 2004) IT-95-14-A available at <http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf> (accessed 19 September 2012) at para 109; *Legality of the Threat on Use of Nuclear Weapons* (advisory opinion) (1996) *International Law Reports* 100 at 257; Crane and Reisner 'Jousting at Windmills' at 1978-87.

³⁷ Roberts 'The Civilian in Modern War' at 38-39.

³⁸ *Prosecutor v Galić* ICTY Appeals Chamber (30 November 2006) IT-98-29-A available at <http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf> (accessed 19 September 2012) at para 130; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 124.

of Israel³⁹, and is considered so 'intransgressible, that the drafters of the Rome Statute saw fit to include it in article 8(2)(b)(i)-(ii) and (iv) as constituting a war crime'⁴⁰.

Despite this legal position, 'there can be no assurances that attacks against combatants and other military objectives will not result in civilian casualties in or near such military objectives'⁴¹ as the 'unintended by product of an attack directed against lawful targets'⁴². Consequently 'each military commander is duty bound, to the maximum extent feasible, to remove civilian objects and individuals from the vicinity of military objectives'⁴³, so as to avoid causing unnecessary civilian 'collateral damage'⁴⁴ 'during the attacks on "combatants"⁴⁵, a view which has been endorsed in several judicial decisions, including the Israeli High Court of Justice in *Public Committee against Torture in Israel ('PCATI') v Government of Israel*.

This principle is expressed in AP I articles 51(5)(b) and article 57(2)(a)(iii) and gave rise to what is called the proportionality enquiry:⁴⁶ 'in determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her could have expected excessive civilian casualties to result from the attack'⁴⁷. Consequently when civilian casualties result from an attack which satisfies the proportionality requirement, it does 'not constitute a violation of the laws of war'⁴⁸.

3.5 The consequences attaching to civilian status: the notion of direct participation in hostilities

Soldiers are trained not to open fire on civilians precisely because civilians are not considered a legitimate military target. Soldiers expect civilians to act in a peaceable manner, and so long as civilians go about their peaceful activities there is no military advantage gained by attacking them. This expectation of civilians is the foundation upon which much of IHL is built⁴⁹.

With the sole exception of the *levée en masse*⁵⁰, civilians are not

³⁹ (2006) HCJ 769/02 available in English from <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008) at para 26.

⁴⁰ *Ibid*; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 130.

⁴¹ *Idem* at 125.

⁴² *Ibid*.

⁴³ *Idem* at 131.

⁴⁴ *Idem* at 128.

⁴⁵ (2006) HCJ 769/02 available in English from <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008) at para 26.

⁴⁶ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 128.

⁴⁷ *Prosecutor v Galić* ICTY Trial Chamber Judgment (5 December 2003) available at <http://www.icty.org/sid/8148> (accessed 19 September 2012) at para 808.

⁴⁸ Crane and Reisner 'Jousting at Windmills' at 1535-44.

⁴⁹ Sadly, when civilians betray their civilian identity so as to launch a surprise attack, their actions make the armed forces understandably suspicious that other so-called civilians might well also pose a threat to them.

⁵⁰ 'Where 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' (GC III article 4 A(6); Anthony P V Rogers 'Unequal Combat and the Law of War' (2004) 7 *Yearbook of International Humanitarian Law* 3 at 18).

authorised to participate directly in hostilities⁵¹. It is this restriction which serves to shield civilians from the effects of hostilities and protects the civilian population from being the legitimate target of a direct military attack⁵². If civilians are found to be abusing this protection, and using their protective status to attack unsuspecting combatants, their actions are viewed as perfidious. The moment civilians begin to participate in hostilities, they pose a threat to the opposition, and are exposed to legitimate direct targeting⁵³ 'for such time as they take a direct part in hostilities'⁵⁴. As participants in the hostilities they are considered 'legitimate military targets', 'whether or not they distinguish themselves from ordinary civilians'⁵⁵ and irrespective of whether their participation is 'permanent, intermittent, or only once off'⁵⁶. Moreover, their capture now constitutes a legitimate military advantage.

3.6 Civilian direct participation in hostilities: the 'unlawful combatant', and the forfeiture of civilian status

i. Unlawful combatant: legal term or misleading descriptor?

The term 'unlawful combatant' was first coined in the 1942 US Supreme Court decision in *Ex Parte Quirin*⁵⁷ to describe 'a combatant who conducted his belligerence in an unlawful manner'⁵⁸ and 'had not fulfilled certain conditions which are indispensable to the acquisition of qualification for the status of POW'⁵⁹. When the ICRC convened a diplomatic conference to draft and adopt

⁵¹ 1949 Geneva Conventions, common article 3.

⁵² Hans-Peter Gasser (1995) 'Protection of the Civilian Population' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 210.

⁵³ Solis suggests that 'carrying heavy arms on one's person is equally an invitation for attack... yet, civilians may possess light weapons for hunting or self defence, without losing their protection from attack, as long as these weapons are not carried or used in questionable circumstances' (Gary Solis (2010) *The Law of Armed Conflict: International Humanitarian Law in War* Cambridge University Press: New York at 208).

⁵⁴ *Ibid*; Eric T Jensen (2011) 'Direct Participation in Hostilities' in William C Banks (ed) '*New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia' (Columbia University Press: New York) (ebook) at 2028-36.

⁵⁵ Rogers 'Unequal Combat and the Law of War' at 15; Roberts 'The Civilian in Modern War' at 39.

⁵⁶ Blank 'Updating the Commander's Toolbox: New Tools for Operationalising the Law of Armed Conflict' at 65.

⁵⁷ In 1942 a group of German 'saboteurs, apparently belonging to the German Marine Infantry' arrived by submarine at the American West Coast, and were captured while in civilian dress (Rogers 'Unequal Combat and the Law of War' at 25). In an application for *habeas corpus* the US Supreme Court ruled unanimously that:

'the laws of war distinguish between combatants and civilians, and between lawful combatants and unlawful ones. Lawful combatants are subject to capture and detention as POW's by the opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful' (*Ex Parte Quirin* 317 U.S. 1 30-31 (1942); Shlomy Zachary 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?' (2005) 38 *Israel Law Review* 378 at 385).

⁵⁸ Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' at 415.

⁵⁹ In the *Mohammed Ali* case (317 U.S. 1 (1942) 59), soldiers who conducted belligerent acts while wearing civilian clothes, were denied POW status because of their breach of the laws of war, since 'such unprivileged belligerents, though not condemned by international law, are not

the four 1949 Geneva Conventions, the term 'unlawful combatant' was not mentioned at all⁶⁰.

Only two years after the Geneva Conventions were drafted, Richard Baxter already recognised the existence of certain types of fighters 'who do not easily fit into the categories of the Geneva Conventions'⁶¹. Once again the term unlawful combatant came to the fore, however what differed from references made in *Ex Parte Quirin*, was that now the term was being used as 'shorthand for persons - civilians - who have directly participated in hostilities in an international armed conflict without being members of the armed forces (as defined by international humanitarian law - IHL) and who have fallen into enemy hands'⁶². They are viewed as a combatant of sorts 'in the sense that they can be lawfully targeted by the enemy'⁶³ the moment they elect to participate directly in hostilities, and yet 'unlawful' in that they cannot 'claim the privileges appertaining to lawful combatancy'⁶⁴, because they lack the requisite authority to participate directly in hostilities.

Legally speaking the term 'unlawful combatant' is completely novel⁶⁵ in that it has 'remained unused in the legal terminology of armed conflict' since the *Quirin* judgment⁶⁶, and is 'not acknowledged or otherwise mentioned in the Laws of War', the Geneva Conventions or in any other IHL treaty⁶⁷ or

protected by it' (*Idem* at 386). Zachary correctly points out that this determination of them being unprivileged belligerents 'does not create a new status, but only links the lawfulness of belligerence with the entitlement of POW status' (*Ibid*). Yoram Dinstein (2007) 'The System of Status Groups in International Humanitarian Law' in Wolff Heintschel von Heinegg and Volker Epping (eds.) *International Humanitarian Law Facing New Challenges* Springer: Berlin at 154. Similarly in the *Hostages Case* members of resistance movements not having lawful combatant status were referred to as "unlawful belligerents" (*Nuremberg Trials of War Criminals 1950* (available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf (accessed 21 September 2012)).

⁶⁰ Zachary argues that 'the term was probably ignored intentionally' (Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' at 386). Some criticise the term for being an oxymoron, since 'if a combatant is by definition someone with lawful authorisation to participate in hostilities, then anyone acting without authorisation cannot enjoy the label combatant at all' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 226).

⁶¹ Baxter defines these 'unprivileged belligerents' as 'persons who are not entitled to treatment either as peaceful civilians or as POWs, by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by article 4 of the Geneva POW Convention of 1949' (Richard Baxter 'So-Called Unprivileged Belligerency: Spies, Guerillas and Saboteurs' (1951) 28 *British Yearbook of International Law* 323); Roberts 'The Civilian in Modern War' at 40.

⁶² ICRC 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2007) 867 *International Review of the Red Cross* 719 at 727; Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 208 and 238; Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' at 385.

⁶³ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 36.

⁶⁴ *Idem* at 29; Nathaniel Berman 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 *Columbia Journal of Transnational Law* 1 at 7.

⁶⁵ ICRC 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' at 727.

⁶⁶ Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' at 387.

⁶⁷ Luisa Vierucci 'Prisoners of War or Protected Persons Qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees are Entitled' (2003) *Journal of International Criminal Justice* 284 at 295.

customary IHL⁶⁸. 'Initially the International Committee for the Red Cross (ICRC) maintained that there was no such category, but they have since admitted that the term "unlawful combatant" has been used over the last century in legal literature, military manuals⁶⁹ and case law⁷⁰. In fact, what started out as a descriptor in *Ex Parte Quirin* soon took on the status of a 'legal' phrase⁷¹, and the initial term 'unlawful combatant'⁷² is now mentioned in some military manuals alongside terms like 'unprivileged belligerents'⁷³, and most recently 'unlawful' enemy combatant'⁷⁴.

Dinstein suggests that these unlawful combatants 'inhabit the grey area in between the lands of the combatant and the civilian'⁷⁵. Many academics question 'whether such a third status (unlawful combatants) really exists in international law'⁷⁶. The problem with sub-dividing 'combatants' into lawful and unlawful sub-categories is that IHL operates on the fundamental principle that everyone in the theatre of armed conflict enjoys primary IHL status as either an authorised combatant⁷⁷ (and is protected by GC III) or a civilian (and is protected by GC IV⁷⁸), and there is no status in-between. Consequently, if a

⁶⁸ Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' at 385.

⁶⁹ For example the United Kingdom Ministry of Defence (2004) *The Manual of the Law of Armed Conflict* Oxford at 279 para 11.4.

⁷⁰ Michael Cowling and Shannon Bosch 'Combatant Status at Guantanamo Bay - International Humanitarian Law Detained Incommunicado' (2009) 42:1 *Comparative and International Law Quarterly of South Africa* 1 at 18; Adam Roberts 'Appendix 9: Supplementary Memorandum 26' (2002) available at

<http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmdfence/93/93ap10.htm> (accessed 3 November 2012).

⁷¹ Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' at 385.

⁷² Kenneth Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' (2005) Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series (Winter) No 2 at 6; Robert Goldman and Brian Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' (2002) *ASIL Task Force Paper* available at www.asil.org/taskforce/goldman.pdf (accessed 21 February 2012) at 4; Knut Ipsen (1995) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 68.

⁷³ Baxter 'So-Called Unprivileged Belligerency: Spies, Guerillas and Saboteurs' at 328; Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' at 6; Berman 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' at 7.

⁷⁴ *Hamdi v Donald H Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) where the term 'enemy combatant' was used in reference to captured Taliban and Al-Qaeda fighters.

⁷⁵ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 36.

⁷⁶ Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' at 379.

⁷⁷ As Watkin explains, 'the inclusion of unlawful combatants within the category of combatants appears *prima facie* to be inconsistent with the historical linkage between legitimacy and combatant status' (Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' at 11).

⁷⁸ 'He might be a protected person under the Geneva Civilian Convention but, if he is a national of a State that is not a party to the armed conflict, he might fall outside the ambit of that convention' (Rogers 'Unequal Combat and the Law of War' at 24). The following 'civilians' are precluded from relying on GC IV in times of international armed conflict:

1. a national of the belligerent party in whose hands he is;
2. a national of any other State not a contracting party to the convention' (although, as the Geneva Conventions have been universally ratified, this exemption is no longer

participant in hostilities does not fulfill the conditions for combatant status (ie membership in an armed group), then they necessarily remain civilians (as they were at their birth)⁷⁹.

Those opposed to the introduction of a third IHL status argue that 'unlawful combatant... has a exclusively descriptive character... and does not corroborate the existence of a third category of persons'⁸⁰. The Israeli High Court of Justice in *Public Committee against Torture in Israel ('PCATI') v Government of Israel* concluded, after analysing the literature, treaty and custom, that there was insufficient evidence to support a conclusion that the term 'unlawful combatant' constituted a third status under IHL⁸¹. There is also growing concern that such a move would re-introduce the 'concept of "quasi-combatant" which was used to justify direct attacks on civilian factory workers during World War II'⁸². Those who reject the introduction of this third category argue that it is legally unacceptable to create a further category for the sole reason of reducing 'the individual protection below the minimum standard of human rights'⁸³.

These academics who reject a third IHL status, maintain that 'unlawful combatants/unprivileged belligerents are not a third battlefield category but a subcategory of civilian'⁸⁴. The ICRC maintains that 'these individuals still fall within the protections of GC IV, the convention protecting civilians'⁸⁵. This viewpoint has been 'endorsed by the International Criminal Tribunal for the former Yugoslavia when it held 'there is no gap between the Third and Fourth Geneva Convention and that if an individual is not entitled to protections of the Third Convention... he or she necessarily falls within the ambit of Convention

relevant in practice);

3. a national of a co-belligerent State maintaining normal diplomatic relations with the belligerent in question or;
4. a national of a neutral country maintaining normal diplomatic representation in the State in whose hands they are'.

(Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 47; Rikke Ishøy (2008) *Handbook on the Practical Use of International Humanitarian Law* (revised edition) Danish Red Cross: København at 121).

⁷⁹ *Ibid.*

⁸⁰ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 208.

⁸¹ (2006) HCJ 769/02 available in English from <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008) at para 28.

⁸² Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' at 10.

⁸³ Knut Ipsen (2008) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 83.

⁸⁴ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 207; Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy' 74-75.

⁸⁵ Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 26; Johannes Van Aggelen 'A Response to John C. Yoo: "The Status of Soldiers and Terrorists under the Geneva Conventions"' (2005) *Chinese Journal of International Law* June 167 at 174.

IV.⁸⁶ Moreover in the *Al-Marri*⁸⁷ case the court simply 'did *not* recognise the legal category of enemy combatant'⁸⁸.

Jensen suggests that we call these 'civilians who are not lawful combatants but still involve themselves in hostilities... direct participants'⁸⁹. Admittedly, 'civilians taking a direct part in hostilities lose civilian immunity from attack, but not the "civilian" status itself'⁹⁰. But 'when an unlawful combatant has ceased taking a direct part in hostilities, even temporarily, he regains the status of an ordinary civilian, a full-fledged 'protected person' who is not a legitimate military target'⁹¹.

We need to appreciate therefore that the term "civilian" might be confusing because it includes within its ranks, protected persons and those who by their actions have made themselves legitimate targets⁹². As Blank explains, 'even though they are fighting, they retain their civilian status in the traditional framework because they do not fit the definition of combatant'⁹³. A civilian's unauthorised participation in hostilities prior to capture does 'not deprive him or her of civilian status, but may lead to some, limited, waiving of rights and privileges'⁹⁴.

ii. Forfeiture of civilian status

Linked to the somewhat misconstrued notion that a civilian who participates in hostilities can become an unlawful combatant, has emerged the notion that one can forfeit one's primary civilian status. So for example some academics argue that 'a person who engages in military raids by night, while purporting to be an innocent civilian by day' forfeits his civilian status'⁹⁵.

The notion that an individual can forfeit their IHL status crept into the language of AP I in the provisions dealing with POW status. However, on closer inspection it becomes apparent that the notion that one can forfeit one's primary status is at odds with IHL - a combatant might forfeit his secondary POW status (for failing to observe the principle of distinction), but neither combatants nor civilians can ever do anything to forfeit their primary status *per se*. Their actions (by participating directly in hostilities) may affect

⁸⁶ *Prosecutor v Delalic et al (Celebici case)* ICTY Judgement (16 November 1998) IT-96-21-T available at http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf (accessed 18 September 2012) at para 271; Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 26.

⁸⁷ 487 F.3d at 184–85.

⁸⁸ Cowling and Bosch 'Combatant Status at Guantanamo Bay – International Humanitarian Law Detained Incommunicado' at 26; Gregory Shill 'Enemy Combatants and a Challenge to the Separation of War Powers in *Al-Marri v Wright*, 487 F.3d 160 (4th Cir. 2007)' (2008) 31:1 *Harvard Journal of Law and Public Policy* at 2.

⁸⁹ Jensen 'Direct Participation in Hostilities' at 1969-78.

⁹⁰ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 27.

⁹¹ Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong' at 393.

⁹² Blank 'Updating the Commander's Toolbox: New Tools for Operationalising the Law of Armed Conflict' at 65.

⁹³ *Ibid.*

⁹⁴ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 121; Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 207; Crane and Reisner 'Jousting at Windmills' at 1621-28.

⁹⁵ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 29.

the extent to which they enjoy the privileges associated with their primary status (ie by exposing them to direct targeting for so long as they participate in hostilities), but that alone does not change the fact that their primary status is civilian. Failing to act like a civilian will not make one a combatant⁹⁶, likewise failing to observe the principle of distinction will not render a combatant a civilian (rather, they will remain a combatant but will forfeit their POW privileges).

3.7 The consequences of unauthorised direct participation in hostilities on the part of civilians

The reason why these civilian belligerents are sometimes labelled unlawful is because they lack the required authorisation to participate in hostilities⁹⁷. If it is clearly established by a court that a person is not entitled to POW status according to GC III article 4(A)(1), (2), (3) or (6), or AP I articles 43 or 44(1), then his or her direct participation in hostilities was also unauthorised.

A civilian who does participate in hostilities 'does not thereby become a combatant entitled to prisoner-of-war (POW) status upon capture'⁹⁸. As a consequence of their lack of authorisation, civilians who participate directly in hostilities do not enjoy the privileges afforded legitimate combatants⁹⁹ (like 'POW status upon capture and immunity from prosecution'¹⁰⁰ for lawful hostile acts).

While engaging in hostilities without authorisation is not a war crime¹⁰¹, as an unprivileged belligerent the individual is exposed to criminal prosecution¹⁰² under domestic 'criminal legislation'¹⁰³ for 'all acts committed against the adversary'¹⁰⁴ even if they had otherwise observed the laws of war.

⁹⁶ *Ibid.* All combatants were initially civilians before they fulfilled certain conditions which were 'indispensable to the acquisition of qualification for the status of POW' (Dinstein 'The System of Status Groups in International Humanitarian Law' at 150). Likewise, when a member of the armed forces retires, he once again reverts to being a civilian.

⁹⁷ Unlawful combatants differ from their lawful colleagues in that they can face prosecution for participating in hostilities without authorisation (Vierucci 'Prisoners of War or Protected Persons Qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees are Entitled' at 296).

⁹⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23.

⁹⁹ Their failure to meet the requirements for full combatant status comes as the 'price of... forfeiting the immunity of a lawful combatant' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 211).

¹⁰⁰ As Ipsen explains, 'a detainee shall not be prosecuted for his participation in hostilities unless he or she has been positively identified as an unlawful combatant' (Ipsen (2008) 'Combatants and non-combatants' at 105).

¹⁰¹ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 211. Although Rogers argues that 'any individual or group not belonging to these categories that takes a direct part in hostilities commits a war crime by violating the laws and customs of war' (Rogers 'Unequal Combat and the Law of War' at 25).

¹⁰² Won Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' (2010) 38:3 *Denver Journal of International Law and Policy* 361 at 386.

¹⁰³ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 37; Goldman and Titemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 4; Leslie Green (2001) *The Contemporary Law of Armed Conflict* (2 ed) Manchester University Press: Manchester at 347; AP I article 45. Despite this, they are still entitled to basic humane treatment, fundamental human rights guarantees, and fair judicial procedures upon capture (AP I article 75, Ipsen (1995) 'Combatants and Non-combatants' at 68; Crane and Reisner

Moreover, civilians who participate in hostilities are at particular risk for being found to have conducted their hostilities in a way which 'may amount to perfidy in violation of customary and treaty IHL'¹⁰⁵, since they seldom distinguish themselves as combatants.

These 'judicial proceedings may be conducted before either military or domestic courts'¹⁰⁶. While they are exposed to criminal prosecution they 'do have a legitimate claim to certain fundamental guarantees (enshrined in API article 75) which include the right to humane treatment and proper judicial procedure'¹⁰⁷. While a POW is only required by law to provide details of his 'name, rank, military number and date of birth', a civilian who is captured whilst participating directly in hostilities without the requisite authorisation is 'subject to standard criminal interrogation, in accordance with the internal criminal procedures of the State'¹⁰⁸.

3.8 Persons accompanying the armed forces

In IHL treaties since the 1893 Lieber code¹⁰⁹ (including HR article 13¹¹⁰ and GC III article 4A(4)¹¹¹) there is reference made to 'persons who accompany the armed forces without actually being members thereof'¹¹². Oddly, while IHL openly states that these individuals lack the membership link to the armed forces required to afford them full combatant status, they are nevertheless mentioned within the treaty provisions which ordinarily deal with the privileges afforded to combatants.

Some texts refer to these individuals as private contractors or civilian employees of the armed forces¹¹³. Whatever label one uses, when we talk of 'persons accompanying the armed forces' we are referring to non-enlisted personnel who for 'centuries... have

'Jousting at Windmills' at 1544-51; Rogers 'Unequal Combat and the Law of War' at 25; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 37).

¹⁰⁴ Ipsen (2008) 'Combatants and Non-combatants' at 106.

¹⁰⁵ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 85.

¹⁰⁶ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 211.

¹⁰⁷ *Idem* at 208; Ipsen (2008) 'Combatants and Non-combatants' at 82.

¹⁰⁸ Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' at 392.

¹⁰⁹ Instructions for the Government of Armies of the United States in the Field (Lieber Code) (24 April 1863) available at <http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/a25aa5871a04919bc12563cd002d65c5?OpenDocument> (accessed 21 September 2012).

¹¹⁰ 'Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as POW, provided they are in possession of a certificate from the military authorities of the army which they were accompanying'.

¹¹¹ 'Persons who accompany the armed forces without actually being members thereof, such as civilian members of 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 authorisation, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model'.

¹¹² Ipsen (2008) 'Combatants and Non-combatants' at 107.

¹¹³ *Ibid.*

participated in a series of significant functions¹¹⁴ like: war correspondents, military aircraft technicians; those 'managing and servicing battle-related equipment'¹¹⁵; members of labour units, supply contractors, those who prepare and sell food or those providing services responsible for the welfare of the soldier¹¹⁶. It is also worth noting that the list enumerated above was not meant to be exhaustive¹¹⁷. By whatever name, the fact remains that 'parties to armed conflicts have increasingly employed private contractors and civilian employees in a variety of functions traditionally performed by military personnel'¹¹⁸.

Since these persons who 'accompany the armed forces'¹¹⁹ are not members of the armed forces, with full combatant status, they could not otherwise 'claim the status of POW awarded to combatants'¹²⁰, were it not for the fact that they are specifically afforded secondary POW by the IHL treaties. This secondary POW status is afforded these individuals on account of the fact that they perform their activities¹²¹ in 'geographic and organisational'¹²² proximity of military objectives and military units involved in belligerent campaigns', and thereby face increased risk of incidental injury¹²³ (as acceptable collateral damage)¹²⁴ and falling into enemy hands¹²⁵, even if they do not take a direct part in hostilities¹²⁶.

¹¹⁴ Dale Stephens and Angeline Lewis 'The Targeting of Civilian Contractors in Armed Conflict' (2006) 9 *Yearbook of International Humanitarian Law* 25 at 33; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 49.

¹¹⁵ Roberts 'The Civilian in Modern War' at 49.

¹¹⁶ GCIII article 4(A)(4); Rogers 'Unequal Combat and the Law of War' at 21; Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 33; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 49.

¹¹⁷ Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 35.

¹¹⁸ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 37.

¹¹⁹ According to the treaty only those civilian contractors who actually accompany the armed forces are afforded this special status. 'Contractors providing support to other branches of the State administration... during an armed conflict cannot claim this status' (Giulio Bartolini (2011) 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' in Francesco Francioni and Natalino Ronzotti (eds) *War By Contract: Human Rights, Humanitarian Law and Private Contractors* Oxford University Press at 220).

¹²⁰ *Idem* at 219.

¹²¹ 'Activities traditionally performed by contractors classified as "persons who accompany the armed force" are not considered as direct participation in hostilities' (*Idem* at 220).

¹²² Ipsen (2008) 'Combatants and Non-combatants' at 107.

¹²³ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 384.

¹²⁴ When an attack is directed at an 'objective containing civilians accompanying armed forces', API article 57(2)(a) demands that care is taken 'in order to keep collateral injuries to the civilians accompanying the armed forces to a minimum' (Ipsen (2008) 'Combatants and Non-combatants' at 107).

¹²⁵ Bartolini (2011) 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' at 219. 'Although the capturing party may decide to simply let these persons go, it is entitled to detain them... and if it does detain them, it is obliged to treat them as POW' (Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 47). POW status brings with it the benefit of being 'repatriated to their country as soon as hostilities cease' (Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 384).

¹²⁶ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 37.

The only condition which was attached to this privileged, was that they had to carry with them the necessary identity cards¹²⁷ 'confirming their status'¹²⁸ and their right to claim POW privileges upon capture. Rogers rightly points out 'it is probably better if they do not wear uniforms' and 'any arms should be for personal self-defence and this should be reflected in the training and rules of engagement of such personnel'¹²⁹.

While it is tempting to classify this group of individuals as non-combatant members of the armed forces, it is important to note that the two groups are in fact distinct from each other¹³⁰. While both non-combatant members of the armed forces and these 'persons accompanying the armed forces' are denied 'authorisation to fight as a combatant', the grounds for this denial is different¹³¹. 'Non-combatants, despite their membership of the armed forces', are denied authorisation to participate directly in hostilities because of the function that they serve¹³². 'Persons who accompany the armed forces', on the other hand, do not enjoy authorisation to participate in hostilities 'because of their primary status'¹³³ as civilians. As civilians, these private contractors are 'entitled to protection against direct attack 'unless and for such time as they take a direct part in hostilities' as is the case with any civilian'¹³⁴. Furthermore they do not lose this civilian status 'simply because they accompany the armed forces and/or assume (non-combative) functions... that would traditionally have been performed by military personnel'¹³⁵.

The majority of 'private contractors and civilian employees currently active in armed conflicts have not been incorporated'¹³⁶ into State armed forces¹³⁷ and consequently, for the most part, they do not 'assume functions'¹³⁸ which amount to direct participation in

¹²⁷ Ipsen (2008) 'Combatants and Non-combatants' at 10; GC III article 4 (A)(4) states: 'provided that they have received authorisation, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model'. The card 'requires the identification of the issuing authority and must specify exactly what the bearer is authorised to do' (Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 382-383).

¹²⁸ Rogers 'Unequal Combat and the Law of War' at 21.

¹²⁹ *Ibid.*

¹³⁰ The fact that both groups are entitled to POW status 'does not equate to having privileged combatant status' (Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 33; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 49).

¹³¹ Ipsen (2008) 'Combatants and Non-combatants' at 79 and 105.

¹³² *Ibid.*

¹³³ *Idem* at 65, 79, 105 and 107; GC III article 4A(4) and AP I article 50(1).

¹³⁴ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 37.

¹³⁵ *Idem* at 38.

¹³⁶ A determination that a party belongs to the state requires integration into the armed forces command structure, either by way of a formal process (made possible by national legislations) or as a consequence of being given a 'continuous combat function' (ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 39; Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 35). In such instances their membership of 'an organised armed force, group, or unit under a command responsible to a party to the conflict' would strip them of their primary civilian status and clothe them with combatant status (ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 39).

¹³⁷ *Idem* at 37.

¹³⁸ *Ibid.*

hostilities¹³⁹. However as the ICRC points out, it can be challenging to ascertain 'the civilian or military nature of contractor activity'¹⁴⁰. It is however imperative that those armed forces employing such private contractors ensure that they do not permit them to partake in activities which are 'are inherently governmental and remain military in nature'¹⁴¹. Serious 'repercussions' result if it is found that these 'civilian contractors' are indeed participating directly in hostilities¹⁴². For one, they lose both their civilian immunity from attack¹⁴³ and may be subject to direct targeting¹⁴⁴. Furthermore they stand to forfeit their POW status¹⁴⁵, and they 'may be prosecuted'¹⁴⁶ for war crimes and other related forms of criminal offenses¹⁴⁷ because they do not enjoy the combatant privilege afforded to members of the armed forces in international armed conflicts¹⁴⁸.

In short, were it to be concluded that a private contractor had participated directly in hostilities 'without the express or tacit authorisation of the State party to the conflict'¹⁴⁹, or without being incorporated into the armed forces, 'they remain civilians' but 'lose their protection against direct attack for such time as their direct participation lasts'¹⁵⁰. Where there is doubt as to whether the private contractor has overstepped the mark and is potentially participating directly in hostilities, 'the general rules of IHL on precautions and presumptions in situations of doubt' become crucial¹⁵¹.

¹³⁹ The test applied to determine whether their actions amount to direct participation in hostilities is the same test that is applied to all ordinary civilians (*Ibid*).

¹⁴⁰ 'For example, the line between the defence of military personnel and other military objectives against enemy attacks (which amount to direct participation in hostilities), and the protection of those same persons and objects against crime or violence unrelated to the hostilities (which does not amount to direct participation in hostilities), may be thin' (*Idem* at 38).

¹⁴¹ Ipsen (2008) 'Combatants and non-combatants' at 108.

¹⁴² *Idem* at 107; Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 385.

¹⁴³ While a private contractor who does not participate in hostilities may not be targeted directly, and will be afforded POW status should he fall into enemy hands, this privilege is not extended to those private contractors who do participate without authorisation.

¹⁴⁴ Ipsen (2008) 'Combatants and Non-combatants' at 107.

¹⁴⁵ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 385; Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 35; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 49 and 121.

¹⁴⁶ The risk of prosecution is the same as for 'all other civilians who are prohibited from taking a direct part in hostilities' (Ipsen (2008) 'Combatants and Non-combatants' at 105 and 107).

¹⁴⁷ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 385.

¹⁴⁸ Ipsen (2008) 'Combatants and Non-combatants' at 108.

¹⁴⁹ Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 35.

¹⁵⁰ *Ibid*; ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 39.

¹⁵¹ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 38.

3.9 Conclusion

In conclusion, given the mutually exclusive nature of the civilian/combatant distinction, and the fact that no one can fall outside of these two IHL categories, all persons who are not members of organised armed groups¹⁵² (which are party to a conflict), are classified as civilians¹⁵³. Once classified, or presumed to possess civilian status, these individuals enjoy civilian immunity against direct targeting (subject to considerations of acceptable and proportional collateral damage). In exchange for this immunity their actions are restricted by the notion of direct participation in hostilities. This restriction is absolute, and civilians who are found to be abusing their protected status are exposed to direct targeting for so long as their participation persists. Thereafter, since they do not enjoy authorisation to partake in hostilities (as is the case with combatants), they will be liable to face domestic criminal prosecution and possibly even charges of perfidy. While any civilian direct participation in hostilities compromises their civilian immunity against direct targeting, it is unhelpful to refer to them as anything other than 'civilians who are participating directly in hostilities', certainly there is no legal relevance in terms such as 'unlawful combatant' or 'unlawful belligerent'. Moreover, the idea that civilian status can be forfeited is not legally accurate. What is valid, however, is that a civilian who elects to breach this limitation on his participation in hostilities, will have his civilian rights and privileges curtailed.

Civilian contractors who 'accompany the armed forces' (with the necessary identity cards) inherently enjoy civilian IHL status, with its attendant rights and obligations. That said, they nevertheless are afforded the unusual privilege of POW status upon capture, in light of the non-combative functions which they carry out in close proximity to hostilities. In order to ensure the these civilian contractors desist from any combative activities, they stand to lose not only their civilian immunity against direct attack but also their POW privileges if they choose to partake in hostilities. Moreover, as is the case with all civilians, they will likely face criminal prosecution for this violation of IHL.

¹⁵² I include the *levée en masse* in this category.

¹⁵³ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 20 and 27; Jean-Marie Henckaerts and Louise Doswald-Beck (2005) *Customary International Humanitarian Law Volume 1: Rules* Cambridge University Press: Cambridge at rule 5.

CHAPTER 4

UNDERSTANDING AND OBSERVING THE INTERNATIONAL HUMANITARIAN LAW NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: A LITERATURE REVIEW

4.1 A brief introduction to the concept of direct participation in hostilities

The phrase 'direct participation in hostilities'¹ has a very specific meaning in the realm of international humanitarian law (IHL) and refers to 'combat-related activities'² that would normally be undertaken only by members of the armed forces³. As a general rule, all those with combatant⁴ status are authorised to participate directly in hostilities, and are immune from prosecution⁵ for their participation. Civilians, on the other hand, enjoy immunity against attack⁶ precisely because they refrain from any such direct participation in hostilities –

¹ Some texts use the phrase interchangeably with 'taking a direct part' or 'taking an active part' in hostilities. So for example in the English text of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) of August 12 1949 (1950) 75 *U.N. Treaty Series* 287, reference is made to 'active' participation. In the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1979) 1125 *U.N. Treaty Series* 1391 the same concept is referred to as 'direct participation'. In the French text of the GC IV and AP I the phrase "*participent directement*" is used throughout, demonstrating that 'the terms "direct" and "active" refer to the same quality and degree of individual participation in hostilities' (ICRC (2009) *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL (Interpretive Guide)* available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609> (accessed 7 August 2011) at 43); Nils Meizer (2009) *Targeted Killings in International Law* Oxford University Press: Oxford at 335.

² Rogers distinguishes these activities from 'support activities, such as provision of supplies and services... which do not amount to taking a direct part in hostilities' (Anthony PV Rogers 'Unequal Combat and the Law of War' (2004) 7 *Yearbook of International Humanitarian Law* 3 at 19).

³ Outside of the ranks of the armed forces we find one other category of persons who participate in hostilities despite not being properly authorised to do so, the so-called *levée en masse* (who are civilian by definition but who acquire the secondary protections afforded combatants when they are forced to take up arms spontaneously) (Geneva Convention Relative to the Treatment of Prisoners of War (GC III) of August 12 1949 (1950) 75 *U.N. Treaty Series* 135 at article 4(6)).

⁴ Traditionally, the individual members of the armed forces enjoy this status (as a result of their affiliation to the State) (Kurt Ipsen (1995) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 66-67). However, as an exception to this general rule, there are a number of groups of service personnel within the ranks of the armed forces who are denied authorisation (by national legislation) to 'use a weapon or a weapons system' and are consequently called non-combatants (AP I article 43(2); The Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention IV of 18 October 1907 (Hague Regulations 'HR') 1910 *U.K. Treaty Series* 9 also available at <http://www.icrc.org/ihl.nsf/full/195> (accessed 14 July 2012) at article 3).

⁵ Provided they adhere to the limitations imposed upon them by IHL regarding the methods and means of warfare (Ipsen (1995) 'Combatants and Non-combatants' at 65-66 and 68; HR article 3 and AP I article 43(2)).

⁶ 'Those who do not participate in the hostilities shall not be attacked' (Michael N Schmitt 'Deconstructing Direct Participation in hostilities: the Constituent Elements' (2010) 42 *International Law and Politics* 697 at 715).

a principle which has been endorsed by the Israeli High Court of Justice in *Public Committee against Torture in Israel ('PCATI') v Government of Israel*⁷. As civilians, they remain protected 'for so long as they do not act to compromise their protected status, by engaging in 'combat related activities'⁸. The Israeli High Court of Justice in *Public Committee against Torture in Israel ('PCATI') v Government of Israel* point out that when a civilian participates directly in hostilities without the requisite combatant authority, they retain their civilian status, but temporarily⁹ lose their immunity from direct attacks¹⁰, and their 'protection against the dangers arising from military operations'¹¹ under international law. Instead, as long as a civilian persists in performing a combatant function, 'he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack'¹². Consequently they are exposed to direct targeting as a legitimate military target¹³. Moreover they may be subject to prosecution in terms of the 'internal state penal law'¹⁴, without the benefit of the privileges extended to combatants¹⁵, like for example POW status and immunity from prosecution¹⁶.

This area has been the subject of much controversy since 'neither the Geneva Conventions nor their Additional Protocols'¹⁷ provide a definition of what activities amount to "direct participation in hostilities"¹⁸. This lacuna in the law is of particular concern in light of the realities of contemporary international armed conflict: where non-State actors (often dressed as

⁷ The judgment states that anyone who is not clothed with combatant status (ie a civilian) 'must refrain from directly participating in hostilities' ((2006) HCJ 769/02 at para 3).

⁸ *Idem* at 714. As the ICRC Commentary on AP I article 51(3) explains: 'the immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts.... thus a civilian who takes part in an armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities' (Eric T Jensen (2011) 'Direct Participation in Hostilities' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (Columbia University Press: New York) (ebook version) at 1995-2003).

⁹ 'Once he ceases to participate, the civilian regains his right to the protection under this section... and he may no longer be attacked' (Jensen 'Direct Participation in Hostilities' at 1995-2012).

¹⁰ (2006) HCJ 769/02 available in English from <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008) at para 26.

¹¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

¹² *Public Committee against Torture in Israel ('PCATI') v Government of Israel* (2006) HCJ 769/02 at para 31.

¹³ Without concern for issues of proportionality (Schmitt 'Deconstructing Direct Participation in hostilities: the Constituent Elements' at 703).

¹⁴ *PCATI v Government of Israel* at para 26; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

¹⁵ *PCATI v Government of Israel* at para 26.

¹⁶ 'As long as he preserves his status as a civilian – that is, as long as he does not become part of the army – but takes part in combat, he ceases to enjoy the protection granted to the civilian, and is subject to the risks of attack just like a combatant, without enjoying the rights of a combatant as a prisoner of war' (ibid at para 31).

¹⁷ William J Fenrick 'ICRC Guide on Direct Participation in Hostilities' (2009) 12 *Yearbook of International Humanitarian Law* 287 at 292.

¹⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12. It is surprising that prior to the turn of the century there was very little academic investigation into 'State practice, customary law... legal literature or case law' on the topic of direct participation in hostilities (Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 287).

civilians) are playing an increasing role, States are outsourcing military functions to private contractors, and civilians are increasingly active as 'farmers by day, fighters by night'¹⁹. Now more than ever there is a dire need for a consensus understanding of exactly what constitutes direct participation in hostilities²⁰, especially when considering to what extent such activities might be deemed to compromise civilian immunity against direct targeting.

4.2 The treaty and customary international law basis for the rule limiting civilian direct participation in hostilities

i. Direct participation in treaty law

Reference is made to the concept of direct participation in hostilities in many treaty provisions of IHL, including: GC common article 3²¹ and AP I article 51(3)²². In the commentary on AP I article 51 it is explained that:

'direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces'²³.

The commentary goes on to differentiate 'direct participation' from general support of the 'war effort', which is often simply expected of the whole population²⁴. This view was endorsed by the Israeli High Court of Justice in *PCATI v Government of Israel*²⁵. The ICRC commentary limits 'direct participation in hostilities' to:

'acts of war which are intended²⁶ by their nature and purpose to hit specifically the personnel and matériel of the armed forces of the adverse Party'²⁷.

¹⁹ Jensen 'Direct Participation in Hostilities' at 2003-12.

²⁰ Ryan Goodman and Derek Jinks 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum' (2010) 42 *International Law and Politics* 637 at 637.

²¹ Article 3(1) states: 'Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

²² 'Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'. At the 'Diplomatic Conference leading to the adoption of the Additional Protocols, Mexico stated that article 51 of Additional Protocol I was so essential that it 'cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis', and in the end there were no reservations made to this provision when States signed up to AP I (Jean-Marie Henckaerts and Louise Doswald-Beck (eds) (2005) *Customary International Humanitarian Law Volume 1: Rules* Cambridge University Press: Cambridge at 23).

²³ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 711.

²⁴ In modern conflicts, almost any 'activities of the nation contribute to the conduct of hostilities, directly or indirectly' (*Ibid*).

²⁵ (2006) HCJ 769/02 at para 34.

²⁶ A 'relatively direct nexus between that action and the resulting harm should exist; in other words, direct participation must be distinguishable from indirect participation' (*Idem* at 712).

In the final analysis, the commentary to AP I 'suggests a narrow interpretation of direct participation in hostilities'²⁸.

While IHL treaty law makes reference to this concept, the law 'does not define direct participation in hostilities'²⁹, or specify definitively 'what actions might amount to 'direct participation in hostilities'³⁰.

ii. Direct participation in customary IHL

At a national level, the principle that civilians lose their immunity against direct attack when they participate in hostilities, is endorsed by several States' military manuals³¹. This position is also endorsed 'by official statements; reported practice' and judicial decisions³², even by States that were not party to AP I³³. According to the ICRC's study into the customary international law status of this provision, no 'official contrary practice was found'³⁴ and on the whole the principle (that civilians lose their immunity from prosecution when they participate in hostilities) was seen as a 'valuable reaffirmation of an existing rule of customary international law'³⁵. The Israeli High Court of Justice in *Public Committee against Torture in Israel* ('PCATI') v *Government of Israel* endorsed the conclusion that it is a recognised principle under customary international law that when a civilian takes a direct part in the hostilities, they lose the 'protection granted to a civilian who is not taking a direct part in the hostilities'³⁶, for so long as their participation in the hostilities persists. While some States' military manuals give examples of 'acts which constitute direct participation in hostilities (e.g. serving as guards, intelligence agents, lookouts on behalf of military forces³⁷... spies or couriers)³⁸, most maintain that an 'assessment of direct participation has to be made on a case-by-case basis'³⁹, although very few actually explain what activities amount to

²⁷ *Ibid.*

²⁸ John Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' (2005) 57 *Air Force Law Review* 155 at 177.

²⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 41.

³⁰ *Idem* at 12.

³¹ Australia; Belgium; Ecuador; El Salvador; India; Netherlands; United States; and Yugoslavia (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 22).

³² The Israeli Supreme Court concurred in *Public Committee against Torture in Israel* ('PCATI') v *Government of Israel* (2006) HCJ 769/02 available in English from <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008) at s37; Melzer *Targeted Killings in International Law* at 337.

³³ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23.

³⁴ *Ibid.*

³⁵ This was the expressed view of the United Kingdom at the Diplomatic Conference (*Ibid.*).

³⁶ (2006) HCJ 769/02 available in English from <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008) at para 26.

³⁷ Ecuador (Naval Manual); United States (Naval Handbook) (*Idem* at 22).

³⁸ Report on the Practice of the Philippines (*Ibid.*).

³⁹ *Ibid.*; Memorandum of Understanding on the Application of IHL between Croatia and the SFRY at para 6; Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina at para 2.5; Inter-American Commission on Human Rights Case 11.137 (Argentina); U.N. Secretary-General's Bulletin at section 5.2; the practice of Australia; Belgium; Benin; Canada; Colombia; Croatia; Dominican Republic; Ecuador; France;

direct participation. The Israeli High Court of Justice in *Public Committee against Torture in Israel ('PCATI') v Government of Israel* endorsed the conclusion 'that an agreed upon definition of the term "direct" in the context under discussion does not exist'⁴⁰, and that with out a definition the best means of assessing the application of the phrase would be on a case by case basis⁴¹.

At a regional level, the Inter-American Commission on Human Rights understands the term 'direct participation in hostilities' to mean 'acts which, by their nature or purpose, are intended to cause actual⁴² harm to enemy personnel and materiel'⁴³.

As evidenced by the ICRC's study into customary international law, 'a precise definition of the term "direct participation in hostilities" does not exist'⁴⁴ in either State practice or international jurisprudence⁴⁵. What is clear however is that civilian 'use of weapons or other means to commit acts of violence against human or material enemy forces' is prohibited⁴⁶. Short of this very obvious occurrence, States are having to interpret 'the notion of direct participation in hostilities ...in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL'⁴⁷.

4.3 A brief introduction to the ICRC's Interpretive Guide on the notion of direct participation in hostilities under IHL

i. The drafting process and the legal implications of the guide

Between 2003 and 2008, more than forty legal experts (drawn from 'academic, military, governmental, and non- governmental circles'⁴⁸) came

Germany; India; Indonesia; Italy; Jordan; Kenya; Madagascar; Malaysia; Netherlands; New Zealand; Spain; Sweden; Togo; United Kingdom; United States; Yugoslavia (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 22).

⁴⁰ (2006) HCJ 769/02 at para 34.

⁴¹ *Ibid.*

⁴² These acts were to be distinguished from 'civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 22). The Special Representative of the U.N. Commission on Human Rights for El Salvador had also made reference to the need to distinguish between direct forms of participation and indirect participation (*Idem* at 23).

⁴³ Inter-American Commission on Human Rights, Third Report on Human Rights in Colombia (*Idem* at 22).

⁴⁴ *Ibid.*

⁴⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 41; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23.

⁴⁶ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23.

⁴⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 41.

⁴⁸ The ICRC 'is an extremely important institution for IHL purposes' (Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 288), some go so far as to call it the 'custodian of IHL' (Damien Van der Toorn (2009) "Direct Participation in Hostilities": A Legal and Practical

together on five occasions at the invitation of the ICRC. The resultant discussions informed the ICRC's Interpretive Guide⁴⁹ on the notion of direct participation in hostilities under IHL⁵⁰. Initially the ICRC had sought a unanimous consensus at these expert meetings, but it soon became apparent (when some experts wanted to remove their names from the final report⁵¹) that seeking unanimity might scuttle the whole project⁵². In the end, the ICRC elected to omit all the names of the external experts, and instead had the Assembly of the ICRC adopt the final version of the guide on 26 February 2009⁵³.

The ICRC's Interpretive Guide was not intended to change the existing and 'binding rules of customary or treaty IHL'⁵⁴, but rather to offer a 'comprehensive legal analysis'⁵⁵ as to how the term 'direct participation in hostilities' was to be interpreted, giving careful consideration to balancing both 'humanitarian and military interests'⁵⁶. The ten recommendations (supported by commentary⁵⁷) strove to 'reflect the ICRC's institutional position as to how existing IHL should be interpreted in light of the circumstances prevailing in contemporary armed conflicts'⁵⁸. While the Interpretive Guide is not legally binding⁵⁹, the ICRC had hoped that their recommendations would have 'substantial persuasive effect'⁶⁰ 'for States, non-State actors, practitioners, and academics alike'⁶¹. Some argue that the Interpretive Guide 'may even be viewed as a secondary source of international law... analogous to writings of the "most highly qualified publicists"'⁶². Until it becomes binding, or is acknowledged as having crystallised into customary IHL, Fenrick warns that 'it is unlikely that the guidance will be adopted in totality by all legal advisers to

Evaluation of the ICRC Guidance' available at http://works.bepress.com/damien_van_der_toorn/1 (accessed 14 July 2012) at 22).

⁴⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 9.

⁵⁰ The Interpretive Guide also draws on 'the ICRC's institutional expertise... as a humanitarian organisation, having been operational for almost 150 years in countless armed conflicts all over the world' (Nils Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 831 at 914).

⁵¹ Adam Roberts 'The Civilian in Modern War' (2009) 12 *Yearbook of International Humanitarian Law* 13 at 41.

⁵² Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 288.

⁵³ *Ibid.*

⁵⁴ The Interpretive Guide drew on the following sources of law: customary IHL; treaty IHL (including the '*travaux préparatoires*' of treaties); international jurisprudence; military manuals and standard works of legal doctrine' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 9).

⁵⁵ *Idem* at 10.

⁵⁶ *Ibid.*

⁵⁷ Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 288.

⁵⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 9.

⁵⁹ 'A legally binding interpretation of IHL can only be formulated by a competent judicial organ or, collectively, by the States themselves' (*Idem* at 10).

⁶⁰ Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 300.

⁶¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 10.

⁶² Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 22.

foreign ministries and defence departments⁶³ unless it can be shown that these recommendations are 'well researched, well thought out, relevant and persuasive'⁶⁴.

ii. Introductory comments on the guide's limitations & controversies

It is worth stating at the outset that the Interpretive Guide makes it explicit that the document only speaks to the notion of direct participation in hostilities in so far as it impacts on decisions regarding 'targeting and military attacks'; it does not propose to deal with issues of 'detention⁶⁵ or combatant immunity'⁶⁶.

Once it is ascertained that an issue of direct participation has an impact on targeting decisions, the first enquiry that the Interpretive Guide directs is to whether the 'specific hostile act'⁶⁷ falls within the ambit of those restricted acts which amount to direct participation in hostilities⁶⁸. Determining which specific activities amount to direct participation in hostilities is not dependent on one's 'status, function, or affiliation'⁶⁹, neither does it matter whether the act is carried out by civilians or members of the armed forces 'on a spontaneous, sporadic, or unorganised basis; or as part of a continuous combat function assumed for an organised armed force or group belonging to a party to the conflict'⁷⁰.

Even prior to the first meeting of the experts it was apparent that there were very divergent opinions on how one should interpret the concept of direct participation in hostilities. Some academics adopted a 'more restrictive interpretation of the term direct participation in hostilities'⁷¹, equating 'actual combat operations with direct participation in hostilities'⁷². Others believed a more liberal interpretation was appropriate⁷³. 'The liberal school of thought

⁶³ Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 300.

⁶⁴ *Idem* at 288.

⁶⁵ 'Its conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty' (Kenneth Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guide' (2010) 42 *International Law and Politics* 641 at 670).

⁶⁶ Goodman and Jinks 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum' at 638.

⁶⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 45. This will be dealt with in greater detail later on in this chapter.

⁶⁸ 'The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 46).

⁶⁹ *Idem* at 10.

⁷⁰ *Ibid.*

⁷¹ See for example: Orna Ben-Naftali and Keren R Michaeli 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' (2003) Spring *Cornell International Law Journal* 233; Roy S. Schondorf 'Are "Targeted Killings" Unlawful? The Israeli Supreme Court's Response: A Preliminary Assessment' (2007) May *Journal of International Criminal Justice* 301.

⁷² Melzer *Targeted Killings in International Law* at 335.

⁷³ See for example: Michael N Schmitt (2004) *Direct Participation in Hostilities and 21st Century Armed Conflict* available at <http://www.michaelschmitt.org/images/Schmitfinal.pdf> (accessed 15 May 2012); Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' 155.

proposed an approach... which essentially encompasses all conduct that functionally corresponds to that of government armed forces, including not only the actual conduct of hostilities, but also the activities such as planning, organising, recruiting and assuming logistical functions⁷⁴. These competing approaches were not new to the ICRC. Already in the commentary on AP I the ICRC noted that ‘to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad’⁷⁵.

Given this background it was not surprising that ‘key features of the guidance have proven highly controversial’⁷⁶. At the heart of much of the generalised criticism leveled at the Interpretive Guide is its alleged failure to adequately balance humanitarian concerns and military necessity in a way which ‘adequately reflect[s] the key object and purpose of the Geneva Conventions and Additional Protocols’⁷⁷. Schmitt and Boothby are critical of what they claim is an overly restrictive interpretation⁷⁸. Boothby argues that ‘the ICRC interprets the concepts of preparation, deployment, and return too restrictively’⁷⁹, and Schmitt is concerned with the fact that the definition ‘excludes support activities not directly causing harm to the enemy’⁸⁰. On the contrary, ‘other experts would criticise the Interpretive Guide’s definition as too generous because, in certain circumstances, it might allow the targeting of civilians who do not pose an immediate threat to the enemy’⁸¹. Some academics have concluded that ‘the deficiencies identified demonstrate a general failure to fully appreciate the operational complexity of modern warfare’⁸². Others have questioned whether the Interpretive Guide achieves what it set out to do, or whether it has merely ‘raised more questions than it answers’⁸³. Some have argued that, rather than ‘re-stating existing law’⁸⁴ in a manner that would prove useful for practitioners and courts, terms like “revolving door of protection,” “continuous combat function,” and “persistent recurring basis” inject new, confusing, and difficult-to-justify concepts into the

⁷⁴ As Melzer notes that the liberal approach ‘stands in contradiction not only to the prevailing opinion in the doctrine, but also to State practice, and to the express distinction drawn in convention law between direct participation in hostilities on the one hand, and work of a military character, activities in support of military operations and an activity linked to the military effort, on the other hand’ (Melzer *Targeted Killings in International Law* at 338-339).

⁷⁵ ‘In modern warfare the whole population participates in the war effort to some extent, albeit indirectly. The population cannot on this ground be considered to be combatants’ (*Idem* at 336).

⁷⁶ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 698.

⁷⁷ Van der Toorn “‘Direct Participation in Hostilities’: A Legal and Practical Evaluation of the ICRC Guidance’ at 45.

⁷⁸ *Ibid.*

⁷⁹ Boothby “‘And For Such Time As’: The Time Dimensions to Direct Participation in Hostilities’ (2010) 42 *International Law and Politics* 741 at 743.

⁸⁰ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 835.

⁸¹ *Ibid.*

⁸² Schmitt ‘Deconstructing Direct Participation in hostilities: the Constituent Elements’ at 699.

⁸³ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 694.

⁸⁴ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 837.

lexicon of IHL⁸⁵.

In response to these criticisms, Melzer maintains that the Interpretive Guide adopted a neutral, impartial and balanced approach⁸⁶, resisting proposals coming from both extremes while ensuring 'a clear and coherent interpretation of IHL consistent with its underlying purposes and principles'⁸⁷. Aside from these differences in the degree of interpretation aside, there is much less controversy around the all important heart of the guidance: determining how one defines 'direct participation in hostilities'⁸⁸. All in all, after careful consideration of the critiques prepared by Watkin, Schmitt, Boothby, and Parks, nothing indicates that the ICRC's Interpretive Guide is 'substantively inaccurate, unbalanced, or otherwise inappropriate, or that its recommendations cannot be realistically translated into operational practice'⁸⁹.

4.4 The specific hostile acts which amount to direct participation in hostilities

The notion that direct participation in hostilities might compromise one's immunity against direct targeting is only intended to be applicable to those who qualify as civilians, and it is the means of determining when their actions result in the loss⁹⁰ of their otherwise protected civilian immunity⁹¹. According to the ICRC's Interpretive Guide 'international humanitarian law neither prohibits nor privileges civilian direct participation in hostilities'⁹². Consequently when civilians participate directly in hostilities they can be targeted directly for such time as their participation persists⁹³. However once they desist they once again regain their full civilian immunity from direct attack, but may face

⁸⁵ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 693.

⁸⁶ Melzer argues that much of the critique comes from a position which weighs military necessity without being 'balanced by equally important considerations of humanity' (*Idem* at 914). For those whose concerns pertain to issues of military necessity, the guide concedes 'that organised armed groups belonging to a non-State belligerents are not civilians but constitute legitimate military targets according to the same principles as regular combatants... for as long as they assume a continuous combat function and for the entire duration of their formal or functional membership' (*ibid*). For those supporting humanitarian causes, the guide 'presumes entitlement to protection in case of doubt' and allows civilians to 'regain their protection once their personal involvement in a hostile act or operation ends' (*ibid*).

⁸⁷ *Ibid*.

⁸⁸ That said, the application of the three criteria (discussed in the next section) to some specific activities 'such as voluntary human shielding and hostage taking, still gave rise to significant disagreement among the participating experts' (*Idem* at 834).

⁸⁹ *Idem* at 915.

⁹⁰ Until such time as the civilian's actions amount to direct participation in hostilities, any 'use of force against him or her must comply with the standards of law enforcement or individual self-defence' (Boothby "'And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' at 755-756). Since the 'loss is temporary', Melzer suggests that it is 'better described as a "suspension" of protection' (Melzer *Targeted Killings in International Law* at 347).

⁹¹ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 704.

⁹² ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 83.

⁹³ *Ibid*.

prosecution for any violations of domestic or international law which were committed during that period of participation⁹⁴. According to the ICRC's Interpretive Guide, 'a specific act must meet three cumulative criteria'⁹⁵, before it can be said to amount to direct participation in hostilities:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)⁹⁶.

i. The threshold of harm

The first criteria, also called the 'threshold of harm' determination, requires that harm⁹⁷

- a) 'of a specifically military nature', or⁹⁸
- b) harm ('by inflicting death, injury or destruction'⁹⁹) of a protected person or object,

must be reasonably expected to result from a civilian's actions before the civilian can be said to be participating directly in hostilities¹⁰⁰. Or to put it another way, in order for a civilian to lose their immunity from direct attack 'they must either harm the enemy's military operations or capacity, or they must use means and methods of warfare directly against protected persons or objects'¹⁰¹. All that is required is the 'objective likelihood'¹⁰² that the act will

⁹⁴ *Ibid.*

⁹⁵ *Idem* at 46.

⁹⁶ *Idem* at 47.

⁹⁷ The degree of harm includes 'not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict' (*Ibid.*).

⁹⁸ From a cursory examination of the criteria, it is apparent that the test is framed in the alternative, that is, 'the harm contemplated may either adversely affect the enemy or harm protected persons or objects' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 713).

⁹⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47.

¹⁰⁰ *Ibid.*

¹⁰¹ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 862.

¹⁰² In other words, 'harm which may reasonably be expected to result from an act in the prevailing circumstances' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47). As was discussed at the expert meeting, 'wherever a civilian had a subjective "intent" to cause harm that was objectively identifiable, there would also be an objective "likelihood" that he or she would cause such harm' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 724).

result in such harm', not necessarily the actual 'materialisation of harm'¹⁰³. Moreover, it is not the 'quantum of harm caused the enemy', which determines whether it reaches the necessary threshold of harm criteria¹⁰⁴, but rather the nature of the intended harm.

Military harm

As Melzer points out, military harm is the 'most common form of harm inflicted during the conduct of hostilities'¹⁰⁵. Even though it is relatively common, the term military harm only applies to objects which 'contribute militarily', and not to civilian objects (even if they may sometimes contribute to a belligerent's success in the conflict)¹⁰⁶. This interpretation, in line with the universally accepted definition of what constitutes a 'military objective'¹⁰⁷, excludes those political, economic and psychological¹⁰⁸ contributions which might play a role in a military victory, but alone are not considered military objects¹⁰⁹. The term military harm encompasses 'not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict'¹¹⁰.

Attacks against protected persons

In accordance with treaty law, even when no military harm results¹¹¹, the actions of civilians might still constitute direct participation in hostilities when their actions amount to attacks¹¹² specifically 'directed against civilians and

¹⁰³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 33. Schmitt concedes that this is a sensible requirement since it would be 'absurd to suggest that a civilian shooting at a combatant, but missing, would not be directly participating because no harm resulted' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 724).

¹⁰⁴ Schmitt observes that perhaps the choice of the label 'threshold', which is a quantitative concept was 'unfortunate', when the substance of the test talks to the 'nature of the harm', the performance of a specified act, and not that the act reaches a 'particular threshold' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 716).

¹⁰⁵ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 858.

¹⁰⁶ Schmitt 'Deconstructing Direct Participation in hostilities: the Constituent Elements' at 717.

¹⁰⁷ *Ibid.*

¹⁰⁸ For example when a 'broadcast station is used to demoralise the enemy civilian population' by 'broadcasting negative messages to the enemy civilian population' (*Ibid.*).

¹⁰⁹ *Ibid.*

¹¹⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47.

¹¹¹ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 860.

¹¹² The Interpretive Guide relies on AP I article 49's definition of 'attack' which 'does not specify the target, but the belligerent nexus of an attack, so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 723). Legal precedence for this position can be found in the jurisprudence emerging from the ICTY, where it was concluded that 'sniping attacks against civilians and

civilian objects'¹¹³. 'In the absence of military harm... the specific act must be likely to cause at least death, injury, or destruction of these civilians or civilian objects'¹¹⁴, as distinct from other forms of harm, such as 'political, diplomatic, economic, or administrative measures'¹¹⁵ like for example deportation'¹¹⁶. These harmful actions which target protected persons must 'in some way be connected to the armed conflict'¹¹⁷ or, as Melzer puts it, they must be an 'integral part of armed confrontations'¹¹⁸. The Israeli High Court of Justice in *Public Committee against Torture in Israel ('PCATI') v Government of Israel* endorse the conclusion that hostile acts directed against the civilian population of the state also fell within the ambit of the notion of direct participation in hostilities'¹¹⁹. However, even harmful acts directed at protected persons and objects will not amount to direct participation in hostilities where they fall 'short of the required threshold of death, injury or destruction' or where they 'lack the belligerent nexus'¹²⁰.

*Examples of activities which satisfy the threshold of harm requirement*¹²¹:

- 'acts of violence'¹²² against human and material enemy forces';
- sabotaging or causing 'physical or functional damage to military objects, operations or capacity'¹²³;

bombardment of civilian villages or urban residential areas', constitutes an 'attack' in the IHL sense of the word (*Ibid*).

¹¹³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 49. It is worth noting that these attacks would also constitute 'grave violations of IHL or even war crimes' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 861).

¹¹⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 49.

¹¹⁵ Examples of these include: 'building of fences or road blocks; the interruption of electricity, water, or food supplies; and the manipulation of computer networks not directly resulting in death, injury, or destruction. While all of these activities may adversely affect public security, health, and commerce, they would not, in the absence of military harm, qualify as direct participation in hostilities' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 862).

¹¹⁶ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 723.

¹¹⁷ For example, a 'prison guard may kill a prisoner for purely private reasons' without his actions amounting to direct participation in hostilities, but were he to engage in 'a practice of killing prisoners of a particular ethnic group during an ethnic conflict', those actions would meet the standard (*Ibid*).

¹¹⁸ This aspect is covered by the third prong of the enquiry (the belligerent nexus) (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 861).

¹¹⁹ (2006) HCJ 769/02 at para 33.

¹²⁰ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 862.

¹²¹ According to Schmitt, most of these examples proved uncontroversial (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 715).

¹²² For example the 'killing and wounding of military personnel' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 48).

¹²³ *Idem* at 47-48.

- restricting or disturbing military ‘deployments, logistics and communications’¹²⁴;
- exercising any form of control, or denying the military use of ‘military personnel, objects and territory, to the detriment of the adversary’¹²⁵;
- clearing mines placed by the opposition;
- ‘guarding captured military personnel to prevent them being forcibly liberated’¹²⁶;
- electronic interference, exploitation or attacks upon ‘military computer networks’¹²⁷;
- ‘wiretapping the adversary’s high command or transmitting tactical targeting information for an attack’¹²⁸;
- violent acts specifically directed against civilians or civilian objects¹²⁹;
- ‘building defensive positions at a military base certain to be attacked’¹³⁰;
- ‘repairing a battle-damaged runway at a forward airfield so it can be used to launch aircraft’¹³¹.

Examples of activities which fall short of the threshold of harm requirement:

- ‘building fences or roadblocks’¹³²;
- interrupting ‘electricity, water, or food supplies’¹³³;
- appropriating cars and fuel¹³⁴;
- manipulating computer networks¹³⁵;
- arresting or deporting persons who may have a ‘serious impact on public security, health, and commerce’¹³⁶;
- refusing ‘to engage in actions that would positively affect one of the parties’¹³⁷;

¹²⁴ *Idem* at 48.

¹²⁵ For example: ‘denying the adversary the military use of certain objects, equipment and territory’ (*Ibid*).

¹²⁶ *Ibid*.

¹²⁷ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 715.

¹²⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 48.

¹²⁹ For example: ‘sniper attacks or the bombardment of civilian residential areas’ (Gary Solis (2010) *The Law of Armed Conflict: International Humanitarian Law in War* Cambridge University Press: New York at 203; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 49).

¹³⁰ Because it is likely to directly and adversely affect the enemy’s impending attack (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 859).

¹³¹ On the grounds that it ‘constitutes a measure preparatory to specific combat operations likely to directly inflict harm on the enemy’ (*Ibid*).

¹³² ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 48.

¹³³ *Ibid*.

¹³⁴ *Ibid*.

¹³⁵ *Ibid*.

¹³⁶ *Ibid*.

¹³⁷ For example a civilian who refuses to provide information (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 719).

- civilian rescuing of enemy aircrew members¹³⁸;
- the development and production of improvised explosive devices¹³⁹.

Critique of the ‘threshold of harm’ requirement:

The ‘threshold of harm’ requirement has been criticised mainly for being under-inclusive and unduly difficult to satisfy. Jensen gives expression to this when he comments that the “actual harm” standard from the ICRC commentary is too restrictive in that it fails to address individuals who, although they are not members of an armed group that is party to the conflict, still openly support hostilities by constructing, financing, or storing weapons and materials of warfare¹⁴⁰. He is in favour of an interpretation which would see some differentiation between those civilians found ‘constructing, financing or storing weapons’, and civilians ‘who disdain hostilities and comply with their status’¹⁴¹. Jensen would also support an interpretation of direct participation which would ‘include not only those who cause actual harm, but those who directly support those who cause actual harm... this would also include those who gather intelligence¹⁴², or act as observers and supply information to fighters, those who solicit others to participate in hostilities, and those who train them on military tactics’¹⁴³.

Schmitt, in his critique, raises a similar concern: the ‘strict application of the threshold of harm constitutive element would exclude conduct that by a reasonable assessment should amount to direct participation’¹⁴⁴. Having said that, Schmitt himself concedes that the treaty definition of a ‘military objective’ ‘supports restricting the notion of direct participation to harm which is military in nature’, and that ‘an act of direct participation must impact the enemy’s military wherewithal’¹⁴⁵. Nevertheless, Schmitt argues that the military harm requirement is ‘under-inclusive because it excludes loss of protection for support activities which do not adversely affect the enemy’¹⁴⁶. In respect of attacks which target protected persons, Schmitt disputes the ICRC’s interpretation which requires death or destruction, because he argues such an interpretation will exclude ‘unlawful conduct such as the deportation of

¹³⁸ Unless these activities are ‘designed to harm the enemy’s capacity or effort to target or capture able-bodied military personnel’ (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 860).

¹³⁹ This is considered to only amount to ‘general war effort’ (*Ibid*).

¹⁴⁰ Jensen ‘Direct Participation in Hostilities’ at 2221-28.

¹⁴¹ *Ibid*.

¹⁴² The Israeli High Court of Justice in *Public Committee against Torture in Israel* (‘PCATI’) v *Government of Israel* endorsed this conclusion in their judgment ((2006) HCJ 769/02 at para 35).

¹⁴³ *Ibid*.

¹⁴⁴ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 714.

¹⁴⁵ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 859.

¹⁴⁶ *Ibid*. Melzer questions whether Schmitt can ‘support his argument as a matter of law’ and ‘demonstrate that the Interpretive Guidance’s wide concept of military harm is “under-inclusive” as a matter of practice’ (*Idem* at 861).

civilians or hostage taking¹⁴⁷. Instead he suggests ‘a better standard is one which includes any harmful acts directed against protected persons or objects, when said acts are either part of the armed conflict’s ‘war strategy... or when there is an evident relationship with ongoing hostilities’, even if such acts do not result in death or destruction¹⁴⁸. Schmitt argues that this strict requirement clearly favours humanitarian concerns at the ‘expense of those of military necessity’¹⁴⁹.

Heaton is also critical of this strict interpretation for its failure to include within its ambit the ‘essential links in the chain immediately preceding that final step’¹⁵⁰. Heaton argues that the final act of the combatant is heavily reliant on the ‘support personnel’, which makes combative actions possible¹⁵¹.

In response to these critiques Melzer warns that any proposal to lower the required threshold of harm, in order to ‘extend loss of protection to a potentially wide range of support activities’, will result in ‘undermining the generally recognised distinction between direct participation in hostilities and mere involvement in the general war effort’¹⁵².

ii. The direct causation requirement

The second requirement, also termed the ‘direct causation’ test, was included as a response to the controversy traditionally surrounding questions about whether ‘general war effort’¹⁵³, and activities aimed at sustaining war¹⁵⁴, would amount to direct participation in hostilities¹⁵⁵. While it is certainly true that war sustaining activities¹⁵⁶ are indispensable to the war effort, which in effect does

¹⁴⁷ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 723.

¹⁴⁸ According to Melzer ‘under this formula, almost any act occurring for reasons related to an armed conflict, and perceived as harmful to the civilian population could be regarded as direct participation in hostilities, including unlikely examples such as economic sanctions, travel restrictions, and political propaganda’ (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 861).

¹⁴⁹ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 714.

¹⁵⁰ Van der Toorn ‘“Direct Participation in Hostilities”: A Legal and Practical Evaluation of the ICRC Guidance’ at 37.

¹⁵¹ *Ibid.*

¹⁵² Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 877.

¹⁵³ This includes all activities ‘objectively contributing to the military defeat of the adversary’, for example ‘design, production and shipment of weapons and military equipment; construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 53).

¹⁵⁴ This would additionally include ‘political, economic or media activities supporting the general war effort’ (*Ibid.*). For example ‘political propaganda, financial transactions, production of agricultural or non-military industrial goods’ (*Ibid.*).

¹⁵⁵ *Idem* at 52.

¹⁵⁶ As the ICRC Interpretive Guide points out, ‘both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities, in fact... some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is

harm the adversary, a line must be drawn between the two degrees of involvement¹⁵⁷. All the experts present at the ICRC's expert meetings were 'agreed on the centrality of a relatively close relationship between the act in question and the consequences affecting the ongoing hostilities'¹⁵⁸. Schmitt expresses it well: 'sometimes causation is so direct that the shield of humanitarian considerations must yield in the face of military necessity, while in other situations the causal connection is too weak (or indirect) to overcome humanitarian factors'¹⁵⁹. Consequently, and in order to avoid depriving much of the civilian population of their protected status, there must be 'a sufficiently close causal relation between the act and the resulting harm' for it to amount to direct participation in hostilities¹⁶⁰.

According to the ICRC's Interpretive Guide, 'direct causation should be understood as meaning that the harm in question must be brought about in one causal step'¹⁶¹. Clearly excluded are activities that indirectly cause harm¹⁶². Moreover, 'temporal or geographic proximity cannot on its own, without direct causation, amount to a finding of direct participation in hostilities'¹⁶³. In cases of collective operations, the ICRC's Interpretive Guide does recognise that 'the resulting harm does not have to be directly caused'¹⁶⁴ by each contributing person individually, but only by the collective operation

designed to cause the required harm, the general war effort and war sustaining activities also include activities that merely maintain or build up the capacity to cause such harm' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 52).

¹⁵⁷ During the expert meetings, emphasis was placed on the 'idea that direct participation in hostilities is neither synonymous with "involvement in" or "contribution to" hostilities, nor with "preparing" or "enabling" someone else to directly participate in hostilities, but essentially means that an individual is personally "taking part in the ongoing exercise of harming the enemy" and personally carrying out hostile acts which are "part of" the hostilities' (*Idem* at 53).

¹⁵⁸ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 725.

¹⁵⁹ *Idem* at 726.

¹⁶⁰ *Ibid.*

¹⁶¹ The act must not only be causally linked to the harm, but it must also cause the harm directly. For example 'the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 54 and 55). In short, where an 'individual's conduct... merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm', these actions do not amount to direct participation in hostilities' (*Idem* at 53); Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 866.

¹⁶² The Interpretive Guide illustrates the direct-indirect distinction by way of two case studies: 'driving a truck delivering ammunition to positions at the front line would constitute "direct" participation, whereas the transport of ammunition from a factory to a storehouse for shipping to the conflict zone would only be indirect participation' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 56). This view was endorsed by the Israeli High Court of Justice in *Public Committee against Torture in Israel* ('PCATI') v *Government of Israel* (2006) HCJ 769/02 which concluded 'in our opinion, if the civilian is driving the ammunition to the place from which it will be used for the purposes of hostilities, he should be seen as taking a direct part in the hostilities' (para 35).

¹⁶³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 56.

¹⁶⁴ In other words, in one causal step.

as a whole'¹⁶⁵. Consequently, where a specific act does not 'on its own directly cause the required threshold of harm, their actions might still amount to direct participation where the individuals are part of a collective operation'¹⁶⁶. In these instances the direct causation criteria would still be fulfilled, and the civilians would lose their immunity from attack, as the individual act 'constitutes an integral part of a concrete and coordinated tactical (or collective) operation that directly causes such harm'¹⁶⁷.

Examples of activities that satisfy the direct causation requirement

- 'bearing, using or taking up arms'¹⁶⁸;
- 'taking part in military or hostile acts, activities, conduct or operations'¹⁶⁹;
- 'participating in attacks against enemy personnel, property or equipment'¹⁷⁰;
- 'coordinated tactical operations which directly cause harm'¹⁷¹;
- engaging in sabotage of military installations¹⁷²;
- manning an anti-aircraft gun¹⁷³;
- supervising the operation of weaponry¹⁷⁴;
- 'gathering tactical intelligence on the battlefield'¹⁷⁵;
- transmitting military information for immediate use¹⁷⁶;

¹⁶⁵ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 866.

¹⁶⁶ *Idem* at 865; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

¹⁶⁷ Examples of such acts would include, *inter alia*, 'the identification and marking of targets; the analysis and transmission of tactical intelligence to attacking forces; and the instruction and assistance given to troops for the execution of a specific military operation' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55); Fritz Kalshoven and Liesbeth Zegveld (2011) *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th ed) Cambridge University Press: Cambridge at 102.

¹⁶⁸ Including 'armed fighting or combat' (Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707; Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 708).

¹⁶⁹ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707.

¹⁷⁰ *Ibid.*

¹⁷¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

¹⁷² Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707.

¹⁷³ *Ibid.*

¹⁷⁴ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 708; *Public Committee against Torture in Israel ('PCATI') v Government of Israel* (2006) HCJ 769/02 at para 35.

¹⁷⁵ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 867; Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 177-8; Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 708.

- 'identifying and marking targets'¹⁷⁷;
- 'instruction and assistance given to troops for the execution of a specific military operation'¹⁷⁸;
- transporting weapons in proximity to combat operations¹⁷⁹;
- transporting 'unlawful combatants to or from the place where the hostilities are taking place'¹⁸⁰;
- 'serving as guards, intelligence agents, lookouts'¹⁸¹, or observers on behalf of military forces'¹⁸²;
- 'capturing combatants or their equipment'¹⁸³;
- 'sabotaging lines of communication'¹⁸⁴;
- performing mission-essential work at a military base'¹⁸⁵;
- 'providing logistical support'¹⁸⁶;
- 'delivering ammunition to combatants'¹⁸⁷.

Examples of activities which fall short of the direct causation requirement

- designing, producing and shipping weapons¹⁸⁸;
- 'transporting arms and munitions'¹⁸⁹;
- purchasing materials in order 'to build suicide vests'¹⁹⁰;

¹⁷⁶ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

¹⁷⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

¹⁷⁸ *Ibid.*

¹⁷⁹ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707.

¹⁸⁰ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 708; *Public Committee against Torture in Israel ('PCATI') v Government of Israel* (2006) HCJ 769/02 at para 35.

¹⁸¹ On the other hand, simply because a civilian's actions fail to assist or 'collaborate with a party to a conflict' (as a lookout or informant for example) will not mean that their conduct will be 'interpreted as adversely affecting the military operations or military capacity of a party' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 49).

¹⁸² Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707.

¹⁸³ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 708.

¹⁸⁴ *Ibid.*

¹⁸⁵ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 177-8.

¹⁸⁶ *Ibid.*

¹⁸⁷ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 708.

¹⁸⁸ Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 293.

¹⁸⁹ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707. While the 'act of driving a munitions truck might not amount to direct participation in hostilities... the truck itself remains a targetable military objective' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 710).

¹⁹⁰ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 865.

- purchasing, smuggling, assembling or storing ‘improvised explosive devices’¹⁹¹;
- gathering and transmitting military information¹⁹²;
- work undertaken by civilians in military vehicle maintenance depots¹⁹³;
- work undertaken by civilians in munitions factories¹⁹⁴;
- ‘driving military transport vehicles’ where the driver is a civilian¹⁹⁵;
- ‘activities in support of the war or military effort’¹⁹⁶;
- ‘the recruitment¹⁹⁷ and general¹⁹⁸ training of personnel’¹⁹⁹;
- ‘providing specialist advice regarding the selection of military personnel, their training, or the correct maintenance of the weapons’²⁰⁰;
- ‘general strategic analysis’²⁰¹;
- ‘voluntary human shielding’²⁰²;
- ‘expressing sympathy for the cause of one of the parties to the conflict’²⁰³;
- distributing propaganda in support of one of the belligerent parties²⁰⁴;
- ‘failing to act to prevent an incursion by one of the parties to the conflict’²⁰⁵;

¹⁹¹ *Ibid.*

¹⁹² Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

¹⁹³ *Idem* at 706.

¹⁹⁴ *Idem* at 710.

¹⁹⁵ *Idem* at 706.

¹⁹⁶ *Idem* at 707. Including working in canteens (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 710).

¹⁹⁷ Including the ‘recruitment of suicide bombers’ (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 865).

¹⁹⁸ ‘General training of recruits undeniably contributes to a party’s military prowess; effective recruit training will often be the difference between eventual victory and defeat on the battlefield. Nevertheless, the causal link between the training and subsequent combat action is attenuated’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 728). However, ‘training for a particular type of mission’ where the training may ‘reasonably be regarded as a preparatory measure integral to a predetermined hostile act or operation’ may qualify as direct participation in hostilities (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 867).

¹⁹⁹ While it ‘may be indispensable, it is not directly causal, to the subsequent infliction of harm’ (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 204).

²⁰⁰ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

²⁰¹ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708; *Public Committee against Torture in Israel* (‘PCATI’) v *Government of Israel* (2006) HCJ 769/02 at para 35.

²⁰² Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 865.

²⁰³ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

²⁰⁴ Schmitt ‘Deconstructing Direct Participation in hostilities: the Constituent Elements’ at 708; *Public Committee against Torture in Israel* (‘PCATI’) v *Government of Israel* (2006) HCJ 769/02 at para 35.

²⁰⁵ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

- contributing funds to a “cause”²⁰⁶;
- ‘economic sanctions’²⁰⁷;
- ‘providing an adversary with supplies (for example food and medicine) and services’²⁰⁸.

Critique of the direct causation requirement

Schmitt raises a number of technical issues in respect of the ICRC’s explanation relating to the direct causation requirement. His first critique questions why the guidance settled on direct causation being linked to a physical act causing harm, when in modern warfare ‘acts that directly enhance the military capacity or operations of a party, without resulting in direct and immediate harm to the enemy’²⁰⁹ may have a marked effect on the belligerent’s capacity to win.²¹⁰ Schmitt argues that ‘the key is whether the acts in question are sufficiently causally related to the resulting harm/benefit to qualify as directly caused’²¹¹. Moreover, Schmitt argues, the effect of the ‘one causal step’ requirement is that a range of ‘capacity-building activities’²¹² (which Schmitt concedes are indirect in nature²¹³) are excluded from those parameters²¹⁴. Schmitt prefers the ‘integral part test’²¹⁵ which makes it possible to ‘extend participation as far up and downstream as there is a causal’²¹⁶ link’²¹⁷. In a similar vein, Watkin argues that the ‘role of logistics or the scope of such a function in a military sense has not been properly

²⁰⁶ Schmitt ‘Deconstructing Direct Participation in hostilities: the Constituent Elements’ at 727 and 708.

²⁰⁷ *Idem* at 728.

²⁰⁸ Schmitt ‘Deconstructing Direct Participation in hostilities: the Constituent Elements’ at 728. Including ‘selling goods to one of the parties to the conflict’ and ‘accompanying and supplying food to one of the parties to the conflict’ (Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707; Schmitt ‘Deconstructing Direct Participation in hostilities: the Constituent Elements’ at 708; *Public Committee against Torture in Israel* (‘PCATI’) v *Government of Israel* (2006) HCJ 769/02 at para 34).

²⁰⁹ Schmitt ‘Deconstructing Direct Participation in hostilities: the Constituent Elements’ at 736.

²¹⁰ *Idem* at 725.

²¹¹ *Idem* at 736; Melzer warns that ‘it is important to recall that immunity from direct attack does not preclude the permissibility of the use of force, even on a significant scale, if necessary to prevent the commission of grave crimes. It merely entails that the force used against perpetrators not qualifying as legitimate military targets remains governed by the standards of law enforcement and individual self-defense and not by those of the conduct of hostilities’ (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 862).

²¹² Melzer notes that ‘States frequently use civilian contractors or employees to carry out roughly equivalent activities’ (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 865).

²¹³ Schmitt ‘Deconstructing Direct Participation in hostilities: the Constituent Elements’ at 727.

²¹⁴ *Ibid.*

²¹⁵ *Idem* at 729.

²¹⁶ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 867.

²¹⁷ *Idem* at 866.

recognised²¹⁸ in the direct causation requirement. Watkin warns that the causal chain requirement limits responses to a 'reactive posture focused on "acts" rather than on the capacity of an opponent to plan and attack in the future'²¹⁹.

Van der Toorn raises a related criticism when he suggests a sound interpretation of direct participation in hostilities should extend beyond the 'specific operations'²²⁰, to 'include precursor operational activities'²²¹ that facilitate and are closely connected with the materialisation of harm²²². As the ICRC's interpretation stands at the moment, 'participation is equated to the single, discrete acts' which allow civilians to interrupt their hostilities with numerous 'intervening periods when they are engaged in their peaceful civilian vocations'²²³. Van der Toorn argues that the ICRC's direct causation requirement needs to 'achieve a greater balance between the ability to achieve military objectives and the protection of innocent civilians'²²⁴. In this regard his proposal would 'permit the targeting of the precursor operational activities that make possible the ultimate infliction of harm'²²⁵.

Melzer warns that Schmitt's 'integrated part test' would translate into an 'extremely permissive' understanding of direct causation, and that in effect 'any act connected with the resulting harm through a causal link would automatically qualify as "direct" participation in hostilities, no matter how far removed the act may be from the final harm caused'²²⁶. According to Melzer,

²¹⁸ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 684.

²¹⁹ *Idem* at 658.

²²⁰ Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 39.

²²¹ Which might include: 'operational level planning; general intelligence activities; military logistics; military communications; and IED assembly and combat instruction' (*Ibid*).

²²² So under Van der Toorn's proposal if 'a civilian were to (over a period of a week) take several steps from sourcing the components to assembling and eventually planting and detonating an IED on day seven, while each day returning to the civilian vocations, each of the weeks activities would not individually amount to direct participation in hostilities (barring the planting and final detonation)' according to the ICRC's interpretation, while it would amount to direct participation on his understanding (Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 39). The Interpretive Guide states definitively that 'the assembly and storing of an 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' (Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 658). Van der Toorn argues that such a 'change would promote a better balance between the achievement of military objectives and the protection of innocent civilians' (Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 39 and 40). In particular he is keen to favour an interpretation which might look at 'a series or chain of acts by an individual' and view 'the entire chain of acts' as amounting to direct participation in hostilities' (*Idem* at 32).

²²³ Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 30.

²²⁴ *Idem* at 32.

²²⁵ *Idem* at 37.

²²⁶ According to Melzer if we were to apply Schmitt's proposal then 'not only the planting or detonation of an improvised explosive device, but also its assembly and storage, as well as the purchase or smuggling of its components, would make legitimate military targets of all those involved, no matter how far their action is removed from the actual causation of harm' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in

'this approach would seem to permit direct attacks against any civilian who, somehow and at some point, causally contributes to the success of a hostile act, no matter how far his action is removed from the potential materialisation of harm'²²⁷. Melzer warns that such an 'extreme relaxation of the requirement of direct causation would invite excessively broad targeting policies, prone to error, arbitrariness, and abuse'²²⁸. According to Melzer, there is no indication by way of 'general *opinio juris* of States', that would favour Schmitt's integrated part interpretation over the ICRC's direct causation requirement²²⁹.

iii. The belligerent nexus requirement

According to the ICRC's Interpretive Guide, the final requirement is that the specific harm must have a link to the hostilities²³⁰. The belligerent nexus requirement is there to ensure that those criminal activities which are 'merely facilitated by the armed conflict'²³¹, and not 'designed to support one party to the conflict by directly causing the required threshold of harm to another party'²³², are excluded from the purview of direct participation in hostilities. As Rogers points out, in 'the case of children throwing petrol bombs or stones at enemy military patrols', members of the patrol will have to assess carefully whether it is just 'criminal activity' or whether the children have forfeited their 'civilian immunity'²³³.

In short, this leg of the test requires that 'an 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'²³⁴. In other words, 'in order to amount to direct participation in hostilities, an act must not only be objectively likely to inflict harm that meets the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another'²³⁵. 'Armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of

Hostilities' at 867). Fenrick argues that 'those involved in the production and storage of IEDs might better be regarded as belonging in the same category as those providing tactical intelligence instead of equating them with workers in munitions factories' (Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 293).

²²⁷ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 878.

²²⁸ *Idem* at 867.

²²⁹ *Idem* at 868.

²³⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 62.

²³¹ It is not uncommon for gangsters to engage in criminal activities in situations of armed conflict.

²³² ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 63 and 64.

²³³ Thereby entitling the military to 'use necessary force in self-defence' (Rogers 'Unequal Combat and the Law of War' at 19).

²³⁴ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 872.

²³⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 64; and Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 102.

another party²³⁶, cannot amount to any form of “participation” in hostilities taking place between these parties²³⁷. So for example if civilians are found causing harm:

- ‘(a) in individual self-defence or defence of others²³⁸,
 - (b) in exercising power or authority over persons or territory,
 - (c) as part of civil unrest against such authority, or
 - (d) during inter-civilian violence’,
- their acts will not be regarded as participating in hostilities.

These acts lack the ‘belligerent nexus required for a qualification as direct participation in hostilities’²³⁹. Moreover ‘when civilians are totally unaware of the role they are playing in the conduct of hostilities²⁴⁰ ... or when they are completely deprived of their physical freedom of action²⁴¹ ... they cannot be regarded as performing an action in any meaningful sense and, therefore, remain protected against direct attack despite the belligerent nexus of the military operation in which they are being instrumentalised’²⁴².

Examples of activities which satisfy the belligerent nexus requirement

- the ‘preparatory collection of tactical intelligence’²⁴³;
- ‘transporting personnel’²⁴⁴;
- ‘transporting and positioning weapons and equipment’²⁴⁵; and
- loading explosives in a suicide vehicle²⁴⁶.

²³⁶ For example ‘looting or civil unrest that merely take advantage of the instability incident to conflict’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 735).

²³⁷ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 873.

²³⁸ So for example, ‘although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another. If individual self-defence against prohibited violence were to entail loss of protection against direct attack, this would have the absurd consequence of legitimising a previously unlawful attack. Therefore, the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 61).

²³⁹ Consequently they must be dealt with by means of the regular law enforcement mechanisms (*Idem* at 64; Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 873; Van der Toorn “‘Direct Participation in Hostilities’: A Legal and Practical Evaluation of the ICRC Guidance’ at 19).

²⁴⁰ For example when a driver is ‘unaware that he is transporting a remote-controlled bomb’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 60).

²⁴¹ For example when involuntary human shields are ‘physically coerced into providing cover in close combat’ (*Ibid*).

²⁴² *Ibid*.

²⁴³ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 204-5.

²⁴⁴ *Ibid*.

²⁴⁵ *Ibid*.

²⁴⁶ *Ibid*.

Examples of activities which fall short of the belligerent nexus requirement

- 'hiding or smuggling weapons'²⁴⁷; and
- 'financial or political support of armed individuals'²⁴⁸.

Critique of the belligerent nexus requirement

While Schmitt supports the notion that there must be a link to the hostilities, he is in favour of reformulating the belligerent nexus test in the alternative, such that it reads: 'in support of a party to the conflict *or* to the detriment of another'²⁴⁹. Melzer cautions against a 'disjunctive reading of the two elements'²⁵⁰. His reason is that it can give rise to situations where it would be permissible to respond with military force against criminal elements who had no connection to the armed conflict²⁵¹. Melzer argues that if 'either element is missing'²⁵² the 'violence in question becomes independent of the armed struggle taking place between the parties to a conflict'²⁵³. Without establishing a link between an individual and a belligerent party, IHL 'simply does not permit categorising persons as legitimate military targets' and leaves these instances to be dealt with as any other threat to security²⁵⁴.

iv. General comments regarding the specific hostile acts which amount to direct participation in hostilities

Schmitt concedes that 'the three constitutive elements reflect factors that undoubtedly must play into such an analysis'²⁵⁵. However the thrust of his criticism is that there are 'deficiencies' to be found in each of the elements which give rise to what he considers an 'under-inclusive'²⁵⁶ notion of direct participation in hostilities. Schmitt's concern is that this pro-humanitarian treatment of the concept of direct participation, 'reflects a troubling ignorance of the realities of 21st century battlefield combat'²⁵⁷. Rogers is of the opposite view and supports a narrow interpretation of direct participation, lest 'the rule of distinction and civilian immunity... be put in serious jeopardy'²⁵⁸. To this end Melzer notes that there were several safeguards built into the three constitutive elements to ensure that 'erroneous or arbitrary targeting of

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ Schmitt 'Deconstructing Direct Participation in hostilities: the Constituent Elements' at 736.

²⁵⁰ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 873.

²⁵¹ *Ibid.*

²⁵² That is: support of a party to the conflict, and the intention to acts to the detriment of another party.

²⁵³ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 873.

²⁵⁴ *Ibid.*

²⁵⁵ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 739.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ Rogers 'Unequal Combat and the Law of War' at 19.

civilians' would be avoided²⁵⁹. Despite their criticism, many like Schmitt concede that the Interpretive Guide is 'superior to the various ad hoc lists because it provides those tasked with applying the norm on the battlefield with guidelines against which to gauge an action'²⁶⁰.

4.5 The temporal element of the loss of protection: 'for such time as' civilians take a direct part in hostilities

In terms of IHL, civilians normally enjoy complete immunity against attack for such time as they refrain from any direct participation in hostilities. However, as soon as civilians compromise their civilian immunity by electing to participate directly in hostilities, their actions expose other truly innocent civilians to 'erroneous or arbitrary attack'²⁶¹. Consequently, in order to dissuade civilians from abusing their civilian immunity, IHL condones the temporary suspension of their civilian 'protection against direct attack'²⁶², for so long as they participate directly in hostilities²⁶³. Expressed another way, 'considerations of military necessity are presumed to override those of humanity for such time as a civilian 'directly participates in hostilities'²⁶⁴. While their civilian immunity is temporarily suspended, this has no effect on their primary IHL status as civilians²⁶⁵. At no time do they lose their civilian status and assume primary combatant status²⁶⁶. Moreover when they cease their unauthorised participation, they resume full civilian immunity against attack. This temporary suspension of a civilian's immunity against direct attack is only afforded 'civilians who participate in hostilities in a spontaneous, unorganised or sporadic basis'²⁶⁷. Consequently, once it has been determined that a civilian has carried out a specific act which amounts to direct participation in hostilities, the next level of enquiry must address when the beginning and end of the loss of civilian immunity results²⁶⁸.

The notion that direct participation has a temporal limitation has a

²⁵⁹ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 877.

²⁶⁰ *Ibid.*

²⁶¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71.

²⁶² *Idem* at 70.

²⁶³ *Ibid.*

²⁶⁴ Melzer *Targeted Killings in International Law* at 331.

²⁶⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 70.

²⁶⁶ *Ibid.*

²⁶⁷ *Idem* at 71. The same cannot be said however of civilians who become members of organised armed groups belonging to a non-State party to an armed conflict. While this category of participant also loses immunity from direct attack, as is the case with any civilian, in this case they 'cease to be civilians... for as long as they assume their continuous combat function' and for the duration of their membership of the group (*Idem* at 70; Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 883).

²⁶⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 65. Until the civilian is performing functions which amount to direct participation in hostilities, all actions which amount to 'the use of force against him or her must comply with the standards of law enforcement or individual self-defence' (*Idem* at 70).

longstanding history²⁶⁹ in IHL since the mid-nineteenth century. The phrase ‘for such time as’, as it appears in API ‘is binding as a matter of treaty law on...approximately eighty-five percent of the world’s States’²⁷⁰. When the state of Israel argued that the phrase ‘for such time’, as it appears on API article 51(3), did not yet constitute customary international law, the Israeli High Court of Justice in *Public Committee against Torture in Israel* (‘PCATI’) *v* *Government of Israel* rejected this position, and concluded that ‘all of the parts of article 51(3) of The First Protocol express customary international law’, including the time dimension expressed in the phrase ‘for such time as’²⁷¹. Not surprisingly, the ICRC’s study into the customary international law status of the phrase ‘and for such time as’, concluded that it was widely recognised as constituting customary international law²⁷².

While the ‘for such time as’ criteria might reflect customary international law, its practical implementation has not been without controversy. For the most part the controversy lies in that fact that when a civilian is no longer engaged in direct participation, and consequently no longer poses a threat to the opposition, they regain their full civilian immunity²⁷³ from direct attack, giving rise to what is called the ‘revolving door’ of civilian protection²⁷⁴. The terminology ‘revolving door’, whereby civilians might vacillate²⁷⁵ between being a belligerent, and reserving the right to reclaim their civilian status, was first coined by Hays Parks²⁷⁶ in his 1990s commentary on the practical effect of AP I.

²⁶⁹ ‘In his Code for use by the Union side in the American Civil War, Dr. Francis Lieber denied prisoner of war (POW) rights to persons who commit hostilities “without being part... of the organised hostile army” and who do so “with intermitting returns to their homes... or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers” (Boothby “And For Such Time As”: The Time Dimensions to Direct Participation in Hostilities’ at 774).

²⁷⁰ Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 884.

²⁷¹ (2006) HCJ 769/02 available in English from <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008) at para 30 and 38.

²⁷² Boothby points to the U.S. and Israel as evidence for his claim that the ‘for such time as’ requirement is not uncontroversially accepted as having crystallised into customary international law. However, even after citing these examples, Boothby himself concedes that the Israeli High Court has nevertheless expressly recognised ‘that all of the parts of article 51(3) of the first Protocol express customary international law’ (*Idem* at 885). In short, ‘Boothby’s doubt as to the customary nature of the phrase “unless and for such time” remains unsubstantiated’ (*Idem* at 886).

²⁷³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71.

²⁷⁴ *Idem* at 70.

²⁷⁵ The net affect of the ‘for such time as’ interpretation is that ‘civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities’ (Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 883).

²⁷⁶ Hays Parks used the phrase disparagingly (William Hays Parks, ‘Air War and the Law of War’ (1990) 32:1 *Air Force Law Review* 1 at 87-88); Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 686.

- i. The parameters of the 'for such time' window: execution, preparation, deployment and withdrawal

The Interpretive Guide expressly recognises that the concept of direct participation in hostilities includes not only the obvious individual armed activities, but also the 'unarmed activities which adversely affect the enemy'²⁷⁷. Uncontroversially, the 'execution phase of a specific act', which satisfies the three pronged test for direct participation in hostilities, will fall within the 'for such time' window, and amount to a temporary loss of immunity from attack²⁷⁸. And in accordance with the 'collective nature and complexity of contemporary military operations', an interpretation of direct participation in hostilities must include those activities which only cause harm 'in conjunction with other acts'²⁷⁹. Consequently, the ICRC's Interpretive Guide includes 'measures preparatory'²⁸⁰ to the execution of a specific act...as well as the deployment to and the return from the location of its execution'²⁸¹ as 'constituting an integral part of the specific hostile act'²⁸². The ICRC guide cites as examples: 'equipping, instructing, and transporting personnel; gathering intelligence; and preparing, transporting and positioning weapons and equipment'²⁸³, if these are carried out as preparation for the undertaking of a specific hostile act. The Israeli High Court of Justice in *Public Committee against Torture in Israel ('PCATI') v Government of Israel* endorsed the conclusion that 'a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it, is a civilian taking "an active part" in the hostilities'²⁸⁴.

These preparations, for a specific hostile act, are to be distinguished from preparatory activities which merely establish 'the general capacity to

²⁷⁷ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 882.

²⁷⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 65. So for example, 'delivery by a civilian truck driver of ammunition to an active firing position at the front line' would amount to direct participation in hostilities because of its 'integral part in combat' (Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 880-881).

²⁷⁹ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 882.

²⁸⁰ The guide stipulates that these preparatory measures must be linked to 'specific hostile acts' of direct participation before they amount to direct participation in hostilities (Boothby "'And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' at 750; Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 880-881).

²⁸¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 65.

²⁸² Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 882-883.

²⁸³ Boothby "'And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' at 747.

²⁸⁴ *Public Committee against Torture in Israel ('PCATI') v Government of Israel*²⁸⁴ (2006) HCJ 769/02 at para 34.

carry out hostile acts²⁸⁵, which do not amount to direct participation in hostilities. Preparations which are part of a generalised 'campaign of unspecified operations'²⁸⁶, or general 'capacity building to undertake military activity'²⁸⁷, do not fall within the scope of the activities for which civilian immunity can be forfeited. Examples of such general preparations include 'the purchase, smuggling, production, and hiding of weapons'²⁸⁸; recruitment and training of personnel; and financial, political, and administrative support to armed actors²⁸⁹.

Where the specific hostile act requires no prior deployment²⁹⁰, the loss of civilian immunity 'will be restricted to the immediate execution of the act and preparatory measures forming an integral part of that act'²⁹¹. However, where the specific 'hostile act requires prior geographic deployment'²⁹², that preparatory deployment 'already constitutes an integral part of the act in question'²⁹³, and results in the loss of civilian immunity. For an activity to amount to a deployment which will compromise a civilian's immunity, deploying individual must 'undertake a physical displacement'²⁹⁴ with the aim of carrying out the specific hostile act. Similarly, if the military withdrawal from the execution of a hostile act remains an 'integral part of the preceding operation'²⁹⁵, it constitutes a part of the 'for such time' window²⁹⁶, and civilian immunity is only restored once the individual in question has physically separated from the operation²⁹⁷. Such physical disengagement can be demonstrated 'for example by laying down, storing or hiding the weapons or other equipment used, and resuming activities distinct from that operation'²⁹⁸. As the Israeli High Court of Justice pointed out in *Public Committee against Torture in Israel ('PCATI') v Government of Israel*, once a civilian detaches himself from his prior participatory activities, 'he is not to be attacked for the hostilities which he committed in the past'²⁹⁹.

²⁸⁵ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 881.

²⁸⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 66.

²⁸⁷ *Ibid.*

²⁸⁸ Boothby "'And For Such Time As': The Time Dimensions to Direct Participation in Hostilities' at 747.

²⁸⁹ *Ibid.*

²⁹⁰ For example where the act with amounts to direct participation 'consists of computer operations conducted from the individual's home' (Boothby "'And For Such Time As': The Time Dimensions to Direct Participation in Hostilities' at 752).

²⁹¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 68.

²⁹² *Idem* at 67.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Idem* at 68.

²⁹⁶ *Idem* at 67.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ At para 39.

ii. A critique of the 'revolving door' concept

Probably the most common academic³⁰⁰ critique leveled at the 'revolving door' phenomenon³⁰¹ was that 'it creates a significant operational advantage for civilians who alternate between civilian life and engagement in hostilities'³⁰². It is argued that the revolving door would give rise to an 'uneven legal playing field on the battleground'³⁰³, permitting attacks to be leveled at regular combatants (be they cooks or infantry) at all times, while affording civilian belligerents the advantage of a shield, behind which to 'repeatedly claim the protection associated with that status'³⁰⁴, and yet launch 'spontaneous, unorganised or sporadic'³⁰⁵ attacks from behind these protected positions³⁰⁶. Watkin agrees that 'the ability to hide behind a revolving door, and thereby gain a tactical advantage through a claim to civilian status is difficult to justify'³⁰⁷. Particularly since there is no 'clear guidance'³⁰⁸ on the number of times a civilian can walk back through the "revolving door"... it is suggested that a civilian can go through the revolving door on a "persistently recurring basis"³⁰⁹. Moreover, there is always potential for this interpretation of the 'revolving door of protection' to be abused by non-State actors³¹⁰.

Some writers, like Boothby argue that 'at customary law there is no revolving door of protection, and thus the ICRC's interpretation of the word "participates" in the treaty rule excessively narrows the notion of [direct participation in hostilities] by inappropriately excluding the notion of continuous participation'³¹¹. Boothby, is critical of the fact that the Interpretive Guide does not provide in its interpretation a way to deal with what he terms the 'persistent civilian participator'³¹². Boothby argues that there must be a way to distinguish between 'isolated and sporadic acts by civilians', and 'repeated or persistent acts' of direct participation in hostilities³¹³. Boothby 'proposes that the time dimension to the rule must permit the targeting of those who, whether voluntarily or otherwise, choose to participate on a persistent or regular basis in the conflict, whether they are or are not

³⁰⁰ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 687.

³⁰¹ Roberts 'The Civilian in Modern War' at 41.

³⁰² Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 24 and 45.

³⁰³ *Idem* at 1.

³⁰⁴ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 682.

³⁰⁵ Boothby "'And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' at 757.

³⁰⁶ Roberts 'The Civilian in Modern War' at 41.

³⁰⁷ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 688.

³⁰⁸ Except to say that civilians who "'go beyond spontaneous, sporadic, or unorganised direct participation... and become members of an organised armed group" are no longer able to make use for the revolving door of protection' (*Idem* at 686).

³⁰⁹ *Idem* at 662.

³¹⁰ Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 45.

³¹¹ Boothby "'And for such time as": The time dimensions to direct participation in hostilities' at 743.

³¹² *Idem* at 758.

³¹³ *Ibid.*

members of organised armed groups³¹⁴. Boothby argues that States (like Israel³¹⁵ and the U.S.³¹⁶) are unlikely to adopt an interpretation which would afford the benefit of the revolving door to ‘unorganised but regular direct participation by a civilian’³¹⁷, when he suggests they should lose their protected status ‘while such persistent or repeated involvement in hostilities continues’³¹⁸.

The Interpretive Guide warns that it would be ‘impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act, have previously done so on a persistently recurring basis, and whether they have the continued intent to do so again’³¹⁹. Moreover, as Melzer points out, Boothby fails to provide ‘operational forces with any reliable guidance as to how the proposed distinction between “sporadic” and “repeated” hostile acts should be made in practice’³²⁰. And as Jensen asserts, ‘any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction made in IHL³²¹ between temporary activity-based loss of protection (due to direct participation in hostilities) and continuous, status- or function-based loss of protection (due to combatant status or continuous combat function)’³²². It does seem ‘incongruous to argue that a civilian who has directly participated in hostilities, and shown continuing intent to do so, should be immune from targeting’³²³. Melzer maintains however that ‘persistently recurrent direct participation in hostilities’ by civilians, who have no ‘affiliation to an organised force or group’, is not likely to present a ‘major problem in practice’³²⁴. In the rare instances

³¹⁴ *Idem* at 798.

³¹⁵ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 687.

³¹⁶ ‘The U.S. would take repeated participation into account in determining whether the individual is in fact continuously engaged and thus loses protection on a continuous basis’ (Boothby “And For Such Time As”: The Time Dimensions to Direct Participation in Hostilities’ at 758).

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ ‘Even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71); Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 687-688.

³²⁰ Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 892.

³²¹ ‘The treaty text leaves no doubt that loss of civilian protection attaches to individual activity (direct participation in hostilities) rather than status or function, and is temporary (“unless and for such time”) rather than continuous’ (Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 887). Moreover this ‘interpretation of the term “participation” as referring to individual involvement in specific hostile acts or operations is also supported by the commentaries’ (*Ibid.*).

³²² Jensen ‘Direct Participation in Hostilities’ at 2101-8.

³²³ *Idem* at 2108-16.

³²⁴ Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 891.

where it does occur³²⁵, ‘the threat posed by these civilians in the interval between hostile acts is more adequately addressed through means and methods of law enforcement’³²⁶.

Another aspect of the temporal approach adopted by the ICRC’s Interpretive Guide which has come under criticism, is its interpretation of which preparatory, deployment or withdrawal activities amount to unprotected direct participation in hostilities. Jensen proposed that ‘a modern view of “for such time” must include the full time that an individual is directly participating, not just the time that results in actual harm’³²⁷. Consequently, Jensen is of the view that the ‘individual who conducts training for individuals to take part in hostilities is targetable until he ceases all training activities’³²⁸. Boothby is critical of what he describes as a ‘restrictive’ interpretation of the preparatory activities that amount to direct participation in hostilities³²⁹. According to Boothby, “participate” could also refer to individual involvement in “groups or sequences of activity spread over a period,” with the effect that the civilian in question would lose protection for the entire period of his involvement, including in the intervals between specific hostile acts’³³⁰. Boothby favours an interpretation which regards ‘preparatory acts, pure and simple, as direct participation’³³¹. Boothby also favours an interpretation where ‘deployment with the explicit purpose of doing something preparatory to an act, that itself amounts to direct participation in hostilities’, also amount to direct participation³³².

The ICRC’s Interpretive Guide acknowledges that the net effect of the ‘revolving door’ phenomenon will limit attacks on civilian participants³³³. It justifies the revolving door position as being a necessary part, rather than a ‘malfunction’³³⁴, of the guide, in order ‘to protect the civilian population from erroneous or arbitrary attack’³³⁵ at times when they do not constitute a military objective. Any interpretation which ‘increases the risks to the innocent, uninvolved civilian, must conflict’ with a reading of the ‘terms of the treaty in their context and in the light of its object and purpose’³³⁶.

³²⁵ For example, ‘teenagers using every opportunity to throw “Molotov cocktails” at occupation forces, or civilians being forced to perform limited acts of direct participation in support of an armed group each time it operates in the vicinity of their village’ (*Ibid*).

³²⁶ *Ibid*.

³²⁷ Jensen ‘Direct Participation in Hostilities’ at 2235-41.

³²⁸ *Ibid*.

³²⁹ Boothby “‘And for such time as’: The time dimensions to direct participation in hostilities’ at 797.

³³⁰ Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 886.

³³¹ Boothby “‘And For Such Time As’: The Time Dimensions to Direct Participation in Hostilities’ at 752.

³³² *Idem* at 750.

³³³ *Idem* at 757.

³³⁴ *Ibid*.

³³⁵ Jensen ‘Direct Participation in Hostilities’ at 2235-41.

³³⁶ Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 886.

4.6 The ‘continuous combat function’ and its implications for civilians participating directly in hostilities

i. The rationale behind the concept of the ‘continuous combat function’

The term ‘continuous combat function’ was first coined³³⁷ at the expert discussions which gave rise to the ICRC’s Interpretive Guide³³⁸. During the discussions the view was expressed that, since the revolving door of protection was only intended to apply to those spontaneous and unorganised acts of participation, it should not also be applied to ‘members of organised armed groups belonging to a non-State party’³³⁹, since their activities were oftentimes neither unorganised nor spontaneous³⁴⁰. If the revolving door were to be applied to such ‘organised armed groups’ (who fell short of the requirements for full combatant status) it would give these ‘farmers by day and fighters by night’... a significant operational advantage³⁴¹ over the ‘State armed groups engaging in hostilities against them, who as a result of their combatant status ‘can be attacked on a continuous basis’³⁴². While there is under IHL no ‘express right for civilians to directly participate in hostilities’, that does not necessarily translate into ‘an international prohibition (or criminalisation) of such participation’³⁴³. Nevertheless, at the expert meetings the concern was raised that such inequality between the States’ armed forces and organised non-State armed groups would ‘undermine respect for IHL, thereby endangering innocent civilians’³⁴⁴. Rogers agrees that ‘there is certainly a case for arguing that a person who becomes a member of a guerrilla group, or armed faction that is involved in attacks against enemy armed forces, forfeits his protected status for so long as he participates in the activities of the group’³⁴⁵.

As a consequence of these concerns, the general consensus at the expert discussion was that there was a legitimate and defensible³⁴⁶ need for a special legal regime applicable to ‘organised armed groups’ who participated in hostilities in a more organised, structured and continuous manner, as compared with those civilians who only participated intermittently in hostilities,

³³⁷ Prior to this, the term ‘continuous combat function’ did not appear in any IHL treaties (Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 655).

³³⁸ *Ibid.*

³³⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71.

³⁴⁰ Until such time as the actions of the *levée en masse* became ‘continuous and organized’ they would not fall within the purview of an organised armed group liable for direct targeting for their continuous combat function (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 840).

³⁴¹ Van der Toorn ‘“Direct Participation in Hostilities”: A Legal and Practical Evaluation of the ICRC Guidance’ at 19.

³⁴² ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 72.

³⁴³ *Idem* at 83.

³⁴⁴ Van der Toorn ‘“Direct Participation in Hostilities”: A Legal and Practical Evaluation of the ICRC Guidance’ at 19.

³⁴⁵ Rogers ‘Unequal Combat and the Law of War’ at 19.

³⁴⁶ Fenrick ‘ICRC Guidance on Direct Participation in Hostilities’ at 209.

and who benefitted from the revolving door of civilian immunity. Rather than apply the revolving door of protection, which only limits their protection from attack 'for such time as they participate directly in hostilities', as is the case with civilians, this group of participants lose their civilian protection 'for as long as they remain members' of the organised group, by virtue of their 'continuous combat function'³⁴⁷. In other words, the 'revolving door of protection starts to operate based on membership'³⁴⁸ in the organised group, and the door revolves again, rendering the individual once again a protected civilian, but only once their membership of the group has ceased. The net effect of this regime for non-State actors, who like child soldiers and PMSCs are affiliated³⁴⁹ with organised armed groups, is that they stand to 'lose their entitlement to protection against direct attack'³⁵⁰ not only during their continuous combative acts, but 'even when they put down their weapons and walk home for lunch with their family'³⁵¹.

While this approach does draw on notions of group membership, it is nevertheless different from the regime applicable to those who are members of the regular armed forces. For members of the State's armed forces, their status as combatants is determined by their formal membership of the armed group, regardless of the function the individual might perform, and until the individual leaves the force³⁵². As Melzer points out any legal regime aimed at organised armed groups needs to take into consideration the 'more informal and fluctuating membership structures of irregularly constituted armed forces fighting on behalf of State and non-State belligerents'³⁵³.

ii. Activating the loss of protection based upon a 'continuous combat function'

The effect of this regime is that, once it is *de facto* evidenced that individual members of the organised armed group³⁵⁴ have functioned in a continuous

³⁴⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71; Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 883.

³⁴⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 72.

³⁴⁹ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 845.

³⁵⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 73.

³⁵¹ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 206.

³⁵² Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 671.

³⁵³ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 845.

³⁵⁴ Moreover, according to the Interpretive Guide, 'membership must depend on whether the continuous function assumed by an individual corresponds to that collectively executed by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict' (Jensen 'Direct Participation in Hostilities' at 2141-49); Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 206).

combative matter³⁵⁵, their 'functional membership' results in their loss of civilian 'protection against direct attack' for 'as long as their membership lasts'³⁵⁶.

According to the ICRC Interpretive Guide, 'membership in an organised armed group begins in the moment a civilian starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function'³⁵⁷. Such an assessment requires proof of repeated direct participation in hostilities, along with 'a lasting integration'³⁵⁸ into an armed group'³⁵⁹, with indications that 'such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation'³⁶⁰. There is no assessment based upon the donning of a uniform or the possession of an identification card³⁶¹, it is determine solely by function³⁶². The Israeli High Court of Justice, in their assessment of the degree of participation in hostilities on the part of Palestinian terrorists, in *Public Committee against Torture in Israel ('PCATI') v Government of Israel* concluded:

'a civilian who 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'³⁶³.

iii. Exclusion and cessation of the 'continuous combat function' classification

At their core these members of organised armed groups still enjoy primary civilian status (i.e. they do not acquire combatant status). As Melzer points out, 'continuous combat function does not, of course, imply *de jure* entitlement

³⁵⁵ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 838.

³⁵⁶ *Idem* at 843.

³⁵⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 72.

³⁵⁸ Van der Toorn proposed the following 'objectively verifiable indicia' of the necessary integration: 'regular physical association with other individuals affiliated with the group; acting under orders or the command of senior figures; and any other conduct that demonstrates they are seeking to advance the common purpose of the group' (Van der Toorn "Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 28-29).

³⁵⁹ *Idem* at 7.

³⁶⁰ Jensen 'Direct Participation in Hostilities' at 2141-49.

³⁶¹ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 206. Neither can it 'depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness, or abuse' (Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 846).

³⁶² Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 206.

³⁶³ At para 39.

to combatant privilege³⁶⁴. Consequently, it is imperative that only those members of the group who actually engage in the continuous combat function³⁶⁵ stand to lose their otherwise civilian immunity from attack³⁶⁶. Those who, while affiliated³⁶⁷ with an organised armed group, fail to 'regularly perform combat duties'³⁶⁸, cannot be said to perform a continuous combat function, and consequently are excluded³⁶⁹ from the loss of protection on account of their failure to directly participate in hostilities³⁷⁰. Moreover 'once a member has affirmatively disengaged from a particular group, or has permanently changed from its military to its political wing³⁷¹, he regains his civilian immunity against attack'³⁷². As to how this disassociation from the group is manifested, the Interpretive Guide states that: 'disengagement from an organised armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life, or the permanent resumption of an exclusively non-combat function'³⁷³. Accordingly, an assessment as to whether an individual has disengaged from an organised armed group, 'must therefore be made in good faith and based on a reasonable assessment of the prevailing circumstances, presuming entitlement to civilian protection in case of doubt'³⁷⁴.

iv. A critique of the continuous combat function

The ICRC's 'continuous combat function' has not been without criticism. In particular some academics have raised concerns around the issue that the specific treaty language, which the Interpretive Guide was attempting to interpret, states that civilians lose immunity from attack 'for such time' as they participate directly in hostilities³⁷⁵. The ICRC's continuous combat function

³⁶⁴ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 847.

³⁶⁵ Jensen 'Direct Participation in Hostilities' at 2141-49.

³⁶⁶ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 846.

³⁶⁷ This would include 'private contractors and civilian employees', contracted to organised armed groups (Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 292).

³⁶⁸ For example 'recruiters; trainers; financiers; propagandists; or those who purchase; smuggle; store; manufacture; or maintain weapons and other military equipment' (Jensen 'Direct Participation in Hostilities' at 2003-12).

³⁶⁹ Included in this exempted group are 'political and administrative personnel, as well as other persons not exercising a combat function' (Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 7).

³⁷⁰ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 704.

³⁷¹ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 891.

³⁷² *Ibid.*

³⁷³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 72-73.

³⁷⁴ *Idem* at 73.

³⁷⁵ Philip Alston 'Study on Targeted Killings' Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (28 May 2010) A/HRC/14/24/Add.6 at para 65.

interpretation effectively arrives at a conclusion which makes it permissible to directly target civilians at *all* times, provided they are engaged in a continuous combat function³⁷⁶. The potential increased risk to civilians posed by the creation of the continuous combat function category, has seen critics of the concept call for the ‘the other constituent parts of the guidance (i.e. the threshold of harm, direct causation and belligerent nexus criteria) not [to] be diluted’³⁷⁷ so as to adequately protect civilians in times of armed conflict. Melzer, and others who defend the proposed continuous combat function category, cite principle XI³⁷⁸ in the ICRC’s Interpretive Guide as providing the necessary counter balance to prevent the continuous combat function category posing an increased risk to civilians around whom there might be some doubt as to their degree of involvement in hostilities (i.e. as a sporadic direct participant or having a continuous combat function).

Watkin is critical that the continuous combat function approach still ‘creates a bias against State armed forces’³⁷⁹ in that the regularly constituted armed forces can only target those within the organised armed group who exhibit continuous combat function, while their own non-combatant members can be targeted at all times³⁸⁰. Watkin is skeptical that, at a split second’s notice, a soldier can ‘realistically be expected to distinguish between a civilian who participates on a “persistent recurring basis”, and a member of an organised armed group who performs a “continuous combat function”’³⁸¹. Fenrick concurs. In essence, ‘members of organised armed groups are treated more favorably than members of State armed forces, in so far as a smaller percentage of them may be lawfully subjected to direct attack’³⁸². Furthermore, protected immunity against attack is afforded to persons ‘who are an integral part of the combat effectiveness of an organised armed group when their regular force counterparts performing exactly the same function can be targeted’³⁸³. In response to these criticisms, Melzer points out that this perceived bias is not a fiction developed by the Interpretive Guide, but is ‘rooted in existing treaty and customary law’ which prohibits the direct

³⁷⁶ *Ibid.*

³⁷⁷ *Idem* at para 69.

³⁷⁸ ‘In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances’.

³⁷⁹ Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 837.

³⁸⁰ Watkin warns that, together with ‘a narrow concept of direct participation’, the pool of ‘persons accompanying the armed force or closely connected to it that cannot be targeted’ is expanding (Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 659-660).

³⁸¹ *Idem* at 662; Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 855.

³⁸² Fenrick ‘ICRC Guidance on Direct Participation in Hostilities’ at 291.

³⁸³ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 664 and 675; Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 837.

targeting of civilians until such time as they participate directly in the hostilities³⁸⁴. Melzer concedes that, while notionally more of the regular armed forces might be exposed to direct targeting than the members of their 'irregularly constituted counterparts', 'the actual practical effect will have very little consequence³⁸⁵, since in organised armed groups many of the so-called non-combatative roles are performed by the very individuals who engage in the continuous combat function³⁸⁶. Moreover, as Melzer points out 'almost all non-combatant³⁸⁷ members of regular armed forces, with the exception of medical and religious personnel... are not only entitled, but also trained, armed, and expected to directly participate in hostilities in case of enemy contact and, therefore, also assume a continuous combat function³⁸⁸.

Another criticism raised by Watkin is that a restrictive interpretation of what activities amount to 'combat function' is at odds with more broader interpretations adopted in 'case law and other academic writings³⁸⁹. Watkin argues that the criteria for attaining 'membership in an organised armed group' is couched so restrictively, as to make the potential for an otherwise civilian to lose that status and thus be targetable, unlikely³⁹⁰. Watkin prefers to apply the continuous loss of civilian immunity from attack 'not only to fighting personnel of organised armed groups, but essentially to any person who could be regarded as performing a "combat," "combat support," or even "combat service support" function for such a group, including unarmed cooks and administrative personnel³⁹¹. Van der Toorn shares a similar concern, that the 'continuous participation requirement' 'imposes a very high threshold and would likely exclude a large number of individuals' who, for all intents and purposes, are 'carrying out substantial and continuing integrated support functions for such groups³⁹², but 'who fight for the group on a regular but not continuous basis³⁹³. Van der Toorn suggests relaxing the strict continuous combat function requirement in favour of "regular participation", or to require an individual's "predominate function" to be direct participation in hostilities for the group³⁹⁴. Watkin also suggests a similar formulation which would state that 'after the first involvement, any subsequent act demonstrating direct participation would start to provide the basis to believe that there is the

³⁸⁴ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 852.

³⁸⁵ *Idem* at 851.

³⁸⁶ *Idem* at 852.

³⁸⁷ For example 'cooks and administrative personnel' (*Idem* at 851).

³⁸⁸ *Idem* at 852.

³⁸⁹ Watkin maintains that the most obvious mistaken exclusions from the ICRC's understanding of 'combat function' is 'the performance of a logistics function' (like the 'transport of weapons and equipment') (Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 683).

³⁹⁰ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 835.

³⁹¹ *Idem* at 913.

³⁹² Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 664.

³⁹³ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 837.

³⁹⁴ *Ibid.*

beginning of a pattern of conduct that reflects an intention to regularly engage in the hostilities”³⁹⁵. So for Watkin, ‘repetitious participation can be considered in determining if such persons are in reality continuously engaged in hostilities’, and when such repetition has taken place, ‘affirmative disengagement would be required in order to establish that such persons are no longer direct participants in hostilities’³⁹⁶.

These criticisms certainly do ‘express understandable concerns over the ability of State armed forces to operate effectively against an elusive enemy who can hardly be distinguished from the civilian population and whose means and methods are often indiscriminate, perfidious, or otherwise contrary to IHL’³⁹⁷. That being said, any interpretation which gives rise to overly permissive targeting of individuals under IHL³⁹⁸, will result in an ‘unacceptable degree of error and arbitrariness’³⁹⁹. In response to this critique, Melzer cautions that what Watkin and Van der Toorn refer to as “‘combat support’ activities would almost invariably constitute an integral part of combat operations’⁴⁰⁰, and consequently would result in the loss of immunity from attack. As Melzer explains,

‘in practice, a civilian who regularly and consistently directly participates in hostilities in support of a belligerent party will almost always be affiliated with an organised armed force or group and, thus, may be regarded as a *de facto* member assuming a continuous combat function for that force or group. This includes not only the armed full-time fighter, but also private contractors hired to defend military objectives, as well as the notorious “farmer by day and fighter by night” who, in parallel to his seemingly⁴⁰¹ peaceful everyday life, assumes a continuous function involving acts such as placing IEDs, mines, or booby-traps, or providing tactical intelligence or logistic support as part of specific attacks or combat operations’⁴⁰².

Moreover Melzer argues that to adopt an ‘overextended’ notion of who could be targeted in an organised armed group ‘to include all persons accompanying or supporting that group (regardless of their function)’ would ‘completely discard the distinction between “direct” and “indirect” participation in hostilities inherent in treaty and customary law’⁴⁰³.

³⁹⁵ *Idem* at 856.

³⁹⁶ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 692.

³⁹⁷ Melzer “Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 913.

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ *Idem* at 848.

⁴⁰¹ *Idem* at 890.

⁴⁰² *Idem* at 891.

⁴⁰³ *Idem* at 837.

4.7 Presumptions in assessing direct participation in hostilities

As already mentioned in the chapter discussing civilian status, IHL operates on the presumption that in cases of doubt 'whether a person is a civilian, that person shall be considered to be a civilian'⁴⁰⁴. According to the study undertaken by the ICRC into the customary international law status of various IHL provisions, 'when there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack'⁴⁰⁵. 'One cannot automatically attack anyone who might appear dubious'⁴⁰⁶. The rationale behind the principle of distinction and this legal presumption is 'to avoid the erroneous or arbitrary targeting of civilians'⁴⁰⁷. The same rationale would make the presumption applicable in instances when an assessment needs to be made as to whether an individual has directly participated in hostilities. In the words of the ICRC's Interpretive Guide: 'in case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not'⁴⁰⁸. Consequently, prior to and during any attack all 'feasible precautions' should be taken 'to ensure that the intended target of the attack is in fact a legitimate military target', and should there be any doubt as to whether a target is in fact a civilian 'entitled to civilian protection' the intended attack must be suspended⁴⁰⁹. In the *Public Committee against Torture in Israel ('PCATI') v Government of Israel* the Israeli High Court of Justice endorses the position that, in examining the grey areas which require a case by case analysis, there is a heavy burden of proof which requires well verified information before a belligerent can justify the direct targeting of a civilian, on the basis that their actions are perceived as amounting to direct participation in hostilities⁴¹⁰. Moreover the Court points out that there is always the obligations upon belligerents to employ less harmful means (ie. arrest, investigation and trial) where at all feasible, rather than order the direct targeting of the civilian⁴¹¹.

i. Critique of the presumption's application to assessments of direct participation

Schmitt rejects the ICRC's application of the presumption of civilian status to assessments of direct participation, in favour of an approach which would see the 'gray areas... interpreted liberally i.e., in favor of finding direct

⁴⁰⁴ AP I article 50(1); 'In case of doubt, the person must be presumed to be protected against direct attack' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 74).

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Idem* at 75.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Idem* at 74.

⁴¹⁰ At para 40.

⁴¹¹ *Idem* at para 41.

participation⁴¹². Schmitt argues that once a determination is made that a civilian is directly participating in hostilities they may be legally targeted without further need to justify any resultant injury or death by considerations of proportionality⁴¹³ or by taking special precautions in attack⁴¹⁴. Schmitt defends what he concedes may seem like a 'counter-intuitive' and 'harsh' approach on the grounds that it 'is likely to enhance the protection of the civilian population as a whole, because it creates an incentive for civilians to remain as distant from the conflict as possible'⁴¹⁵.

Melzer cautions that instructing the armed forces that they are justified in directly targeting civilians whose actions are questionable is clearly contrary to the ethos of IHL and in violation of many of its fundamental provisions⁴¹⁶. As Melzer points out, it is not surprising, given the radical approach that Schmitt proposed, that there is 'no support in State practice and jurisprudence'⁴¹⁷ for his inversion of the presumption of civilian status. I prefer a more nuanced conclusion: that the proportionality and special precautions test would be easier to satisfy when doubts are raised regarding the degree of a civilian's involvement in hostilities. In other words there is still an obligation to assess the proportionate result of the impending attack, as well take special precautions during the attack⁴¹⁸. The threshold for justifying these actions is easier to achieve when civilians are playing an active role in the hostilities. This view has been endorsed by the Israeli High Court of Justice in *Public Committee against Torture in Israel ('PCATI') v Government of Israel* which stated that if a civilian's actions brought them into close proximity to military targets (by providing strategic analysis or disseminating propaganda), while those actions would not amount to direct participation in hostilities, the State would nevertheless not be liable for their injury where such injury 'falls into the framework of collateral or incidental damage'⁴¹⁹.

As Melzer correctly points out, if a civilian's actions 'posed a grave threat to public security, law and order, without clearly amounting to direct participation in hostilities', then in such instances 'the regular law enforcement mechanisms as well as the legal regime applicable to individual self-defence

⁴¹² Schmitt 'Direct Participation in Hostilities' and 21st Century Armed Conflict' at 505 and 509; Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 875.

⁴¹³ The 'principle of proportionality prohibits attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated' (AP I article 51(5)(b)); Michael Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2004) 5:2 *Chicago Journal of International Law* 511 at 541).

⁴¹⁴ There is a further imperative on commanding officers, once they have determined that an attack is proportional, to select a military objective 'which may be expected to cause the least danger to civilian lives and to civilian objects' (*Idem* at 519; AP I article 57(3)).

⁴¹⁵ *Idem* at 505; Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 875.

⁴¹⁶ *Ibid.*

⁴¹⁷ *Idem* at 876.

⁴¹⁸ Hans-Peter Gasser (1995) 'Protection of the Civilian Population' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 211.

⁴¹⁹ *Public Committee against Torture in Israel ('PCATI') v Government of Israel* (2006) HCJ 769/02 at para 35.

will prevail⁴²⁰.

4.8 The legal consequences for civilians found participating directly in hostilities

It is also worth noting that at all times (even while participating directly in hostilities) civilians retain their primary civilian status. Their actions alone do not re-classify them as combatants. They are, however, exposed to direct attack for so long as they persist with their direct participation in hostilities, despite their primary civilian status. While they lose their civilian immunity against direct attack, they never lose their inherently civilian status. Once they desist from their direct participation or disengage from the group's continuous combat function, they regain their full civilian immunity against direct attack.

Civilians, by definition, do not enjoy combatant status, with its attendant authorisation to participate directly in hostilities, associated POW status and immunity from prosecution. Consequently when a civilian is found to be participating directly in hostilities without the requisite combatant privileges, they are exposed to potential 'prosecution for violations of domestic and international law they may have committed'⁴²¹, even if during their participation they observed the laws of war regarding the means and methods of warfare⁴²². What is particularly problematic for civilians taking a direct part in hostilities, or acting with a continuous combat function, is that they very often 'capture, injure, or kill an adversary'⁴²³ whilst 'failing to distinguish themselves from the civilian population'⁴²⁴ and feigning the right to 'civilian protection against direct attack'⁴²⁵. This is considered a serious violation of the IHL prohibition against perfidy⁴²⁶.

4.9 Conclusion

At present, the ICRC's Interpretive Guide appears to provide a neutral, impartial and balanced interpretation of the longstanding IHL principle against civilian direct participation in hostilities. In setting a minimum threshold of harm, the Interpretive Guide respects the customary IHL distinction between 'direct participation in hostilities, and mere involvement in the general war effort'⁴²⁷. In applying the direct causation requirement the Interpretive Guide limits 'broad targeting policies, prone to error, arbitrariness, and abuse'⁴²⁸.

⁴²⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 76.

⁴²¹ *Idem* at 83; Roberts 'The Civilian in Modern War' at 41.

⁴²² Melzer *Targeted Killings in International Law* at 329; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 84.

⁴²³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 85.

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*

⁴²⁷ Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 877.

⁴²⁸ *Idem* at 867.

The belligerent nexus link distinguishes occasions of legitimate military targeting from common criminal activities.

As for the temporal scope of the loss of civilian immunity from attack, the revolving door phenomenon ensures maximum protection for the civilian population against ‘erroneous or arbitrary attack’⁴²⁹, in line with the fundamental principles of IHL. The concept of a ‘continuous combat function’ distinguishes those ‘farmers by day and fighters by night’, who participate directly in hostilities from those who merely provide indirect support for a belligerent party (and who retain their civilian immunity against attack). This concession, for critics like Schmitt who felt that the ‘under-inclusivity’ of the guide reflected ‘a troubling ignorance of the realities of 21st century battlefield combat’⁴³⁰, allows ‘that organised armed groups belonging to non-State belligerents... constitute legitimate military targets according to the same principles as regular combatants... for as long as they assume a continuous combat function’⁴³¹ and for the entire duration of their formal or functional membership.

At all times it is evident that the Interpretive Guide adheres to the longstanding IHL principle of presumptive civilian status and immunity against direct attack in cases of doubt. The Interpretive Guide is also clear that, even while participating directly in hostilities, these civilian participants retain their primary civilian status, albeit without immunity against direct attack during their active and direct participation in hostilities. Their participation in hostilities does not render them authorised combatants, which is why they face criminal prosecution for their unauthorised participation in hostilities, in some instances on serious charges of perfidy. Nevertheless, the cessation of their participation in the hostilities restores their full civilian immunity against direct targeting.

While there was criticism directed at aspects of the Interpretive Guide, mostly on the grounds that it was under-inclusive, even those critics concede that ‘the three constitutive elements reflect factors that undoubtedly must play into such an analysis’⁴³², and that the Interpretive Guide is ‘superior to the various ad hoc lists because it provides those tasked with applying the norm on the battlefield with guidelines against which to gauge an action’⁴³³. All in all, ‘after careful consideration of the critiques prepared by Watkin, Schmitt, Boothby and Parks, nothing indicates that the ICRC’s interpretive guidance is substantively inaccurate, unbalanced, or otherwise inappropriate, or that its recommendations cannot be realistically translated into operational practice’⁴³⁴. More importantly the guide’s cautious interpretation of direct

⁴²⁹ Boothby ‘“And For Such Time As”: The Time Dimensions to Direct Participation in Hostilities’ at 757.

⁴³⁰ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 739.

⁴³¹ Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 914.

⁴³² Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 739.

⁴³³ Melzer ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 877.

⁴³⁴ *Idem* at 915.

participation in hostilities ensures that the fundamental principles of distinction and civilian immunity, upon which all of IHL are built, are observed.

CHAPTER 5

THE COMBATANT STATUS OF 'UNDER-AGED' CHILD SOLDIERS RECRUITED BY NON-STATE-ARMED GROUPS IN INTERNATIONAL ARMED CONFLICTS, IN LIGHT OF THE INTERNATIONAL HUMANITARIAN LAW NOTION OF DIRECT PARTICIPATION IN HOSTILITIES¹

5.1 Introduction

Children have featured in historical accounts of the earliest conflicts as 'lookouts, spies'², 'drummer boys, messengers, porters, and servants'³. However since the mid 20th century, the role of child soldiers has undergone significant transformation in the extent of their recruitment⁴ (both locally and across borders⁵), their increasing youthfulness (some reportedly as young as

¹ This chapter is based on two articles entitled: 'Targeting and Prosecuting 'Under-aged' Child Soldiers in International Armed Conflicts, in Light of the International Humanitarian Law Prohibition Against Civilian Direct Participation in Hostilities' (2012) *Comparative and International Law Quarterly of South Africa* (forthcoming) and 'The Combatant Status of 'Under-aged' Child Soldiers Recruited by Non-State Armed Groups in International Armed Conflicts' submitted for publication to the (2012) *African Yearbook of International Humanitarian Law* (awaiting review).

² Rachel Brett and Margaret McCallin (1998) *Children the Invisible Soldiers* Radda Barnen: Sweden at 20.

³ Anna Cataldi and Jimmie Briggs 'Child Soldiers' *Crimes of War* available at <http://www.crimesofwar.org/a-z-guide/child-soldiers> (accessed 3 August 2011); David M Rosen 'Who is a Child? The Legal Conundrum of Child Soldiers' (2009) 25 *Connecticut Journal of International Law* 81 at 85.

⁴ Currently there are approximately 300 000 child soldiers deployed in seventy-five percent of all armed conflicts in about fifty countries (Coalition against Child Soldiers, *Child Soldiers: Global Report* (2008) available at <http://www.child-soldiers.org/library/global-reports> (accessed 3 June 2011) at 22). As Brett and McCallin rightly point out - 'almost by definition information on child soldiers is out of date before it is published' (Brett and McCallin *Children the Invisible Soldiers* at 31). Children have served 'in government forces, paramilitaries, or in opposition forces ... in the following States: In Africa: Algeria, Angola, Burundi, Chad, DRC, Eritrea, Ethiopia, Djibouti, Liberia, Rwanda, Sierra Leone, Somalia, South Africa, Sudan, and Uganda. In the Americas: Colombia, Ecuador, Guatemala, Mexico and Peru. In Europe: Bosnia and Herzegovina, Croatia, United Kingdom/Northern Ireland, Turkey/Kurdistan, and the Russian Federation/Chechnya. In the Middle East/Persian Gulf: Israel/occupied territories, southern Lebanon, Iran, and Iraq/Kurdistan. In Asia: Afghanistan, Burma, Cambodia, India/Kashmir, Indonesia/East Timor, Myanmar, Nepal, the Philippines, Papua New Guinea, Sri Lanka, Pakistan, Solomon Islands and Tajikistan, and Uzbekistan (Nsongurua J Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' (2006) 20:1 *Temple International and Comparative Law Journal* 57 at 61-62 and 65; Center for Defense Information 'Defence Monitor: The Invisible Soldier' (1997) XXVI:4 (DC-I.S.S.N. # 0195-6450) available at <http://www.cdi.org/dm/1997/issue4/> (accessed 1 February 2012)). The Sudan People's Liberation Army alone is reported to have recruited in excess of 20 000 child soldiers, while the Lord's Resistance Army (LRA) is estimated to have abducted in the region of 26 000 children (*BBC News* 'South Sudan to End Use of Child Soldiers' (31 August 2010) available at <http://www.bbc.co.uk/news/world-africa-11135426> (accessed 5 August 2011)); Watchlist 'Sudan's Children at a Crossroads' (2007) available at http://watchlist.org/reports/pdf/sudan_07_final.pdf (accessed 31 August 2010) at 23; United Nations (U.N.) (2011) *Report of the Secretary-General to the Security Council (A/65/820-S/2011/250)*, issued on 23 April 2011.

⁵ Armed groups in Chad and the Democratic Republic of Congo (DRC) are reported to have recruited refugee children from Rwanda and Sudan, while the LRA is reported to have

eight⁶ years of age), their degree of military involvement⁷, and most significantly that the vast majority are being recruited by non-State-armed groups⁸. In recent armed conflicts, child soldiers - often drugged into a state of irrational fearlessness - have acted as 'regular soldiers, guerrilla fighters, cooks'⁹, human shields¹⁰, porters¹¹, lookouts and spies¹², and in the case of young girls, have been offered as 'sex slaves to the armed forces'¹³. Of course the data detailing the extent of their involvement in armed conflict is at best an underestimation. As Brett and McCallin point out, child soldiers are often invisible because those who employ them often either deny their existence, or falsify their ages¹⁴. Singer reports that child soldiers featured as combatants in sixty-eight percent of recent and ongoing conflicts, and in eighty percent of these instances the children are under fifteen years of age¹⁵. 'In short, the participation of children in armed conflict is now global in scope and massive in number'¹⁶.

abducted children from Uganda, Sudan, the DRC and the Central African Republic (CAR) (Coalition Against Child Soldiers *Child Soldiers: Global Report* at 17 and 23).

⁶ Amnesty International 'In the Line of Fire: Somalia's Children Under Attack' (July 2011), available at <http://www.amnesty.org/en/library/info/AFR52/001/2011/en> (accessed 6 August 2011). In 2002 the Joint Army Commission of the U.N., which was investigating the situation in the Congo, reported that 'children accounted for fifty percent of the three hundred and fifty-thousand total soldiers being used' in the Congo, and they estimated that 'ten percent were under twelve years of age, thirty percent were between twelve and fifteen years of age and twenty per cent were between sixteen and eighteen years of age' (Justin Coleman 'Showing its Teeth: The International Criminal Court Takes On Child Conscription in the Congo, But is its Bark Worse Than Its Bite?' (2007-2008) 26 *Penn State International Law Review* 765).

⁷ In the DRC most children, recruited in 2010 into non-State-armed groups, were used in military operations (U.N. *Report of the Secretary-General to the Security Council*; Coalition Against Child Soldiers *Child Soldiers: Global Report* at 19).

⁸ Singer reports that sixty percent 'of the non-State armed forces in the world today deliberately make use of child soldiers' (Peter Warren Singer (2005) *Children at War* Pantheon Books: USA at 95). Even the private security industry has made use of child soldiers (Francesco Francioni and Natalino Ronzitti (eds) (2011) *War by Contract: Human Rights, Humanitarian Law and Private Contractors* Oxford University Press: Oxford at 266). In figures quoted by the International Criminal Court (ICC), it is estimated that 'over eighty-five percent of the LRA's forces are made up of children', bolstering the numbers of 200 core members to 14 000 soldiers (Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 65; Singer *Children at War* at 95), and a U.N. report released in 1999 maintained that the Taliban were enlisting child warriors younger than fourteen years of age in Afghanistan (Anatole Ayissi 'Protecting Children in Armed Conflict: From Commitment to Compliance' (2002) available at <http://www.unidir.org/pdf/articles/pdf-art1727.pdf> (accessed 28 December 2011) at 10). What is not covered by this piece though, is any analysis of non-State-organised armed groups *per se*, and the controversy around how IHL deals with such groups.

⁹ Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 61.

¹⁰ Feigning protected civilian status to shield military targets from attack.

¹¹ It is not uncommon for children to be used to transport contraband items through checkpoints, where they are less likely to be searched.

¹² Coalition Against Child Soldiers *Child Soldiers: Global Report* at 22. According to Brett and McCallin 'many of the case studies refer to a special preference for using children as look outs, messengers and for intelligence work' (Brett and McCallin *Children the Invisible Soldiers* at 95).

¹³ U.N. *Report of the Secretary-General to the Security Council*.

¹⁴ Brett and McCallin *Children the Invisible Soldiers* at 19.

¹⁵ A study conducted in Asia estimated the average age of child soldiers at thirteen years of age, while a similar study conducted in Africa concluded that over sixty percent of all child soldiers in Africa were under fourteen years of age (Singer *Children at War* at 28-29).

¹⁶ Singer *Children at War* at 16.

Just what is meant by the term ‘child soldier’¹⁷ has also undergone significant legal scrutiny in recent years. While most international treaties and customary international law set the minimum age for recruitment into the the States armed forces or armed groups, at fifteen years of age¹⁸, there has been significant international pressure to increase this minimum age to eighteen years of age¹⁹.

Despite redoubled efforts by a myriad of international organisations, including the U.N. Security Council²⁰, UNICEF, many regional organisations²¹, the International Committee for the Red Cross (ICRC), the U.N. High Commissioner for Human Rights, and NGO groupings like ‘the Coalition to Stop the Use of Child Soldiers’²², the statistics reveal that under-

¹⁷ The use of the term ‘child soldier’ in this paper is defined according to the Cape Town Principles and Best Practices (27-30 April 1997), adopted at the Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilisation and Social Reintegration of Child Soldiers in Africa’ (Cape Town Principles) available at [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) (accessed 15 December 2011). The Cape Town Principles define a child soldier as ‘any person under eighteen years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms’. This definition is ‘intentionally broadly worded so as to extend its application beyond those employed as combatants, to include ‘cooks, porters, messengers, and anyone accompanying such groups, including girls recruited for sexual purposes and forced marriage’ (UNICEF *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* (2003) available at http://www.unicef.org/emerg/files/option_protocol_conflict.pdf (accessed 6 July 2011) at 14). This definition applies to all child participants, irrespective of whether ‘the authorities contend the child “volunteered” for soldiering’ (Sonja Grover ‘“Child Soldiers” as “Non-Combatants”: The Inapplicability of the Refugee Convention Exclusion Clause’ (2008) 12:1 *The International Journal of Human Rights* 53 at 54).

¹⁸ See section 5.2 for a full discussion of each piece of law.

¹⁹ Particularly in cases where conscription is involuntary, and in cases involving recruitment by non-State-armed groups. The 1997 Cape Town Principles, which has widespread endorsement from the UN, sets the age limit for participation in hostilities at eighteen years, and the U.N. Secretary-General has requested that U.N. peacekeepers preferably be twenty-one years of age, but certainly no younger than eighteen (UNICEF *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* at 14).

²⁰ The U.N. Security Council have frozen assets and imposed travel bans on the leaders of armed groups suspected of recruiting child soldiers in *Côte d’Ivoire*, Rwanda and the DRC (Coalition Against Child Soldiers *Child Soldiers: Global Report* at 14; U.N. *A World Fit for Children* (2002) available at <http://www.unicef.org/specialsession/wffc/> (accessed 7 August 2011) Part III:B3 at para 22). Moreover, the following Security Council Resolutions: 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009) and 1998 (2011) all call for countries to criminalise child recruitment, and the national legislation and military manuals in numerous countries do indeed reflect this stance (U.N. Office of the Special Representative of the Secretary-General on Children and Armed Conflict *The Six Grave Violations Against Children During Armed Conflict* (2009) Working paper no. 1 available at <http://www.un.org/children/conflict> (accessed 5 August 2011).

²¹ 1996 Organisation of African Unity (O.A.U.) Resolution on the Plight of African Children in Situation of Armed Conflicts, 1998 European Parliament Resolution on Child Soldiers, 1999 Declaration by the Nordic Foreign Ministers Against the Use of Child Soldiers, 1999 Berlin Declaration on the Use of Children as Soldiers, 1999 Montevideo Declaration on the Use of Children as Soldiers, 1999 Maputo Declaration on the Use of Children as Soldiers, 2000 Organisation of American States’ Resolution on Children and Armed Conflict, and the 2001 Amman Declaration on the Use of Children as Soldiers.

²² The umbrella organisation was formed in 1998 and comprised Amnesty International, Human Rights Watch, Save the Children, Jesuit Refugee Service, the Quaker U.N. Office - Geneva, and International Federation *Terre des Hommes* (Singer *Children at War* at 142).

aged and forcible 'recruitment' remains widespread²³, especially when it comes to non-State-armed groups²⁴. Of the fifty-six armed groups who engage in the unlawful recruitment of child soldiers, sixteen appear on the U.N. Secretary-General's watch-list for being in persistent violation of international law for more than five years²⁵.

While the project of pursuing and prosecuting the warlords who persist in recruiting under-aged child soldiers is important²⁶, I have chosen instead to focus this piece on the issue of how one assigns international humanitarian law (IHL) status to these under-aged child soldiers in international armed conflicts. As Moodrick-Even Khen correctly points out, 'most efforts are aimed at reducing the number of children recruited into armed forces and criminalising their recruiters, whereas relatively less attention has been directed at reconsidering the legal status of children participating directly in hostilities and the rules for their targeting'²⁷. 'This lacunae in IHL is especially relevant ... for the incorporation of new irregular actors, such as children, into the battlefield'²⁸.

From the earliest IHL treaties there are references made to the special protection and respect afforded children, because of their youthfulness²⁹. The majority of these child-focused protections build on the assumption that children were to be automatically assigned civilian status, and as such they were restricted from participating in hostilities³⁰. Without any authorisation to participate in hostilities, children were immune from attack and were to be respected and protected. As is the case with any civilian, children 'who are taking no part in the hostilities and whose weakness makes them incapable of contributing to the war potential of their country... appear to be particularly deserving of protection'³¹. However, IHL also states that the moment a civilian participates directly in hostilities, they lose their civilian immunity from direct targeting, and can be prosecuted for their unauthorised participation in

²³ The use of child soldiers has been of particular concern in Africa, but large numbers of children are 'being deployed as soldiers throughout the world, including Europe, Asia, the Americas and the Middle East' (Jay Williams 'The International Campaign to Prohibit Child Soldiers: a Critical Evaluation' (2011) 15:7 *The International Journal of Human Rights* 1072).

²⁴ Coalition Against Child Soldiers *Child Soldiers: Global Report* at 17.

²⁵ Watchlist 'Next Steps to Protect Children in Armed Conflict: Briefing Note to the U.N. Security Council' (June 2011) available at <http://www.watchlist.org> (accessed 6 August 2011) at 12; U.N. Report of the Secretary-General 'Children and Armed Conflict' (26 April 2012) A/66/782-S/2012/261 available at http://www.auswaertiges-amt.de/cae/servlet/contentblob/619998/publicationFile/169346/120612_VN_Bericht_Kinder_Konflikte.pdf (accessed 25 September 2012).

²⁶ For more on this aspect of child soldiering, see Shannon Bosch and Juanita Easthorpe 'Africa's Toy Soldiers, Non-State Armed Groups and 'Voluntary' Recruitment: Anything but Child's Play' (2012) 21:2 *African Security Review* (forthcoming).

²⁷ Hilly Moodrick-Even Khen 'Children as Direct Participants in Hostilities' in William C Banks (ed) (2011) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia Studies in Terrorism and Irregular Warfare at 2867-74 (ebook version).

²⁸ Moodrick-Even Khen 'Children as Direct Participants in Hostilities' at 2874-2881.

²⁹ Kurt Ipsen (1995) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 216.

³⁰ Hans-Peter Gasser (1995) 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 210; Noëlle Quénivet and Shilan Shah-Davis (2010) 'Confronting the Challenges of International Law and Armed Conflict in the 21st Century' (Chapter 1) in Noëlle Quénivet and Shilan Shah-Davis (eds) *International Law and Armed Conflict: Challenges in the 21st Century* TMC Asser Instituut, Martinus Nijhoff Publishers: Netherlands at 16.

³¹ Howard Mann 'International Law and the Child Soldier' (1987) 36 *International and Comparative Law Quarterly* 32 at 35.

hostilities³². Given the serious legal implications which flow from one's IHL status in international armed conflicts, including whether one is afforded prisoner of war (POW) status and immunity from prosecution for participating in hostilities, it is high time that the question of the child soldier's IHL status is explained. In particular, I wish to consider the case of the under-aged child soldier (i.e. under fifteen years of age), who is recruited into a non-State-armed group³³, and who participates directly in an international³⁴ armed conflict. At this juncture it is useful to note that while the under-aged recruitment of child soldiers is prohibited under IHL, and the actions of these unlawfully recruited child soldiers might constitute direct participation in hostilities, those actions themselves are neither 'neither prohibited nor privileged'³⁵ according to the ICRC Interpretive Guide. What is crucial however, is understanding that these actions which amount to direct participation in hostilities do compromise the immunity from direct targeting, which is otherwise enjoyed by civilians in situations of armed conflict.

In 1994, when Goodwin-Gill and Cohn published their study on the role of children in armed conflict, they concluded that at the time, there were no international armed conflicts in which AP I was 'applied to the benefit of children'³⁶. Eighteen years later, the growing involvement of children in armed

³² Ipsen (1995) 'Combatants and Non-combatants' at 211.

³³ I have chosen to focus this piece on those child soldiers recruited into non-State-armed groups, because these instances are more statistically significant, and the legal regime applicable under IHL to non-State-armed groups is more complicated than that applicable to the recruitment of child soldiers into the State's armed forces.

³⁴ IHL is divided into a body of rules that applies to international conflicts, and another vastly different legal regime that applies to internal armed conflicts. I have chosen to restrict my focus here to international armed conflicts, because it is within the legal regime specifically applicable to international armed conflicts where one finds the legal allocation of combatant and POW status, a status that under both customary IHL and conventional IHL 'is strictly limited to international armed conflicts' (Robert Goldman and Brian Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' (2002) *ASIL Task Force Paper* available at <http://www.asil.org/taskforce/goldman.pdf> (accessed 21 February 2012) at 1). Common article 2, found in all four of the 1949 Geneva Conventions, defines what constitutes an 'international armed conflict' as, 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the State of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance' (1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) of August 12 (1950) 75 *U.N. Treaty Series* 31; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) of August 12 (1950) 75 *U.N. Treaty Series* 85; 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GC III) of August 12 (1950) 75 *U.N. Treaty Series* 135; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) of August 12 (1950) 75 *U.N. Treaty Series* 287). The 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1979) 1125 *U.N. Treaty Series* 3, article 1(4), includes within the parameters of an international armed conflict, 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination'.

³⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 83.

³⁶ 'There are no recent conflicts in which AP I has been applied to the benefit of child soldiers generally, because one or both of the parties to the conflict has not ratified it or made the necessary declaration'. Such was the case in the war between Iran and Iraq, and that between Ethiopia and Eritrea (Guy Goodwin-Gill and Ilene Cohn (1994) *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute Geneva*

conflicts, including international armed conflicts (as Iraq³⁷ and Afghanistan can attest), suggest that the issue of child soldiers is likely to become more prevalent.

I will begin by setting out the existing international legal framework (found in IHL, international and regional human rights law, international criminal law and customary international law) - which dictates when 'children'³⁸ may lawfully be recruited by non-State-armed groups. I will then turn to explore the IHL framework for assigning combatant status to under-aged child soldiers recruited by non-State-armed groups. In exploring this topic, I will discuss when the activities of children may compromise their otherwise protected civilian status, and expose them as legitimate military targets. I will explore the question of how one assigns combatant and prisoner of war status when these under-aged child soldiers are recruited into non-State groups (considering their age, and the possibility that their recruitment may be involuntary). Lastly, I end off by discussing the possibility of prosecuting under aged-child soldiers where they are suspected of committing war crimes during international armed conflicts.

5.2 The international law response to the issue of recruiting under-aged child soldiers: IHL, international and regional human rights law, international criminal law, and evolving customary international law

i. International humanitarian law

In almost every traditional culture there is reference to the belief that children should be excluded from warfare³⁹. While historically there were compelling and pragmatic reasons for excluding children from the theatre of warfare, based largely around the belief that 'adult strength and training were needed to use pre-modern weapons'⁴⁰, this is no longer the case in modern armed conflicts⁴¹.

While the very early IHL treaties⁴² expressed the view that 'children should be especially protected against warfare'⁴³, one had to read into the

Clarendon Press: Oxford at 63 and 66). Iraqi soldiers have confirmed that 'the Iranian child soldiers against whom they fought were the most difficult because "they had not fear", and an army without fear is the most dangerous army in the world' (Geraldine Van Beuren 'The International Legal Protection of Children in Armed Conflicts' (1994) 43 *International and Comparative Law Quarterly* 809 at 813).

³⁷ U.S. Special Forces also faced Somali child soldiers in 1993 in Mogadishu, as did NATO forces in Kosovo in 1999 (Singer *Children at War* at 163).

³⁸ The use of the term 'child soldier' in this work is defined according to the Cape Town Principles (see footnote 17).

³⁹ Singer *Children at War* at 9.

⁴⁰ *Idem* at 10.

⁴¹ *Idem* at 14.

⁴² 1924 Geneva Declaration of the Rights of the Child (ICRC) available at <http://www.un-documents.net/gdrc1924.htm>; Maria Dutli 'Captured Child Combatants' (1990) 278 *International Review of the Red Cross* 421 available at <http://www.icrc.org/eng/resources/documents/misc/57jmea.htm> (accessed 15 December 2011).

⁴³ Denise Plattner 'Protection of Children in International Humanitarian Law' (1984) 240 *International Review of the Red Cross* 140 available at <http://www.icrc.org/eng/resources/documents/misc/57jmat.htm> (accessed 15 December 2011).

1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War's (GC IV)⁴⁴ prohibition against 'compulsory labor for those under eighteen' for any prohibition against 'compulsory enlistment of child soldiers'⁴⁵. Only in 1977, the additional protocols (AP I⁴⁶ and AP II⁴⁷) to the four Geneva Conventions (GC), stated for the first time in an international treaty, that the recruitment of child soldiers under fifteen years of age was contrary to IHL⁴⁸. Even today one will not find any IHL provision stating outright that 'a child may never become a combatant'⁴⁹.

In so far as international armed conflicts are concerned, API now dictates that 'States should take all feasible measures'⁵⁰ to ensure that children under fifteen years of age should not take a direct part in hostilities⁵¹. In line with this directive, AP I prohibits 'all States party to the protocol from conscripting children under the age of fifteen into the armed forces'⁵². The ICRC's commentary on the drafting of the two AP's, reveals that arriving at agreement on the fifteen-year age limit was not without lengthy debate⁵³. The initial proposal had been for an eighteen-year age limit, but that proposal was rejected because a number of influential States still had domestic legislation in place that permitted the 'recruitment of children under eighteen years of age, into their armed forces'⁵⁴ (a reality that continues

⁴⁴ 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) of August 12 (1950) 75 *U.N. Treaty Series* 287.

⁴⁵ CG IV article 51; Claire Breen "When Is a Child Not a Child?" *Child Soldiers in International Law* (2007) January-March *Human Rights Review* at 77.

⁴⁶ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1979) 1125 *U.N. Treaty Series* 1391. At present there are 171 States party to AP I.

⁴⁷ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (AP II) (1979) 1125 *U.N. Treaty Series* 609. At present there are 166 States party to AP I.

⁴⁸ ICRC *Children Protected Under IHL* (29 October 2010) available at <http://www.icrc.org/eng/war-and-law/protected-persons/children/overview-protected-children.htm> (accessed 7 August 2011). Whilst GC III makes reference to women POW's, 'no mention at all is made of child POW's' (Françoise J Hampson 'Legal Protection Afforded to Children Under International Humanitarian Law' (1996) Report for the Study on the Impact of Armed Conflict on Children by University of Essex) available at http://www.essex.ac.uk/armedcon/story_id/000578.html (accessed 1 February 2012)).

⁴⁹ Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 61. While GC IV makes no mention of 'child soldiers' *per se*, it does 'afford lesser protection to children between the ages of fifteen and eighteen' (Rosen 'Who is a child? The Legal Conundrum of Child Soldiers' at 88).

⁵⁰ At the ICRC's diplomatic conference tasked with drafting AP I, the initial proposal was for States party to take 'all necessary measures' - a more mandatory demand which failed to achieve State support (Breen "When Is a Child Not a Child?" *Child Soldiers in International Law* at 77).

⁵¹ According to the ICRC's Commentary on AP I, the prohibition found in article 77(1-3) also precludes children under fifteen years of age from voluntarily signing up to gather information, transmit orders, deliver ammunition and food, or participate in acts of sabotage (Breen "When Is a Child Not a Child?" *Child Soldiers in International Law* at 78).

⁵² As Udombana points out - 'voluntary enrolment was not explicitly mentioned... an omission that probably was deliberate'. If one scrutinises the writings of the Rapporteur for the Working Group of Committee III, we find that this was as a result of the belief that 'it would not be realistic to completely prohibit voluntary participation of children under fifteen, especially in occupied territories and in wars of national liberation' (Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 76).

⁵³ Breen "When Is a Child Not a Child?" *Child Soldiers in International Law* at 78.

⁵⁴ *Ibid.* Having said that, the 'majority of States fix eighteen as the age for compulsory military service, and that many States which permit voluntary enlistment at a lower age, nevertheless

today). Consequently, the fifteen year minimum was proposed as a compromise⁵⁵, with a clause tacked on to article 77(2) which stipulates that in the case of recruitment, States party to the protocol should give preference to the oldest when they recruit children between fifteen and eighteen years of age⁵⁶. Initially the ICRC had also proposed that AP I be worded to restrict even 'indirect participation in hostilities, such as the transmission of information, transport of arms and provision of supplies'⁵⁷. However, this proposal was rejected given the perception that such a requirement would be unrealistic in the existing climate which characterised the wars of national liberation⁵⁸.

It is interesting to note that when the wording of AP II was debated, in respect of non-international armed conflicts, States opted for a much more rigorous clause in article 4(3)(c) which reads: 'children ... shall *neither* be recruited in the armed forces or groups, *nor* allowed to take part in hostilities ... regardless of whether the participation is of a direct or indirect nature'⁵⁹. The resultant effect was to impose an absolute ban on the involvement of any children, under fifteen years of age, in situations of internal conflicts. The intended effect of this clause was to deny rebel groups the perceived advantage that they had by being able to recruit child soldiers⁶⁰. In line with this thinking, 'the U.N. Secretary-General demanded that non-State actors involved in conflict not use children below the age of eighteen in hostilities', and he backed this demand with the promise of 'targeted sanctions if they did not comply'⁶¹.

This legal distinction (between the children recruited into non-State-armed groups and those recruited into the State's armed forces) is problematic for child soldiers recruited into non-State-armed groups fighting in armed conflicts of an international character. While AP II contains an outright ban on non-State-armed groups recruiting children less than fifteen years of age, this treaty is not applicable in conflicts of an international character. Having said that, AP I does permit non-State actors, 'involved in "internationalised" conflict within the terms of article 1(4)', the right to unilaterally 'declare their adherence to GC's and API', which Goodwin-Gill

limit the assignment of such recruits to inactive duty' (Goodwin-Gill *Child Soldiers: Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 62).

⁵⁵ Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 76.

⁵⁶ Breen "When Is a Child Not a Child?" *Child Soldiers in International Law* at 78. The ICRC has continued to seek to raise the minimum age from fifteen to eighteen years, for children to participate directly in hostilities. In 1991, the ICRC requested that the Henry Dunant Institute 'undertake a study ... on the recruitment and participation of children as soldiers in armed conflicts, and on measures to reduce and eventually eliminate such recruitment and participation.' The result of the study was the book *Child Soldiers: The Role of Children in Armed Conflict* by Ilene Cohn and Goodwin-Gill (Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 91 and 92).

⁵⁷ Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 61.

⁵⁸ *Idem* at 62.

⁵⁹ According to Goodwin-Gill 'voluntary or indirect participation of those under fifteen is equally ruled out' (*Idem* at 64).

⁶⁰ Rosen 'Who is a child? The Legal Conundrum of Child Soldiers' at 92; Ipsen (1995) 'Combatants and Non-combatants' at 217.

⁶¹ Liesbeth Zegveld (2002) *The Accountability of Armed Opposition Groups in International Law* Cambridge University Press: Cambridge at 63.

and Cohn argue makes many of AP I's provisions (including article 77 on recruitment) binding on 'all parties to the conflict, as opposed only to States'⁶².

ii. International and regional human rights law

As early as 1924, the international community - through the League of Nations - stressed 'the need for special care and protection' for children, when they endorsed the first Declaration on the Rights of the Child⁶³. This was followed in 1948 by the U.N. Universal Declaration of Human Rights⁶⁴, the U.N. Declaration on the Rights of the Child in 1959⁶⁵, and then the U.N. Declaration on the Protection of Women and Children in Emergencies and Armed conflict in 1974⁶⁶. However it was not until 1989, when the U.N. Convention on the Rights of the Child (UNCRC)⁶⁷ became one of the most widely ratified international human rights treaties, that the rights of children were really given effect. A year later, in 1990, the World Summit for Children adopted the World Declaration on the Survival, Protection and Development of Children, which added impetus to the speed with which the UNCRC received the necessary ratifications for it to enter into force. The speed with which the UNCRC attained the required ratifications, prompted international lawyers to suggest that 'the UNCRC became international customary law almost at the time of [its] entry into force'⁶⁸ - a remarkable first for international law. The UNCRC achieved other notable firsts in the field of human rights law: 'unlike many other human rights treaties, the UNCRC has no general derogation clause allowing States to suspend certain rights in times of emergency'⁶⁹. Moreover, the treaty applies to all children under the jurisdiction of a signatory State, and is not restricted to those children who are nationals of the signatory State.

The UNCRC defines 'a child' as 'every human being below the age of eighteen years'⁷⁰, and extends special protections to 'children' in a myriad of circumstances. However, if we examine article 38, the sole provision dealing with the effects of conflict on children, there is a notable departure from the eighteen-year age limit that applies to all the other provisions in the UNCRC.

⁶² Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 123.

⁶³ 1924 Geneva Declaration of the Rights of the Child (adopted by the League of Nations on 26 September 1924) available at <http://www.un-documents.net/gdrc1924.htm> (accessed 15 December 2011). The Declaration had been proposed the year before, by an NGO called Save the Children International Union (Ayissi 'Protecting Children in Armed Conflict: From Commitment to Compliance' at 6; Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 55).

⁶⁴ General Assembly Resolution 217 A (III) (adopted 10 December 1948) available at <http://www.un.org/en/documents/udhr/> (accessed 21 February 2012).

⁶⁵ General Assembly Resolution 1386(XIV) (adopted 20 November 1959) available at http://www.unicef.org/lac/spbarbados/Legal/global/General/declaration_child1959.pdf (accessed 21 February 2012).

⁶⁶ General Assembly Resolution 3318 (XXIX) (adopted 14 December 1974) available at <http://www.ohchr.org/english/law/protectionwomen.htm> (accessed 15 December 2011).

⁶⁷ 1989 U.N. Convention on the Rights of the Child (UNCRC) (1989) 1577 *U.N. Treaty Series* at 3. At present there are 193 States that are party to the UNCRC.

⁶⁸ Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 58.

⁶⁹ Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* 124.

⁷⁰ 'Unless under the law applicable to the child, majority is attained earlier' (article 1).

Sadly, article 38 failed the world's children in perhaps their most notable time of need. As the Swiss delegation pointed out to the Working Group on the UNCRC Protocol, 'there is no reason for lowering the limit ... precisely in a sphere in which the rights of the child are exposed to grave danger'⁷¹. Despite thirteen years of child rights' activism since the Additional Protocols were adopted, the UNCRC could not garner support for a straight-eighteen ban on the recruitment of child soldiers, and instead settled for restating the legal position, as it had been reflected in the AP I in 1977. Child rights' activists argued that the failure to adopt the eighteen years age limit, together with a total ban on any level of participation in hostilities by a child, seemed to undermine the ground that had been gained in the progressive wording of AP II (which 'provides a more absolute and comprehensive prohibition for non-international armed conflicts')⁷².

Two years after the UNCRC entered into force, the UNCRC Committee began discussions on the topic of 'children in armed conflict', with a view to ameliorating the unsatisfactory protection provided by the 'pre-existing fifteen-years-of-age standard for recruitment'⁷³. These discussions led to the appointment in 1994 of Ms Graça Machel, who was tasked with conducting a study into the impact of armed conflict on children. The Machel report⁷⁴ endorsed the position that 'war violated every right of a child'⁷⁵, and not surprisingly 'recommended eighteen years as the minimum age for recruitment into armed forces or groups, and for participation in hostilities'⁷⁶.

Drawing on the findings of the Machel report, the UNCRC Committee drafted the Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflict (OP-AC)⁷⁷, and opened it for ratification in 2000. The main thrust of the Protocol was to increase 'the minimum age for compulsory recruitment and participation in hostilities of children, from fifteen to eighteen years of age, and to explicitly include non-State actors under its coverage'⁷⁸. Although the negotiations on the OP-AC failed to establish a 'straight-

⁷¹ Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 97.

⁷² Daniel Helle 'Optional Protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child' (2000) 839 *International Review of the Red Cross* at 3.

⁷³ Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 92.

⁷⁴ UNICEF *Impact of Armed Conflict in Children* ('the Machel Report') (1996) available at <http://www.unicef.org/graca/> (accessed 1 December 2011).

⁷⁵ Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 92. Another recommendation flowing from the Machel Report was that a 'representative of the Secretary-General' should be appointed to Report on the implementation of the Report. A Ugandan, Olara Otunnu, was the first appointment to this position (Ayissi 'Protecting Children in Armed Conflict: From Commitment to Compliance' at 7).

⁷⁶ Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 93.

⁷⁷ 2000 Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflict, (2000) 2173 *U.N. Treaty Series* 222 (Doc.A/RES/54/263). OP-AC currently has 142 States party to it (including many African States where child soldier recruitment is rife), and it entered into force on 12 February 2002. It is interesting to note that in 2002 the U.S. was pressurised to ratify its signature two years prior to the OP-AC, despite the fact that they had not yet ratified their signature of the UNCRC, or either of the two 1977 AP's (Matthew Happold 'Child Soldiers: Victims or Perpetrators?' (2008) 29 *University of La Verne Law Review* 56). Interestingly, Afghanistan acceded to the Optional Protocol on September 24, 2003.

⁷⁸ Singer *Children at War* at 143.

eighteen' ban across the board, it did impose considerably more stringent demands in cases of recruitment by non-State-armed groups. Echoing the sentiments of AP II, OP-AC imposed the straight-eighteen ban even in cases of voluntary recruitment⁷⁹, and dictated that States party to the Protocol were to criminalise the recruitment of children less than eighteen years of age by non-State-armed groups, by way of the States' domestic legislation⁸⁰. Sadly, the same was not demanded of States with regard to recruitment into the States' armed forces. Under OP-AC, States are obliged to refrain from *compulsory* recruitment (or conscription) of under-eighteens into their armed forces⁸¹, and to undertake to 'raise the minimum age for voluntary recruitment into their armed forces from fifteen to eighteen'⁸². However, as the treaty stands at the moment, States party to OP-AC are legally still permitted to recruit those between sixteen and eighteen years of age, provided the safeguarding requirements set out in OP-AC are met. OP-AC exhorts States to take 'all feasible measures to ensure that under-eighteens who volunteer in the States' armed forces do not take a direct part in hostilities'⁸³. However, OP-AC opted not to adopt the language found in AP II article 4(3)(c), 'which prohibits *any* participation in hostilities'⁸⁴ (even indirect participation).

While the UNCRC had been paralysed by the resistance of some States to the adoption of a straight-eighteen ban, the African Union (AU) took the lead when in 1999 The African Charter on the Rights and Welfare of the Child (ACRWC)⁸⁵ came into force - ten years after it was opened for ratification. The ACRWC is notable for being the first international law treaty that imposes a more stringent straight-eighteen ban on child recruitment and direct participation in hostilities, across the board⁸⁶. Unfortunately, though, it is only binding on the thirty-seven AU member States who have ratified the ACRWC, which means that before the straight-eighteen ban can be applied to non-State-armed groups, these signatory States will have to pass domestic legislation to that effect.

This gradual move towards an eighteen-year minimum for the voluntary recruitment of individuals into the armed forces, is in line with the legal age of majority adopted by most States, where eighteen is considered the legal age

⁷⁹ Article 4(1).

⁸⁰ Article 4(2); Coleman 'Showing its Teeth: The International Criminal Court Takes On Child Conscription in the Congo, But is its Bark Worse Than its Bite?' at 775.

⁸¹ Article 2.

⁸² Article 3(1). Of the 142 States party to the OP-AC, two thirds of States party 'have committed themselves to setting a minimum voluntary recruitment age at eighteen or higher'. OP-AC demands that States obtain informed consent from legal guardians, fully reveal the duties involved in military service, and only permit voluntary sign-up once proof of age is provided (article 3(3)). Despite these safeguards, the 'risk of inadvertent under-age recruitment of children, because of low birth registration rates', is a very real problem, particularly in war-torn African States (Coalition Against Child Soldiers 'Facts and Figures on Child Soldiers' (2009) available at <http://www.childsoldiersglobalReport.org/content/facts-and-figures-child-soldiers> (accessed 12 August 2011) at 22).

⁸³ Article 1.

⁸⁴ Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 94.

⁸⁵ 1990 African Charter on the Rights and Welfare of the Child (adopted by the O.A.U. on the 11 July 1990) CAB/LEG/24.9/49 available at <http://www.unhcr.org/refworld/docid/3ae6b38c18.html> (accessed 12 August 2011). The ACRWC currently has thirty-seven African States party (see http://www.au.int/en/sites/default/files/96Welfare_of_the_Child.pdf (accessed 12 August 2011)).

⁸⁶ Article 22(2).

for voting and full legal responsibility⁸⁷. 'Of the 185 States surveyed, only seven are quoted as having a lower age for compulsory recruitment, and only six had a lower voting age⁸⁸. In fact many States expressed dissatisfaction with the low fifteen-year minimum set out in the UNCRC and OP-AC for voluntary recruitment⁸⁹. There is indeed something 'logically untenable and peculiarly intolerable that the age of recruitment into the army should be less than the age of criminal responsibility or the voting age⁹⁰. It is not clear why we would hold to the view that an unassisted sixteen-year-old child cannot conclude a legal contract (for lack of legal capacity), yet afford them the capacity to volunteer themselves for use in situations of armed conflict.

iii. International criminal law

Against this international treaty law background, it was appropriate that when the International Criminal Court (ICC) was established, pursuant to the Rome Statute in 2002⁹¹, that 'conscripting or enlisting⁹² children under fifteen years into any armed forces, or using them to participate actively in hostilities (in both international and internal conflicts) was listed as a prosecutable war crime⁹³. With the domestic legislation of many nation States still permitting the armed forces to recruit children over fifteen years of age⁹⁴, it is understandable why the drafters of the Rome Statute could not garner support for a straight-eighteen ban. However, as the *travaux préparatoires* of the Rome Statute reveal, this compromise was ameliorated by a very 'broad

⁸⁷ Some States go so far as to set the age of majority between 19 and 21 years, and only 4 States (Brasil, Cuba, Iran and Nicaragua) have dropped the legal age of majority to 16 years (Udombana 'War is not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 97 and 98).

⁸⁸ Brett and McCallin *Children the Invisible Soldiers* at 168.

⁸⁹ Austria, Germany, Colombia, Spain, Uruguay and Germany stated that they felt that the 'age-limit of fifteen years was incompatible with the best interests of the child'. Moreover, in 1999 (at the 27th International Conference of the Red Cross and Red Crescent) 'Belgium, Canada, Denmark, Finland, Guinea, Iceland, Mexico, Mozambique, Norway, South Africa, Sweden, Switzerland and Uruguay pledged support to raise the age-limit for participation in hostilities to eighteen years' (Jean-Marie Henckaerts and Louise Doswald-Beck (2005) *Customary International Humanitarian Law Volume 1: Rules* Cambridge University Press: Cambridge at 96).

⁹⁰ Udombana 'War is not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 97 and 98.

⁹¹ U.N. doc. S/25704 (3 May 1993) 36. At present there are 139 States signatory, and 119 States who have ratified the Rome Statute.

⁹² The words 'conscripting or enlisting' were substituted for the initial proposal, which read merely 'recruiting', so that it would be possible to prosecute someone who did 'not provide for safeguards and inquire the age of the child, even though the child's age appears close to the protected minimum age'. Consequently, under this new wording 'evidence of the accused's willful blindness of the child's age should be sufficient to establish liability under the ICC Statute' (Udombana 'War is not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 86).

⁹³ Articles 8.b.xxvi and 8.e.vii. Out of the proposed options put to the participants at the Rome Diplomatic Conference, which drafted the Rome Statute, this variation was adopted to 'appease the United States, which had argued that the criminalisation of children's involvement in armed conflicts did not reflect customary international law, and that it was a human rights, rather than a criminal law, provision' (Udombana 'War is not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 86).

⁹⁴ The United Kingdom, Australia, India and Canada all permit sixteen year-old children to voluntarily join the military, with China accepting applicants from fifteen years of age (UNICEF 'Database On Age of Child' (2011) (on file with author)).

interpretation' of what acts would amount to 'direct participation of children in hostilities'⁹⁵. Using children in 'active participation in military activities linked to combat such as scouting, spying, sabotage, and the use of children as decoys, couriers, or at military checkpoints', all satisfy the definitional requirements for the crime. Similarly, 'the use of children in direct support functions such as carrying supplies to the front line or activities at the front line itself'⁹⁶, all satisfy the definitional criteria for direct participation in hostilities. The ICC has already issued arrest warrants against five senior Lord's Resistance Army (LRA) members, and 'three members'⁹⁷ of Ituri-based armed groups in the DRC', on charges relating to the recruitment of child soldiers⁹⁸. Thomas Lubanga Dyilo, was the first accused to face prosecution at the hands of the ICC for recruiting as many as 30 000 boys and girls under the age of fifteen, to fight with his militia⁹⁹. Lubanga even went so far as establishing 'a special "Kadogo Unit"... which was comprised principally of children under the age of fifteen'¹⁰⁰. Lubanga's defence was that these child soldiers 'volunteered to join the UPC'¹⁰¹, although the testimonies of many of the child soldiers spoke of large-scale forcible abductions¹⁰². On the 14th March 2012, the court found Lubanga Dyilo guilty of enlisting, conscripting and using 'children under the age of fifteen ... to participate actively in hostilities between 1 September 2002 and 13 August 2003'¹⁰³ ... 'as soldiers and as bodyguards for senior officials including the accused'¹⁰⁴. His sentence is still to be determined, but he could face a life prison term¹⁰⁵.

⁹⁵ UNICEF *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* at 14.

⁹⁶ 'It would not cover activities clearly unrelated to the hostilities, such as food deliveries to an airbase, or the use of domestic staff in an officer's married accommodation' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 487; Coalition Against Child Soldiers *Child Soldiers: Global Report* at 375).

⁹⁷ Germain Katanga was transferred to the ICC in October 2007.

⁹⁸ Coalition Against Child Soldiers *Child Soldiers: Global Report* at 110. However, it must be noted that the Trial Chamber did in its judgment find that the 'armed conflict between the UPC/FPLC and other armed groups between September 2002 and 13 August 2003, was non-international in nature' (*Prosecutor v Thomas Lubanga Dyilo* ICC Public judgment pursuant to article 74 of the statute (14 March 2012) No. ICC-01/04-01/06 2/593 at 567).

⁹⁹ Evidence presented before the court reveals that some of Lubanga's child soldiers were as young as nine (Child Soldier Relief 'Lubanga Trial: Week 13 and 14 in Review' (2009) available at <http://childsoldierrelief.org/2009/05/10/lubanga-trial-week-13-in-review> and <http://childsoldierrelief.org/2009/05/18/lubanga-trial-week-14-in-review/> (accessed 12 August 2011)).

¹⁰⁰ *Prosecutor v Thomas Lubanga Dyilo* ICC Summary of the judgment pursuant to article 74 of the statute (14 March 2012) ICC-01/04-01/06-2843 1/17 SL T at para 31.

¹⁰¹ Wairagala Wakabi 'Lubanga Trial Highlights Plight of Child Soldiers' Commentary trial reports (October 2010) available at <http://www.lubangatrial.org/2010/10/05/lubanga-trial-highlights-plaint-of-child-soldiers> (accessed 14 August 2011).

¹⁰² *The Prosecutor v Thomas Lubanga Dyilo* ICC Decisions on the confirmation of charges (29 January 2007) ICC-01/04-01/06 at para 251. The decision of the court turns on their response to allegations made by the defence team that child witnesses were coached, or paid incentives by the office of the prosecution, to give false evidence against Lubanga (Wairagala Wakabi 'Lubanga Witness Claims his Son Lied to the ICC' (1 February 2010) available at <http://www.lubangatrial.org/2010/02/01/lubanga-witness-claimshis-son-lied-to-the-icc/> (accessed 26 April 2010)).

¹⁰³ *Prosecutor v Thomas Lubanga Dyilo* ICC Summary of the judgment pursuant to article 74 of the Statute' at para 35.

¹⁰⁴ *Ibid.*

¹⁰⁵ Kate Davey and Sarah Pierce (Coalition Against the Use of Child Soldiers) 'Too Young to Fight: A Review of the Laws that Protect Child Soldiers and Children in Armed Conflict' available at <http://childsoldierrelief.org/child-soldiers-csr-reports-on-a-global-crisis> (accessed

While the ICC ‘now stands as the primary international legal forum’ for the prosecution of those recruiting child soldiers, it will not be the first international tribunal to hand down a conviction under international law for recruiting child soldiers. Here the Special Court for Sierra Leone (SCSL)¹⁰⁶, established in 2002, has already achieved a world first. In 2007 the SCSL handed down a forty-five year prison term and two fifty year terms, to ‘three members of the Armed Forces Revolutionary Council¹⁰⁷, and one member of the government-backed Civilian Defence Forces’, on a variety of charges, including the recruiting and use of child soldiers under the age of fifteen years¹⁰⁸. In another world first, the decision of the SCSL to prosecute Charles Taylor marks ‘the first time a former head of State has been brought to trial for the crime of recruiting children’¹⁰⁹. On the 26th April 2012, the SCSL’s Trial Chamber II handed down a guilty verdict on several counts, including the aiding and abetting in ‘conscripting or enlisting of children under the age of fifteen years into armed forces or groups, or using them to participate actively in hostilities, another serious violation of IHL pursuant to article 4(c) of the Statute’¹¹⁰.

While international criminal law is casting an ever-tightening noose around all those who recruit child soldiers, sadly international criminal law has been unable to set the minimum age for prosecuting such recruitment higher than the pre-existing fifteen-year minimum found in IHL and international human rights treaty law.

iv. Evolving customary international law

The measures aimed at protecting children in situations of armed conflict, in IHL, international human rights laws, and international criminal law, have also been endorsed in soft law¹¹¹, international refugee law¹¹², and international

12 August 2011).

¹⁰⁶ Statute of the Special Court for Sierra Leone, available at <http://www.sc-sl.org> (accessed 19 December 2011) at article 4.

¹⁰⁷ *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL Trial Chamber II sentencing judgment (19 July 2007) available at <http://www.sc-sl.org/documents/SCSL-04-16-T-624.pdf> (accessed 22 October 2012) at 36.

¹⁰⁸ U.N. *A World Fit for Children at 7*; Steven Freeland ‘Mere Children or Weapons of War - Child Soldiers and International Law’ (2008) 29 *University of La Verne Law Review* 19. Under article 4 of the statute of the SCSL ‘the abduction and forced recruitment of children under the age of fifteen years into the armed forces’ is a serious violation of IHL, punishable before the court. There was doubt expressed whether this customary law prohibition was ‘recognised as a war crime entailing individual criminal responsibility’, as is the case under the statute of the ICC (Zegveld *The Accountability of Armed Opposition Groups in International Law* at 103).

¹⁰⁹ Coalition against Child Soldiers *Child Soldiers: Global Report* at 32. *Prosecutor of the Special Court v Charles Ghankay Taylor* Case No. SCSL-2003-01-T. For reasons of security, Charles Taylor is facing prosecution at the ICC, but the trial is being conducted under the SCSL’s exclusive jurisdiction.

¹¹⁰ *Prosecutor v Charles Ghankay Taylor* SCSL Trial Chamber II summary judgment (26 April 2011) SCSL-03-1-T at page 44 and paras 37-45.

¹¹¹ The international concern around the plight of children in conflict situations led to the drafting of the non-binding 2007 Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, available at http://www.un.org/children/conflict/documents/pariscommitments/ParisCommitments_EN.pdf (accessed 12 August 2011), and the 2007 Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, available at http://www.un.org/children/conflict/documents/parisprinciples/ParisPrinciples_EN.pdf (accessed 12 August 2011). Both documents exhort States to adopt a ‘straight-eighteen’ ban

labour law¹¹³. It is apparent that the prohibition against the recruitment of children less than fifteen years of age reflects a recognised principle of customary international law, applicable to any recruiters (be they State or non-State actors), in instances of both conscription and voluntary recruitment. However, while the aspiration towards raising the age for recruitment from fifteen to eighteen years of age expressed in the ACRWC and OP-AC are laudable, both these treaties suffer from the same fundamental flaw: non-State-armed groups cannot legally ratify these treaties. International treaty law, 'is a body of rules operates primarily between States ... and has only indirect effect on non-State actors'¹¹⁴. Without their ratification, these human rights law-based obligations do not bind non-government agencies without further domestic legislation on the part of States where these non-State-armed groups are operating¹¹⁵. Consequently, the effectiveness of any attempt to increase the age for recruitment from fifteen to eighteen years of age is heavily reliant on a State's ability to legislate and enforce a more stringent legal framework.

Fortunately, once an IHL principle can be said to have achieved customary international law status, those customary provisions can be

on recruitment into the armed force, as well as initiatives aimed at demobilisation, disarmament and reintegration of child soldiers. Since 1994, thirty-four formal demobilisation processes have been carried out, twenty-two of them in Africa. They cost an average of US\$1 565 per child (Coalition Against Child Soldiers *Child Soldiers: Global Report* at 151).

¹¹² The U.N. High Commissioner for Refugee's Policy on Refugee Children and the Guidelines on Refugee Children (Geneva, August 1988) define recruitment of children from refugee camps as 'not only forced recruitment but also voluntary participation in armed attacks. Equally, support functions, such as carrying arms and ammunition and acting as scouts for military patrols is as unacceptable as more direct functions, such as active combat duty' (at para 26(e)). This policy was updated in 1993 with the U.N. High Commissioner for Refugee's Policy on Refugee Children (6 August 1993) EC/SCP/82 available at <http://www.unhcr.org/refworld/docid/3f9e6a534.html> (accessed 18 December 2011).

¹¹³ The cause has also been championed by the International Labour Organisation, which adopted Convention 182 in 1999. Convention 182 concludes that 'forced or compulsory recruitment of children (under eighteen years of age) for use in armed conflict is among the worst forms of child labour, and calls for programs of action to eliminate child soldiering' (1999 ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 12 August 2011) at article 3(a)). Also the 1973 ILO Convention No. 138 on Minimum Age 'establishes eighteen years as the minimum age for admission to employment or work which by its nature ... is likely to jeopardise the health, safety or morals of young persons' (Brett and McCallin *Children the Invisible Soldiers* at 167).

¹¹⁴ Barbara Fontana 'Child Soldiers and International Law' (1997) 6:3 *African Security Review*, available at <http://www.iss.co.za/pubs/asr/6no3/fontana.html> (accessed 26 December 2011). When a State ratifies a treaty, the 1969 Vienna Convention on the Law of Treaties (1980) 115 *U.N. Treaty Series* at 331 (which entered into force on 27 January 1980), and the principle of *pacta sunt servanda* demand that States act in good faith and ensure that they promulgate the necessary domestic legislation, in accordance with their treaty obligations, so that the treaty can be incorporated into their domestic law. This is the 'traditional approach to the implementation of international human rights instruments in many States', and is necessary in all instances where the 'treaties are not self-executing' (Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 98; Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 56).

¹¹⁵ According to Goodwin-Gill, non-State entities may become bound by the provisions in for example AP I 'if it is recognised as enjoying a sufficient measure of "personality" and had made a valid unilateral declaration of intent to respect the rules of IHL'. Beside two Sudanese groups, most of these non-State-armed groups have not attempted to make any declaration of acceptance of the UNCRC (Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 65).

enforced against 'all parties to a conflict, including non-State actors'¹¹⁶. As the Marten's clause states in AP I:

'in cases not covered by this Protocol or by other international agreements, civilians and combatant remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'¹¹⁷.

In 2005 the ICRC published a study on the IHL principles which could be said to have achieved customary international law status. The study confirmed that the principle that children 'must not be recruited into armed forces or armed groups'¹¹⁸, and must not be allowed to participate in hostilities¹¹⁹ had crystallised into a norm of customary international law. Notably, both the ICC and the Appeals Chamber of the SCSL have stated that 'the recruitment and use of children under fifteen years in armed conflict is also a war crime under customary international law, at least since 1996. Consequently the prohibition is universally binding upon all nations and persons'¹²⁰. However, the same cannot be said of aspirations to raise the recruitment age from fifteen to eighteen years of age at present. In essence this means that non-State-armed groups will not be legally liable for recruiting children over fifteen years of age, unless the jurisdictional State has the requisite legislation in place¹²¹ to prosecute the recruitment of children under eighteen years of age, and possesses the judicial clout to enforce their international treaty obligations. Since non-State-armed groups are the main culprits when it comes to recruiting child soldiers, it is worrying that only twenty States have domestic legislation in place to criminalise the recruitment of child soldiers¹²². Since there is this disconnection between what States sign up to, and what they actually enforce or criminalise, the plight of child soldiers is heavily dependent on the application of customary international law. As already noted, this

¹¹⁶ 'A treaty rule may bind non-parties if it becomes a part of international custom'.

Unfortunately, at present the OP-AC has not attained customary law status, although it might attain such status in the future (Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 103-4).

¹¹⁷ AP I article 1(2); Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 56.

¹¹⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 136.

¹¹⁹ *Idem* at rule 137.

¹²⁰ *Prosecutor v Norman* SCSL Decision on preliminary motion based on lack of jurisdiction (child recruitment) (31 May 2004) SCSL-2004-14-AR72(E) at paras 44-45; U.N. *A World Fit for Children* at 7; David Rosen 'Social Change and the Legal Construction of Child Soldier Recruitment in the Special Court for Sierra Leone' (2010) December 1:2 *The Institute for the African Child* (Ohio University 'Childhood in Africa') at 50.

¹²¹ Unless the State adopts the monist approach to international law, in which further domestic law is not required for international treaty obligations to be applicable to individuals in the State's jurisdiction.

¹²² Australia; Azerbaijan; Bangladesh; Belarus; Canada; Colombia; Congo; Georgia; Germany; Ireland; Jordan; Malawi; Malaysia; Netherlands; New Zealand; Norway; Philippines; Spain; Ukraine and United Kingdom. See also the draft legislation of Argentina; Burundi and Trinidad and Tobago (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 484). Notably absent are the African States, which the persistent violators make their hunting ground for prospective child soldiers (Rosen 'Who is a child? The Legal Conundrum of Child Soldiers' at 98).

customary obligation binds non-State actors even without domestic legislation, 'in both international and non-international armed conflicts'¹²³.

While this is a significant achievement in the project of protecting the rights of children in situations of armed conflict, it is still worrying that children as young as eight are still found to be participating in hostilities.

Unfortunately, the reality of armed conflict, lawlessness and potentially failed States all work together to undermine the effectiveness of any obligations to prevent children under fifteen years of age from participating directly in hostilities. Not surprisingly, with the exception of two cases in the DRC, almost no one has been 'prosecuted by national courts for recruiting and using children'¹²⁴. This speaks to the gap which exists between a customary IHL obligation to prevent use of child soldiers, and the judicial and political will necessary to act on those undertakings.

When all is said and done, the reality remains that non-State-armed groups will continue to recruit children to fight in armed conflicts, and these child soldiers are going to pose difficult questions for those opposing these non-State groups. One of the fundamental problems for those engaged in international armed conflict against child soldiers who are fighting on behalf of non-State-armed groups, is assessing their combatant status and the resultant implications which that determination of status has for targeting decisions, POW privileges and the possible prosecution of these child soldiers once they are detained or rendered *hors de combat*.

5.3 The combatant status of under-aged child soldiers recruited into non-State-armed groups in international armed conflicts

i. An introduction to combatant status under IHL

At the heart of IHL, is the notion that every individual in the theatre of international armed conflict must be categorised as either a combatant or a civilian, and serious legal consequences flow from this determination¹²⁵. 'As a matter of customary international law (applicable to all parties to an international armed conflict)¹²⁶ combatant status is extended to all members of the armed forces¹²⁷ (irrespective of whether they are members of a regular or irregular armed force) who:

¹²³ The ICC, in the Lubanga trial, has stated that this customary international law prohibition against the recruitment of child soldiers applied 'equally to international and non-international conflicts, and to State and non-State armed groups' (Wakabi 'Lubanga Trial Highlights Plight of Child Soldiers').

¹²⁴ Coalition Against Child Soldiers *Child Soldiers: Global Report* at 32.

¹²⁵ Ipsen (1995) 'Combatants and Non-combatants' at 65.

¹²⁶ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 3 and rule 4.

¹²⁷ As per the functional based definition set out in API article 43(1) which replaced the membership based regime which existed under GCIII (Daphne Richemond-Barak (2011) 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (Columbia Studies in Terrorism and Irregular Warfare) at 2502-9; 2509-17 and 2495-2502). No longer do irregulars have to prove that they wore a uniform; carried their arms openly; or that they enjoyed political recognition (Nils Melzer (2009) *Targeted Killing in International Law* Oxford University Press: Oxford at 307; Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 87; Goldman and Tittlemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under

- a) 'fight in an international armed conflict;
- b) on behalf of a party to a conflict'¹²⁸;
- c) who subordinate themselves to its command'¹²⁹ and
- d) behave in accordance with the laws of war'¹³⁰

While the new customary law understanding of one's primary combatant status does away with the visibility requirement (previously contained in GCIII article 4A(2))¹³¹, combatants are nevertheless still obliged to distinguish themselves from the civilian population, or risk the forfeiture of their secondary POW status upon capture¹³². Those who enjoy combatant

International Humanitarian and Human Rights Law' at 17-18; Mirko Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' in Francesco Francioni and Natalino Ronzotti (eds) *War By Contract: Human Rights, Humanitarian Law and Private contractors* (2011) Oxford University Press: Oxford at 199 – 200).

¹²⁸ The relationship of belonging may 'be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting' (Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 18).

¹²⁹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 4.

¹³⁰ What is key is that the irregulars must 'conduct hostilities on behalf and with the agreement of that party' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* (May 2009) available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609> (accessed 7 August 2011) (*Interpretive Guide*) at 23; Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 18). As Rogers points out 'it is a matter of [a measure of] organisation and discipline, which goes to the root of the definition of armed forces' (Anthony PV Rogers 'Unequal Combat and the Law of War' (2004) 7 *Yearbook of International Humanitarian Law* 3 at 14-15; Fritz Kalshoven and Liesbeth Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (2010 4th ed) Cambridge University Press: Cambridge at 87; Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 200; Richemond-Barak 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' at 2502-9; Christopher Greenwood (1991) 'Customary Law Status of the 1977 Additional Protocols' in Astrid JM Delissen and Gerard J Tanja (Eds) *Humanitarian Law of Armed Conflict: Challenges Ahead* T.M.C Asser Instituut: Martinus Nijhoff Publishers at 107). Some academics maintain that a combatant cannot lose their primary combatant status even if their actions violated IHL (Garth Abraham "'Essential Liberty" Versus "Temporary Safety": The Guantanamo Bay Internees and Combatant Status' (2004) 121 *South African Law Journal* 829 at 844; George Aldrich 'New Life for the Laws of War' (1981) 75 *American Journal of International Law* at 773; Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 20), although they do concede that they will likely face court martial and punishment. While others like Rogers argue that consistent violation of IHL, that goes unpunished 'is strong evidence that the group does not qualify as 'armed forces', since it fails to meet the criterion of an internal disciplinary system' (Rogers 'Unequal Combat and the Law of War' at 16).

¹³¹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 15 and rule 106.

¹³² *Idem* at rule 106; Knut Ipsen (2008) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 93. 'In the whole of API, article 48 (parties shall at all times distinguish between the civilian population and combatants) 'may be its most cardinal provision' (Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 86).

status¹³³ are then authorised to participate directly in hostilities¹³⁴. Until they surrender, are captured, or are rendered *hors de combat*¹³⁵, this authorisation makes it permissible for the opposing force to treat combatants as legitimate military objectives, and target them for attack¹³⁶. Once captured, their primary combatant status translates into secondary POW privilege¹³⁷, and affords them immunity from prosecution for their participation in hostilities, provided they have observed the laws of war during hostilities¹³⁸.

Every person, who is not obviously a traditional combatant or a member of the *levée en masse*, and who falls into enemy hands, is presumed to have protected civilian status, until their status can be accurately determined by a competent tribunal¹³⁹. Amongst this 'civilian' category we find ordinary civilians and those non-combative 'persons accompanying the armed forces' (like civilian contractors)¹⁴⁰. Civilian status comes with the benefit of immunity from attack, and the right to be shielded against the effects of the conflict. These perks are of course solely dependent on the civilian not compromising his protected status by playing any part in the hostilities. Civilians who do participate in hostilities, without the necessary authorisation, are sometimes referred to as 'unlawful or unprivileged' combatants¹⁴¹, but in fact there is no such legal category. The consequences for being found participating directly in hostilities without the requisite

¹³³ In this category we find not only the 'traditional combatant', but also the '*levée en masse*', which is the term given to 'the inhabitants of a country which ... spontaneously take up arms to resist the invading troops without having time to form themselves into an armed force. Such persons are considered combatants if they carry arms openly and respect the laws and customs of war' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 18).

¹³⁴ There is an exception to this general rule that combatants are authorised to participate in hostilities: 'civilians accompanying the armed forces without actually being members thereof, and members of crews of the merchant navy and of civil aircraft, are not entitled to take a direct part in hostilities. In the event of such participation as unprivileged belligerents they must expect to be prosecuted in the same manner as all other civilians who are prohibited from taking a direct part in hostilities'. They are the only categories of civilians who upon capture acquire POW status (Ipsen (1995) 'Combatants and Non-combatants' at 105 and 107).

¹³⁵ Which means disabled or injured.

¹³⁶ Steven Oeter (1995) 'Methods and Means of Combat' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press: Oxford at 155. As Solis correctly points out 'a combatant remains a combatant when he/she is not actually fighting' and 'a lawful combatant enjoys the combatant's privilege, but also is a continuing lawful target' (Gary Solis (2010) *The Law of Armed Conflict: International Humanitarian Law in War* Cambridge University Press: New York at 188).

¹³⁷ 1907 Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention of 18 October 1907 (HR) article 3(2), GC III article 4A(1-3), AP I article 44(1).

¹³⁸ Ipsen (1995) 'Combatants and Non-combatants' at 93, Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 2. Members of the regular armed forces who fail to observe the laws of war do not on account of that fact lose their combatant status, or their 'right to be treated as a POW'. It may, however, be grounds for a military court martial to prosecute and punish them for this omission (Claude Pilloud, Yves Sandoz and Bruno Zimmermann (1987) *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* Martinus Nijhoff Publishers: Geneva at 511, GC III articles 4, 5 and 85).

¹³⁹ AP I article 45(1).

¹⁴⁰ GC III article 4A(4), AP I article 50(1), Ipsen (1995) 'Combatants and Non-combatants' at 65.

¹⁴¹ Ipsen (1995) 'Combatants and Non-combatants' at 68.

authorisation are dire. Not only does one temporarily lose the immunity from attack normally afforded to civilians, but unauthorised participants also become legitimate military targets for attack, for so long as they persist in their participation in hostilities¹⁴². Once captured, unauthorised participants are not treated as POWs (which is a privilege extended only to lawful combatants) - instead they may face criminal prosecution under the State's domestic legislation, solely on the basis that they participated in the hostilities without the requisite authorisation¹⁴³.

IHL has for some time already acknowledged the presence of children in the theatre of war. However, most of the provisions dealing with child soldiers have dealt exclusively with children who are 'enrolled in the armed forces' or who take 'part in a mass uprising of the population (*levée en masse*)'¹⁴⁴. And in these instances, it is argued that these child soldiers 'do in fact have combatant status and are *ipso facto* entitled to prisoner-of-war status if captured'¹⁴⁵. I turn now to explore the combatant status of the vulnerable under-aged child soldiers who are participating in international armed conflicts on behalf of non-State-armed groups, who may or may not fulfill the criteria of an 'armed force' as defined in AP I article 43(1).

ii. Under-aged child soldiers 'recruited' into non-State-armed groups - 'civilians' participating directly in hostilities

IHL has always regarded 'children' as a subset of the group of those afforded civilian status in international armed conflicts, and protected against the effects of warfare by GC IV¹⁴⁶ and AP I¹⁴⁷. More especially, children have enjoyed preferential treatment in situations of armed conflict owing to their special developmental needs¹⁴⁸. In the words of AP I:

'children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall

¹⁴² Grover 'Child Soldiers' as "Non-Combatants": The Inapplicability of the Refugee Convention Exclusion Clause' at 56.

¹⁴³ Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 2.

¹⁴⁴ Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 63; Dutli 'Captured Child Combatants'.

¹⁴⁵ *Ibid.* Since the injunction contained in AP I article 77(2) (against recruiting children under fifteen years of age) is aimed at the State and not the child, 'children under fifteen years of age who, are recruited or are enrolled as volunteers in the armed forces, also have combatant status and will if captured have POW' status since there is no minimum age requirement for POW status (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 4).

¹⁴⁶ GC IV 'contains numerous provisions benefiting or protecting children both as civilians and in their own right' (Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 121).

¹⁴⁷ AP I articles 77 and 78.

¹⁴⁸ These include: 'free passage of assistance intended for children under fifteen (GC IV article 23); requiring the occupying power to facilitate the good functioning of institutions for the care of children in occupied territory (GC IV article 50(1)); provision of food supplements to interned children (GC IV article 81(3)); moreover there are several provisions dealing with the protection of the family unit which afford special protections to children (AP I articles 77(4) and 74), holding detained children in special facilities (AP I article 77(4)), and lastly the prohibition against imposing the death penalty for infringements committed by children (AP I article 77(5)).

provide them with the care and aid they require, whether because of their age or for any other reason¹⁴⁹.

Having said that, these special privileges extended to children are conditional upon their preserving their primarily civilian status. The full enjoyment of these privileges is necessarily restricted, the moment the child elects to compromise 'their civilian status by participating directly in hostilities'¹⁵⁰. The consequence of a decision to participate in hostilities can result in the loss of their 'inviolability as non-combatants', and can make them a legitimate military target¹⁵¹. Given the dire consequences which flow from this compromise of their civilian status, some have argued that children 'must be considered as non-combatants in that they, unlike adult soldiers, have no unqualified right under international law to directly participate in armed conflict'¹⁵². Grover, for example, argues that when children¹⁵³ (under eighteen years of age) participate directly in hostilities they must be treated as protected civilians and non-combatants, even where they are voluntarily recruited¹⁵⁴. Grover bases her argument on several assertions: firstly, IHL 'deems their [children's] participation in hostilities as abnormal', and IHL prohibits their recruitment and participation in hostilities, which Grover argues necessarily denies them 'an unqualified right to participate in hostilities'¹⁵⁵. Secondly, Grover cites the 'presumption of civilian status, which prevails in cases of doubt'¹⁵⁶, as the authority for her position that 'children ... taking a direct part in hostilities ... also retain their civilian status'¹⁵⁷. Thirdly, Grover argues that since there is no minimum age requirement for POW status¹⁵⁸, the fact that IHL affords 'special civilian protections to child soldiers under eighteen as opposed to just those protections associated with ordinary prisoner of war status, reflects recognition of the child soldier as a "non-combatant" or "protected civilian"¹⁵⁹.

I believe that Grover has over stated the point on each of these assertions, particularly when one appreciates that she starts from the position that her claim of civilian immunity on the basis of youthfulness applies to all children under *eighteen* years of age. In respect of her first assertion, it is simply not true that the recruitment of children aged fifteen to eighteen always constitutes a breach of international law (unless a particular State has

¹⁴⁹ Article 77 opening paragraph.

¹⁵⁰ Breen "When Is a Child Not a Child?" *Child Soldiers in International Law* at 73.

¹⁵¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 12. A legitimate military target is defined in the 1968 Declaration of St Petersburg as any 'individuals whose death or disablement results in that weakening of the armed forces of the enemy, which is the only legitimate aim in war' (1970) 1 (Eng Supplement) *American Journal of International Law* 95.

¹⁵² 'The general unqualified right of adult combatants to participate directly in combat is set out in AP I article 43' (Grover "Child Soldiers" as "Non-Combatants": The Inapplicability of the Refugee Convention Exclusion Clause' at 56).

¹⁵³ *Idem* at 54.

¹⁵⁴ *Idem* at 56.

¹⁵⁵ *Ibid.*

¹⁵⁶ AP I article 50(1).

¹⁵⁷ Grover "Child Soldiers" as "Non-Combatants": The Inapplicability of the Refugee Convention Exclusion Clause' at 56.

¹⁵⁸ Which means that, in effect, even the youngest child soldier could technically be granted POW status.

¹⁵⁹ Grover "Child Soldiers" as "Non-Combatants": The Inapplicability of the Refugee Convention Exclusion Clause' at 56.

adopted the straight-eighteen ban). The current legal position is that, for the most part, children over fifteen who are voluntarily recruited, would enjoy the right to participate in hostilities as a combatant (and whether this is also true of those recruited into non-State groups would depend on the State's domestic legislation¹⁶⁰). As for her second assertion, that of presumptive civilian status, Grover misses the point that this legal presumption only operates until a competent tribunal can assess the individual's claim to combatant and POW status. It is entirely possible that a child soldier might appear before such a tribunal and be granted combatant and POW status. Lastly, the argument that children under eighteen years of age always qualify for special privileges over and above those afforded regular POWs, just speaks to an understanding that their developmental needs might be more demanding than that of their adult colleagues. It does not necessarily mean that they cannot be classed with combatants. In fact AP I article 77 states '... if in exceptional cases, ... children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse party, they shall continue to benefit from the special protection accorded by this article, whether or not they are prisoners of war' - which seems to suggest that they might acquire POW status (a status which is necessarily reserved for those who enjoy primary combatant status). Ipsen notes that 'children protected under article 77 can only be POW if they have previously attained the primary status of combatants by being unlawfully recruited into the armed forces of one of the parties to the conflict. This is particularly significant because the combatant status protects the child against being prosecuted upon capture for its direct participation in hostilities'¹⁶¹.

It is certainly correct that the blame for the recruitment of children less than fifteen years of age lies at the recruiter's door. However, if 'child soldiers under fifteen [are] arrested, detained or interned by an adverse party due to their soldiering activities, [they] are entitled to receive the special protections afforded child civilians under IHL'¹⁶², although this does not necessarily mean that whilst participating in hostilities they are entitled to complete, protected civilian status.

Mulira, on the other hand, proposes a viewpoint, which I think expresses more accurately the subtle nuances which permeate IHL on this topic. Mulira argues that, 'although the Protocols prohibit the recruitment and participation of children less than fifteen years of age in armed conflicts, those who do decide to participate are recognised as combatants and lose the protections afforded civilians under IHL'¹⁶³. She then goes on to clarify that once captured these child soldiers do enjoy the special treatment afforded to children¹⁶⁴.

The differing viewpoints found in a variety of legal opinions reveal that there is indeed a need to clarify the issue of the IHL status of under-aged child soldiers, especially when they are recruited to fight for non-State-armed

¹⁶⁰ So for example, for those States who had signed up to OP-AC, and who had legislated to enforce the straight-eighteen ban stipulated against non-State-armed groups, in these instances it would be a domestic offence to recruit children under eighteen years of age into non-State-armed groups.

¹⁶¹ Ipsen (1995) 'Combatants and Non-combatants' at 73.

¹⁶² AP I article 77.

¹⁶³ Dorcas B Mulira 'International Legal Standards Governing the Use of Child Soldiers' (2007) Paper 88 LLM Theses and Essays, available at http://digitalcommons.law.uga.edu/stu_llm/88 at 29 (accessed 12 August 2011).

¹⁶⁴ AP I article 77 (3).

groups. Any discussion must take into consideration the myriad of factors which impact upon the assessment - including their age, the voluntariness of their recruitment and with whom they are associated (State armed forces or non-State-armed groups), and what activities they are involved in performing. What I want to explore here is the effect that 'direct participation in hostilities may have on the otherwise civilian status of children (under fifteen years of age) in situations of international armed conflict, where they are recruited into non-State-armed groups. More specifically, I want answers to the question of whether under-aged child soldiers acquire combatant status, and whether they can be prosecuted for their direct participation in international armed conflicts on the side of non-State-armed groups.

An investigation of this sort must start with an analysis of what actions amount to 'direct participation in hostilities'. It is only when child soldiers engage in these 'specific hostile acts'¹⁶⁵ that they compromise their otherwise presumptive civilian status, with its consequent 'protection against direct attack'¹⁶⁶. Their direct participation in hostilities 'does not however result in the loss of their primary civilian status'¹⁶⁷. However, as a consequence of their actions, they do become 'a legitimate target, though only for as long'¹⁶⁸ as they take part in hostilities'¹⁶⁹.

Although the phrase 'direct participation in hostilities' can be found in many IHL treaties, up until 2009 there was no clear guidance on exactly what actions might amount to 'direct participation in hostilities'¹⁷⁰. To this end the

¹⁶⁵ Determining what activities amount to direct participation in hostilities is not dependant on ones 'status, function, or affiliation' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 10). Moreover the scope of what constitutes 'direct participation in hostilities' does not change whether it is carried out by civilians, or members of the armed forces 'on a spontaneous, sporadic, or unorganised basis, or as part of a continuous function assumed for an organised armed force or group belonging to a party to the conflict' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 10).

¹⁶⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* 70. This is based on the 'fundamental principle of the laws of war that those who do not participate in the hostilities shall not be attacked' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 715). According to the ICRC's study into the customary international law status of IHL, no 'official contrary practice was found', and on the whole, the principle that civilians lose their immunity from prosecution when they participate in hostilities is seen as a 'valuable reaffirmation of an existing rule of customary international law' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23).

¹⁶⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 70.

¹⁶⁸ The ICRC's Commentary on AP I article 51(3) 'allows that this would include preparation for combat and the return from combat', but then adds 'once he ceases to participate, the civilian regains his right to the protection under this section ... and he may no longer be attacked' (Eric Talbot Jensen 'Direct Participation in Hostilities' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (2011) at 2003-2012).

¹⁶⁹ Jensen 'Direct Participation in Hostilities' at 1995-2003; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 70. Since the 'loss is temporary', Melzer suggests that it is 'better described as a "suspension" of protection' (Melzer *Targeted Killing in International Law* at 347).

¹⁷⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 12 and 41. The most commonly held opinion is that direct participation in hostilities refers to 'combat-related activities that would normally be undertaken only by members of the armed forces' (Rogers 'Unequal Combat and the Law of War' at 19). Moreover the ICRC's study into customary international law confirms that 'a precise definition of the term "direct participation in hostilities" does not exist' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 22).

ICRC undertook a study and consequently published an Interpretive Guide¹⁷¹ to assist in determining when actions amount to direct participation in hostilities¹⁷². The guide makes it explicit that it only speaks to the 'notion of direct participation in hostilities in so far as it impacts on decisions regarding targeting and military attacks'. It does not propose to deal with issue of 'detention¹⁷³ or combatant immunity'¹⁷⁴. It is in this vein that I have relied upon the guide to assist in determining when the actions of a child soldier might expose them to direct targeting.

*Specific hostile acts which amount to direct participation in hostilities on the part of civilians*¹⁷⁵

'According to the ICRC's Interpretive Guide, in order to qualify as direct participation in hostilities, a specific act must meet three cumulative criteria¹⁷⁶:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

¹⁷¹ Which while not legally binding, it was hoped that it may be accepted 'as a secondary source of international law ... analogous to writings of the "most highly qualified publicists"' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 10; Damien van der Toorn "Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' (2009) available at http://works.bepress.com/damien_van_der_toorn/1 (accessed 23 October 2012) at 22).

¹⁷² The Interpretive Guide was not without its critics. For more on this issue see Michael Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *International Law and Politics* 697; Bill Boothby "'And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 741; Kenneth Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' (2010) 42 *International Law and Politics* 641; Nils Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 831.

¹⁷³ '[I]ts conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty.' (Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 670).

¹⁷⁴ Ryan Goodman and Derek Jinks 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: An Introduction to the forum' (2010) 42 *International Law and Politics* 637 at 638.

¹⁷⁵ It is important to remember that this rule is only intended to be applicable to those who qualify as civilians, and it is the means of determining when their actions result in the loss of their otherwise protected civilian immunity. As Boothby explains 'until the civilian in question again engages in a specific act of direct participation in hostilities, the use of force against him or her must comply with the standards of law enforcement or individual self-defence' (Boothby "'And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' at 755; Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 704).

¹⁷⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 46.

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 (*belligerent nexus*)¹⁷⁷.

The first criterion, the 'threshold of harm' determination, would be satisfied if the actions of child soldiers were 'reasonably expected to result in the infliction of harm'¹⁷⁸ of a specifically military nature¹⁷⁹, or¹⁸⁰ harm of a protected person or object¹⁸¹. In short, if a child soldier was found committing 'acts of violence against human and material enemy forces,' or causing 'physical or functional damage to military objects, operations or capacity'¹⁸², this would satisfy the threshold of harm requirement for a finding of 'direct participation in hostilities'¹⁸³. Moreover, any action on the part of child soldiers which sabotages military capacity, or restricts military 'deployments, logistics and communications'¹⁸⁴, would also satisfy the threshold of harm criteria. Similarly, exercising any form of control over 'military personnel, objects and territory, to the detriment of the adversary', also reaches the required level of harm¹⁸⁵.

Even when no military harm results, the actions of child soldiers might still constitute direct participation in hostilities when child soldiers attack¹⁸⁶ and inflict 'death, injury or destruction upon protected persons or objects'¹⁸⁷ (like 'civilians and civilian objects'¹⁸⁸). In both instances (military harm or harm of protected persons), all that is required is the 'objective likelihood'¹⁸⁹ that the

¹⁷⁷ *Idem* at 47.

¹⁷⁸ The degree of harm includes 'not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict' (*Ibid*).

¹⁷⁹ The term 'military harm should be interpreted as encompassing not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict' (*Ibid*).

¹⁸⁰ From a cursory examination of the criteria it is apparent that test is framed in the alternative 'that is, the harm contemplated may either adversely affect the enemy or harm protected persons or objects' (Schmitt Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 713).

¹⁸¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 47.

¹⁸² *Idem* at 48.

¹⁸³ *Idem* at 47.

¹⁸⁴ *Idem* at 48.

¹⁸⁵ *Ibid*.

¹⁸⁶ The Interpretive Guide relies on AP I article 49's definition of 'attack' which 'does not specify the target, but the *belligerent nexus* of an attack, so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities' (Schmitt Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 723). Legal precedence for this position can be found in the jurisprudence emerging from the ICTY, where it was concluded that 'sniping attacks against civilians and bombardment of civilian villages or urban residential areas' constitutes an 'attack' in the IHL sense (Schmitt Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 723).

¹⁸⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 47.

¹⁸⁸ *Idem* at 49; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 862.

¹⁸⁹ As was discussed at the expert meetings - 'wherever a civilian had a subjective "intent" to cause harm that was objectively identifiable, there would also be an objective "likelihood" that he or she would cause such harm' (Schmitt Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 724). All that is required is 'harm which may reasonably be

act will result in such harm', not necessarily the actual 'materialisation of harm'¹⁹⁰.

At the drafting of the Interpretive Guide, experts were able to agree on a myriad of activities which they felt satisfied either the military harm requirement, or the requirement of harm in the form of death or destruction directed at protected persons¹⁹¹. If we look at the activities which child soldiers are reportedly carrying out: scouting; spying; acting as couriers and porters; transporting detonators; cooking; participating in sabotage activities; clearing and laying landmines; acting as decoys or human shields; being assistants at military checkpoints and providing logistical support¹⁹² - some of these activities feature in the list of 'specific hostile acts'. Certainly, participating in sabotage activities; relaying tactical targeting information; laying or clearing the oppositions' landmines; and acting as human shields, would certainly rise to the threshold of harm required of the first criterion. Furthermore, often times child soldiers are used to 'restrict military deployments' on account of the IHL principle of distinction. According to the ICRC 'where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cross the threshold of harm required for a qualification as direct participation'¹⁹³. In a survey conducted into the activities carried out by child soldiers, it was revealed that ninety-one percent of these child soldiers had seen active combat¹⁹⁴. This alone, however, is not sufficient to arrive at a determination of direct participation in hostilities - the action must be linked to

expected to result from an act in the prevailing circumstances' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 47).

¹⁹⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 47. Schmitt concedes that this is a sensible requirement since it would be 'absurd to suggest that a civilian shooting at a combatant, but missing, would not be directly participating because no harm resulted' (Schmitt *Deconstructing Direct Participation in Hostilities: The Constitutive Elements* at 724).

¹⁹¹ 'Acts of violence against human and material enemy forces'; causing 'physical or functional damage to military objects, operations or capacity'; 'sabotaging military capacity and operations'; 'restricting or disturbing' military 'deployments, logistics and communications' exercising any form of control or denying the military use of 'military personnel, objects and territory to the detriment of the adversary'; 'sabotage or other unarmed activities qualify, if they restrict or disturb logistics or communications of an opposing party to the conflict'; 'clearing mines placed by the opposition', 'guarding captured military personnel to prevent them being forcibly liberated'; 'wiretapping the adversary's high command or transmitting tactical targeting information for an attack'; 'violent acts specifically directed against civilians or civilian objects, such as sniper attacks or the bombardment of civilian residential areas, satisfy this requirement' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 47- 49). Schmitt adds electronic interference, exploitation or attacks on 'military computer networks' to the ICRC's list (Schmitt *Deconstructing Direct Participation in Hostilities: The Constitutive Elements* at 715). While Melzer adds 'building defensive positions at a military base certain to be attacked', and 'repairing a battle-damaged runway at a forward airfield so it can be used to launch aircraft' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 859).

¹⁹² UNICEF *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* at 3; Coalition Against Child Soldiers *Child Soldiers: Global Report* at 22; U.N. *Report of the Secretary-General to the Security Council*.

¹⁹³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 56.

¹⁹⁴ Singer *Children at War* at 77.

the resulting harm or benefit so as to satisfy the direct causation requirement, and lastly there needs to be a *belligerent nexus*.¹⁹⁵

The second leg of the test for direct participation in hostilities (that of direct causation) was formulated in order to exclude 'general war effort'¹⁹⁶ and activities aimed at sustaining war¹⁹⁷, which would otherwise amount to direct participation in hostilities, were it not for the direct causation requirement of the test¹⁹⁸. While these activities are indispensable to the war effort, which in effect does harm the adversary, the concern raised at the drafting of the ICRC's Interpretive Guide, was that these functions are frequently carried out by the protected civilian population.

In order to prevent any of these supportive functions amounting to direct participation in hostilities, the direct causation test requires 'a sufficiently close causal relation between the act and the resulting harm', for it to amount to direct participation in hostilities¹⁹⁹. In other words: the 'harm (which already satisfies the threshold enquiry) must be brought about in one causal step'²⁰⁰. Clearly excluded from the definition of 'acts, which amount to direct participation in hostilities' - are activities that only indirectly cause harm, and mere 'geographic or temporal proximity'²⁰¹ on their own are insufficient without this direct causation²⁰². Having said that, the drafters of the

¹⁹⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 50.

¹⁹⁶ This includes all activities 'objectively contributing to the military defeat of the adversary'. For example 'design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations' (*Idem* at 53).

¹⁹⁷ As the ICRC's Interpretive Guide points out - 'both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities, in fact ... some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is designed to cause the required harm, the general war effort and war sustaining activities also include activities that merely maintain or build up the capacity to cause such harm' (*Idem* at 52). War sustaining activities reach beyond general war effort to include 'political, economic or media activities supporting the general war effort', like for example 'political propaganda, financial transactions, production of agricultural or non-military industrial goods', providing 'finances, food and shelter to the armed forces and producing weapons and ammunition' (*Ibid*).

¹⁹⁸ During the expert meetings, emphasis was placed on the 'idea that direct participation in hostilities is neither synonymous with "involvement in" or "contribution to" hostilities, nor with "preparing" or "enabling" someone else to directly participate in hostilities, but essentially means that an individual is personally "taking part in the ongoing exercise of harming the enemy" and personally carrying out hostile acts which are "part of" the hostilities' (*Idem* at 52 and 53).

¹⁹⁹ *Ibid*.

²⁰⁰ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 866. The act must not only be causally linked to the harm, but it must also cause the harm directly. For example 'the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly' (*Idem* at 54 and 55).

²⁰¹ *Ibid*.

²⁰² Watkin cites the following activities as not satisfying the direct causation test: 'civilians driving military transport vehicles'; 'participating in activities in support of the war or military effort'; 'selling goods to one of the parties to the conflict'; 'expressing sympathy for the cause of one of the parties to the conflict'; 'accompanying and supplying food to one of the parties to the conflict'; 'gathering and transmitting military information'; 'transporting arms and

Interpretive Guide wanted to include under the banner of 'direct participation' - those acts, which are part of a tactical operation, and aimed at causing harm. The ICRC's Interpretive Guide recognises that in the case of collective operations, the resulting harm does not have to be directly caused (i.e. in one causal step) by each contributing person individually, but only by the collective operation as a whole²⁰³. In these instances the direct causation criteria would still be fulfilled, and the civilian would lose their immunity from attack, where their individual 'act constitutes an integral part of a concrete and coordinated tactical (or collective) operation that directly causes such harm'²⁰⁴.

In short, child soldiers will fall foul of the second leg of the test for direct participation in hostilities, if their actions (either alone or part of a coordinated military operation) may 'reasonably be expected to directly - in one causal step - cause harm that reaches the required threshold'²⁰⁵. According to the ICRC's Interpretive Guide, there are a number of activities which will satisfy the direct causation aspect of the three-pronged analysis of direct participation in hostilities²⁰⁶. Certainly participating in sabotage activities,

munitions' and 'providing supplies' (Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' 707). To this list Schmitt adds: 'selling food or medicine to an unlawful combatant'; providing 'logistical, general support, including monetary aid'; 'distributing propaganda supporting those unlawful combatants'; 'working in canteens' and 'working in factories producing munitions' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 708 and 710).

²⁰³ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 865-6; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 55.

²⁰⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 55; Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 102.

²⁰⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 58.

²⁰⁶ The ICRC's Interpretive Guide cites the following as instances which satisfy the direct causation requirement: 'a coordinated tactical operation that directly causes such harm'; 'the identification and marking of targets'; 'the analysis and transmission of tactical intelligence to attacking forces' and the 'instruction and assistance given to troops for the execution of a specific military operation' (*Idem* at 55). Melzer and Ricou-Heaton add to that list 'gathering tactical intelligence on the battlefield' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 867; John Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' (2005) 57 *Air Force Law Review* 155 at 177-8). Watkin includes 'bearing, using or taking up arms'; 'taking part in military or hostile acts, activities, conduct or operations'; 'armed fighting or combat'; 'participating in attacks against enemy personnel, property or equipment'; transmitting military information for immediate use'; 'transporting weapons in proximity to combat operations'; 'serving as guards, intelligence agents, lookouts, or observers on behalf of military force', and 'civilians manning an anti-aircraft gun engaging in sabotage of military installations' (Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' 707). Ricou-Heaton adds 'performing mission-essential work at a military base' and 'providing logistical support' to the list (Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 177-8). While Schmitt cites 'a person who collects intelligence on the army'; 'a person who transports unlawful combatants to or from the place where the hostilities are taking place'; 'a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may'; 'delivering ammunition to combatants'; 'a person who gathers military intelligence in enemy-controlled territory'; 'conducting attacks'; 'capturing combatants or their equipment' and 'sabotaging lines of communication' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 708).

laying landmines, spying which results in gathering and relaying tactical information to attacking forces²⁰⁷, actual combat activities, transporting arms to the frontlines, and guarding functions - would rise to the fall into this category. In particular the ICRC's Interpretive Guide warns that civilians (which includes children) must be cautious that they do not divulge tactical information regarding combatants, or be used as lookouts. Certainly child soldiers used to scout information or act as spies would be seen to be satisfying the direct causation test.

The third, and final leg of the test for direct participation, termed the '*belligerent nexus* test', requires that 'an 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'²⁰⁸. In other words, 'in order to amount to direct participation in hostilities, an act must not only be objectively likely to inflict harm that meets the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another'²⁰⁹.

This nexus is sometimes very difficult to assess, because during armed conflicts gangsters can often engage in criminal activities, which are 'merely facilitated by the armed conflict', while not 'designed to support one party to the conflict by directly causing the required threshold of harm to another party'²¹⁰. As Rogers points out, in 'the case of children throwing petrol bombs or stones at enemy military patrols', members of the patrol will have to assess carefully whether it is just 'criminal activity' or whether the children have forfeited their 'civilian immunity' – thus entitling the military to 'use necessary force in self-defence'²¹¹.

As recruits of non-State-armed groups, these child soldiers will most often be inflicting harm in support of the non-State-armed group which recruited them, to the detriment of the opposing force (be it a State force for another non-State group)²¹². It is important that the harmful action is 'in some way connected to the armed conflict'²¹³, or as Melzer puts it, they are an

²⁰⁷ UNICEF *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* at 3; Coalition Against Child Soldiers *Child Soldiers: Global Report* at 22; U.N. *Report of the Secretary-General to the Security Council*.

²⁰⁸ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 872; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 64.

²⁰⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 64; Kalshoven *Constraints on the Waging of War An Introduction to International Humanitarian Law* at 102.

²¹⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 63 and 64; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 873.

²¹¹ Rogers 'Unequal Combat and the Law of War' at 19.

²¹² Solis cites the following as examples of activities which satisfy the *belligerent nexus* test: 'preparatory collection of tactical intelligence'; 'the transport of personnel'; 'the transport and positioning of weapons and equipment' and 'the loading of explosives in a suicide vehicle' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 204-205).

²¹³ For example a 'prison guard may kill a prisoner for purely private reasons' without his actions amounting to direct participation in hostilities, but were he to engage in 'a practice of killing prisoners of a particular ethnic group during an ethnic conflict would meet the standard' (Schmitt *Deconstructing Direct Participation in Hostilities: The Constitutive Elements* at 723).

‘integral part of armed confrontations’²¹⁴. However, the guidelines do go on to state that if child soldiers are found causing harm in:

- ‘(a) individual self-defence or defence of others,
- (b) in exercising power or authority over persons or territory,
- (c) as part of civil unrest against such authority, or
- (d) during inter-civilian violence,

these acts lack the *belligerent nexus* required for a qualification as direct participation in hostilities²¹⁵, and must be dealt with by means of the regular law-enforcement mechanisms²¹⁶.

Also of importance to questions involving the participation of children in hostilities, is the understanding that ‘the *belligerent nexus* is generally not influenced by factors such as personal distress or preferences, or by the mental ability or willingness of persons to assume responsibility for their conduct’²¹⁷. Consequently, according to the ICRC’s Interpretive Guide, ‘even children below the lawful recruitment age may lose protection against direct attack’²¹⁸. Having said that, part of the *belligerent nexus* requirement is an appreciation that ‘when civilians are totally unaware of the role they are playing in the conduct of hostilities’²¹⁹, or ‘when they are completely deprived of their physical freedom of action’²²⁰, the individual ‘remain[s] protected against direct attack despite the *belligerent nexus* of the military operation in which they are being instrumentalised’²²¹. This is because they cannot be said to be acting (in a meaningful and voluntary sense of the word). Schmitt supports the conclusion that, in the case of children (as a vulnerable group in situations in armed conflict), there needs to be an exception to the voluntariness assessment, on the basis that ‘children are legally incapable of forming the intent necessary to “directly participate” in hostilities’²²². Schmitt agrees with the Interpretive Guide that an activity does not amount to direct participation in hostilities on the basis of the actor’s subjective intent. In his own words, ‘the question is not whether the participants wanted to harm the

²¹⁴ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 861.

²¹⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 64. ‘For example, although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another. If individual self-defence against prohibited violence were to entail loss of protection against direct attack, this would have the absurd consequence of legitimising a previously unlawful attack. Therefore, the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 61; Van der Toorn “Direct Participation in Hostilities”: A Legal and Practical Evaluation of the ICRC Guidance’ at 19).

²¹⁶ Melser ‘Keeping the balance between military necessity and humanity: A response to four critiques of the ICRC’s interpretive guidance on the notion of direct participation in hostilities’ at 873.

²¹⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 59-60.

²¹⁸ *Ibid.*

²¹⁹ For example ‘a driver unaware that he is transporting a remote-controlled bomb’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 60).

²²⁰ For example when ‘involuntary human shields are physically coerced into providing cover in close combat’ (*Ibid.*).

²²¹ *Ibid.*

²²² Michael N Schmitt ‘Human Shields in International Humanitarian Law’ 2008-2009 (47) *Columbia Journal of Transnational Law* 292 at 335.

enemy, but instead whether their actions were of a nature to do so,' wherefore even 'civilians impressed into fighting or children under the age of fifteen can be treated as direct participants even though their participation is, as a matter of fact or law, involuntary'²²³.

The temporal scope of the loss of civilian immunity on the part of child soldiers: the 'for such time as' or the 'continuous combat function' test

Once it has been determined that a civilian is carrying out a specific hostile act which amounts to direct participation in hostilities, the next level of enquiry must address when the loss of civilian immunity starts and ends²²⁴. The notion that direct participation has a temporal limitation has a longstanding history²²⁵ in IHL, and the ICRC's study into the customary international law status of the phrase 'and for such time as', concluded that it was widely recognised as constituting customary international law.²²⁶

While the 'for such time' criterion might reflect customary international law, its practical implementation has not been without controversy. For the most part the controversy lies in that fact that when such a civilian is no longer engaged in direct participation (and consequently no longer poses a threat to the opposition), 'they regain their full civilian immunity from direct attack'²²⁷. This gives rise to the so called 'revolving door' of civilian protection²²⁸. According to the ICRC's Interpretive Guide, the scope of the 'for such time' window will also include 'measures preparatory to the execution of a specific act' ... 'as well as the deployment to and the return from the location of its execution'²²⁹. This was done in order to take into account 'the collective nature and complexity of contemporary military operations', where some activities only result in the cause of harm 'in conjunction with other acts'²³⁰.

The ICRC's Interpretive Guide justifies the revolving door position as being necessary in order to protect the civilian population from erroneous or arbitrary attack²³¹, at times when they do not constitute 'a military threat'²³².

²²³ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 869.

²²⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 65. Until the civilian is performing functions which amount to direct participation in hostilities, all actions which amount to 'the use of force against him or her must comply with the standards of law enforcement or individual self-defence' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 70).

²²⁵ Boothby "And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' 774.

²²⁶ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 885 and 886.

²²⁷ 'Even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 71).

²²⁸ *Idem* at 70.

²²⁹ *Idem* at 65.

²³⁰ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 882.

²³¹ Boothby "And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' at 757; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A

That said, it is worth noting that even when they regain full civilian immunity from attack, these civilians may nevertheless still face ‘prosecution for violations of domestic and international law they may have committed’²³³.

There is, however, always the potential for the ‘revolving door of protection’ to be abused by non-State actors²³⁴, giving these ‘farmers by day and fighters by night’ ... a significant operational advantage²³⁵ and ‘endangering innocent civilians’²³⁶. In response to this concern, the Interpretive Guide mandates that the temporary nature of the suspension of a civilian’s immunity from attack is only afforded civilians who participate in hostilities in a ‘spontaneous, unorganised or sporadic basis’²³⁷. As soon as a civilian is found to be participating in hostilities in a more permanent and organised manner, they are treated as a member of an organised armed group. At the ICRC’s expert meeting it was generally agreed that ‘the distinction between civilians and members of organised armed groups was defensible’²³⁸. Accordingly, ‘members of organised armed groups belonging to a non-State party to an armed conflict’, are not afforded the same protection as the spontaneous and unorganised acts of participation by civilians²³⁹. While this category of participant also loses immunity from direct attack, as is the case with a civilian, they however lose their immunity ‘for as long as they assume their continuous combat function’²⁴⁰, and for the duration of their membership of the group²⁴¹. ‘In other words, the “revolving door” of protection operates based on membership’²⁴², and the individual only becomes a protected civilian once their membership in the group has ceased.

This functional membership ‘requires a lasting integration’²⁴³ into the

Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 886.

²³² Jensen ‘Direct Participation in Hostilities’ at 2235-41.

²³³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 83. The mere fact that they participated in hostilities without the requisite ‘combatant privileges’ exposes them to potential prosecution even if during their participation they observed the laws of war regarding the ‘means and methods of warfare’ (Melzer *Targeted Killing in International Law* at 329).

²³⁴ Van der Toorn “‘Direct Participation in Hostilities’: A Legal and Practical Evaluation of the ICRC Guidance’ at 45.

²³⁵ *Idem* at 19; Rogers ‘Unequal Combat and the Law of War’ at 19.

²³⁶ Van der Toorn “‘Direct Participation in Hostilities’: A Legal and Practical Evaluation of the ICRC Guidance’ at 19.

²³⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 71.

²³⁸ William Fenrick ‘ICRC Guidance on Direct Participation in Hostilities’ (2009) 12 *Yearbook of International Humanitarian Law* 287 at 289.

²³⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 71.

²⁴⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 70. The term ‘continuous combat function’ was conceived at the expert discussions which gave rise to the ICRC’s interpretive guide. Prior to this, the term was not ‘found in treaty law’ (Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 655).

²⁴¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 71; Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 883.

²⁴² ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 72.

²⁴³ Van der Toorn proposed the following ‘objectively verifiable indicia’ of the necessary integration: ‘regular physical association with other individuals affiliated with the group, acting under orders or the command of senior figures, and any other conduct that demonstrates they are seeking to advance the common purpose of the group’ (“‘Direct Participation in Hostilities’: A Legal and Practical Evaluation of the ICRC Guidance’ at 28-29).

armed group'²⁴⁴, and 'includes those who have repeatedly, directly participated in hostilities, in support of an organised armed group, in circumstances indicating that such conduct constitutes a continuous function, rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation'²⁴⁵. Those, who while affiliated with an organised armed group, fail to undertake a continuous combat function, are excluded²⁴⁶ from the loss of protection, on account of their failure to directly participate in hostilities. These 'members of an organised armed group who do not regularly perform combat duties continue to enjoy full civilian protection from attack unless they directly participate'²⁴⁷ in the hostilities. Targeting is limited to 'only those serving in a continuous combat function'²⁴⁸.

According to the Interpretive Guide, 'once a member has affirmatively disengaged from a particular group, or has permanently changed from its military to its political wing'²⁴⁹, he can no longer be regarded as assuming a continuous combat function and must be considered a civilian protected against attack, unless and for such time as he directly participates in hostilities'²⁵⁰. As to how this disassociation from the group needs to be manifested, the Interpretive Guide states that 'disengagement from an organised armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life, or the permanent resumption of an exclusively non-combat function'²⁵¹. Accordingly, an assessment as to whether an individual has disengaged from an organised armed group 'must therefore be made in good faith, and based on a reasonable assessment of the prevailing circumstances, presuming entitlement to civilian protection in case of doubt'²⁵².

The ICRC's approach to those who adopt a continuous combat function has not been without criticism. In particular it raised concern because the specific treaty language which the guide was attempting to interpret, stated that 'civilians lose immunity from attack 'for such time' as they participate directly in hostilities'²⁵³. The ICRC's interpretation effectively arrives at a conclusion which makes it permissible to directly target civilians at *all* times,

²⁴⁴ *Idem* at 7.

²⁴⁵ Jensen 'Direct Participation in Hostilities' at 2141-2149.

²⁴⁶ Included in this exempted group are 'political and administrative personnel, as well as other persons not exercising a combat function' (*Ibid*).

²⁴⁷ Schmitt *Deconstructing Direct Participation in Hostilities: The Constitutive Elements* at 704.

²⁴⁸ Jensen 'Direct Participation in Hostilities' at 2141-2149; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 837-838.

²⁴⁹ However, Melzer warns that 'a member of an organised armed group who changes his function within that group will remain a legitimate military target for as long as the current function at least partially involves his direct participation in hostilities' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 891).

²⁵⁰ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 891.

²⁵¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 72.

²⁵² *Idem* at 73.

²⁵³ Philip Alston 'Study on Targeted Killings' Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (28 May 2010) A/HRC/14/24/Add.6 at para 65. In regard to this point I wish to acknowledge Dr Gus Waschfort of the University of Pretoria for his inciteful comments on earlier drafts of this piece.

provided they are ‘engaged in a continuous combat function’²⁵⁴. The potential increased risk to civilians, posed by the creation of the continuous combat function category, has seen critics of the concept call for the ‘the other constituent parts of the guidance (threshold of harm, causation and belligerent nexus) not [to] be diluted’ so as to adequately protect civilians in times of armed conflict²⁵⁵. Melzer and others who defend the proposed continuous combat function category, cite principle XI²⁵⁶ in the ICRC’s Interpretive Guide as providing the necessary counter balance to prevent the continuous combat function category posing an increased risk to civilians around whom their might be some doubt as to their degree of involvement in hostilities.

In short we can conclude from looking at the ICRC’s guidelines that the concept of ‘direct participation’ extends beyond active participation in combat and military activities, and includes many of the direct support functions which child soldiers traditionally carry out²⁵⁷. Taking cognisance of the ICRC’s Interpretive Guide on what amounts to direct participation in hostilities, it is apparent that many child soldiers will find themselves in breach of the restrictions against specific hostile acts, which amount to civilian participation in hostilities. Moreover, since these child soldiers are recruited into fulltime membership of organised armed groups, it is very possible that their performance of these specific, prohibited hostile acts, will amount to evidence of a continuous combat function. As a consequence of these two factors these child soldiers will likely ‘lose their entitlement to protection against direct attack’²⁵⁸, which would normally apply to civilians. Consequently those who perform ‘a continuous combat function’ will remain lawful targets ‘even when they put down their weapons and walk home for lunch with their family’²⁵⁹, and their ‘loss of protection against direct attack endures for the duration of their membership while they ‘assume their continuous combat function’²⁶⁰.

It is interesting to note that the drafters of the Rome Statute, in a bid to increase the courts’ prospects of prosecuting those found recruiting child soldiers (under fifteen years of age), adopted a much broader interpretation of ‘what acts would amount to direct participation of children in hostilities’²⁶¹. According to the *travaux préparatoires* of the Rome Statute, when children partake in ‘active participation in military activities linked to combat such as scouting, spying, sabotage, and the use of children as decoys, couriers, or at military checkpoints’, as well as the ‘use of children in “direct” support functions such as carrying supplies to the front line or activities at the front

²⁵⁴ *Idem* at 65.

²⁵⁵ *Idem* at 69.

²⁵⁶ ‘In addition to the restraints imposed by IHL on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances’.

²⁵⁷ UNICEF *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* at 14.

²⁵⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 73.

²⁵⁹ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 206.

²⁶⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 73 and 83.

²⁶¹ UNICEF *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* at 14.

line itself²⁶², this will be sufficient to justify prosecuting their recruiters under articles 8(b)(xxvi) and 8(e)(vii). Clearly the purpose of this extended interpretation was to make it easier to prosecute their recruiters, and this interpretation should not be used to deny children less than fifteen years of age their civilian immunity from attack. A similarly 'liberal' interpretation was adopted by the SCSL in *Prosecutor v Brima (Armed Forces Revolutionary Council)*²⁶³, which concluded that 'any labour or support that gives effect to or helps maintain operations in a conflict constitutes active participation. Hence 'carrying loads for the fighting faction, finding or acquiring ... ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are examples of active participation as much as fighting and combat'²⁶⁴. The trial chamber in the Lubanga case even went so far as to state that the 'offence of using children under the age of fifteen to participate actively in hostilities...includes a wide range of activities, from those children on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants'²⁶⁵. Moreover the chamber concluded that 'the decisive factor...in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target'²⁶⁶. Consequently this means that 'although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them' if his support exposed him to consequent risk²⁶⁷.

I would argue that in order to determine the loss of civilian status for under-aged child soldiers, it would be in the best interests of the child and in keeping with IHL to apply the more conservative interpretation proposed by the ICRC's Interpretive Guide, rather than the more far-reaching definition set out in the Rome statute. Regardless, I would argue that it is justifiable to conclude that under-aged child soldiers/civilians, carrying out activities which satisfy the three-pronged test for direct participation in hostilities, will lose their civilian immunity from attack. The ICRC's guidelines make it explicit that no special allowances are made for children, 'even children below the lawful recruitment age may lose protection against direct attack'²⁶⁸ when they participate in hostilities. This one statement by the ICRC, in its Interpretive Guide published in 2009, puts pay to the argument that Grover proposed in 2008 - that child soldiers would always maintain their civilian inviolability in situations of armed conflict.

This viewpoint, that children be treated as any other participants in IHL, applies irrespective of whether the particular child soldier is obviously under fifteen years of age, and therefore in terms of IHL below the lawful recruitment age and restricted from participating in hostilities. Moreover, there

²⁶² 'It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase, or the use of domestic staff in an officer's married accommodation' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 487; Coalition Against Child Soldiers *Child Soldiers: Global Report* at 375).

²⁶³ SCSL Trial Chamber II Judgment (20 June 2007) SCSL-2004-16-T.

²⁶⁴ *Prosecutor v Thomas Lubanga Dyilo* ICC Judgment pursuant to article 74 of the statute (14 March 2012) No. ICC-01/04-01/06 2/593 at para 624.

²⁶⁵ *Prosecutor v Thomas Lubanga Dyilo* ICC Summary judgment pursuant to article 74 of the statute at para 24.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 50.

doesn't appear to be any relaxation of the principle to account for the fact that some of these child soldiers may have been conscripted against their will. Obviously, evidence of under-aged or forcible conscription will aggravate a case for prosecuting their recruiters, and will be a compelling consideration in their defence or mitigation of sentence if these child soldiers are captured and prosecuted for war crimes, or unauthorised participation in hostilities.

Opposition forces faced with under-aged child 'soldiers' are going to have to conduct an on-the-spot analysis to ascertain whether the child's specific activities amount to direct participation in hostilities, thereby compromising their presumptive civilian status and making them potential and legitimate military targets. Sadly, in conflicts where under-aged child soldiers are utilised, the net effect is to increase the 'risk for other children in the conflict zone' who are viewed with suspicion, and subjected to interrogation and harassment²⁶⁹.

All of this discussion emanates from the premise that a child is most naturally categorised under IHL as a civilian, because IHL, international customary law, and treaty law, discourage their participation in hostilities. Having said that, customary and IHL only prohibit the recruitment of those children under fifteen years of age, and many States have not adopted the straight-eighteen ban. What this means is that it is legally plausible for a child (between fifteen and eighteen years of age) to be part of an armed group and consequently entitled to combatant and POW status.

This leads me to the next portion of this analysis: what is the combatant status of under-aged child soldiers who are recruited to participate directly in hostilities as members of non-State-armed groups? Can a child soldier (under fifteen years of age) be clothed with combatant and POW status and does the manner of their recruitment (be it voluntary or involuntary) impact upon the determination of their IHL status?

5.4 Under-aged child soldiers recruited to participate directly in hostilities in non-State-armed groups - assessing combatant and POW status

'Recruiting or using children under the age of fifteen as soldiers is incontrovertibly prohibited under IHL— treaty and custom'²⁷⁰, and this prohibition is applicable to non-State-armed groups. Consequently, a child soldier who is under fifteen years of age would necessarily have been unlawfully recruited according to existing customary IHL. Despite pressure from human rights activists to adopt a straight-eighteen ban in cases of recruitment by non-State groups, the adoption by the international community, of a universal age limit of eighteen, has still not been attained²⁷¹. Consequently, it is highly debatable whether any straight-eighteen ban, applicable to non-State-armed groups in international armed conflicts, can be said to have achieved customary status. As a consequence of this, the child soldier over fifteen years of age might plausibly have been lawfully recruited (provided the straight-eighteen ban was not legally applicable in the particular case as a result of the jurisdictional State's domestic legislation²⁷²), and

²⁶⁹ Singer *Children at War* at 103.

²⁷⁰ U.N. 'The Six Grave Violations Against Children During Armed Conflict' at 7.

²⁷¹ ICRC *Children Protected Under IHL*.

²⁷² At most, all that can be expected is that those thirty-seven AU States who are party to the ACRWC (article 22(2)) and those States party to OP-AC article 4(2), legislate to make it

consequently entitled to combatant status. The real issue is whether it is at all possible for child soldiers under fifteen years of age to also acquire this status?

The issue of the 'combatant/civilian' status of the under-aged child soldiers recruited into a non-State-armed groups and involved in an international armed conflict, is a complex legal question. The treatment of these child soldiers upon capture is dependent upon their individual claims to combatant or civilian status. If they can be classified as members of the 'armed forces' as defined in AP I article 43(1), they acquire combatant and POW status upon capture, and immunity from prosecution for 'participating in hostilities', provided they comply with the laws and customs of war. Civilians, on the other hand, who participate directly in hostilities, do so without authorisation and consequently face criminal prosecution for their actions. Since the legal implications of being found to be a lawful combatant and a protected POW are so important, it is imperative that IHL provide guidance to those who are engaging in hostilities against under-aged child soldiers - an issue which has been fudged for too long. Since armed forces 'now face real and serious threats from [child] opponents whom they generally would prefer not to harm', 'being unwilling or unable to operate in child soldier zones is a recipe for strategic inaction'²⁷³, even though fighting children has a demoralising effect on troop morale²⁷⁴.

We know from the discussion above that children under fifteen years of age who participate directly in hostilities, lose their civilian immunity from attack. 'To conscript or recruit soldiers, of whatever age, is necessarily to change their status; to convert them from civilians ... to fighters who can be personally attacked on that account alone'²⁷⁵. Which begs the question - is it possible for these under-aged soldiers, who are recruited into non-State-armed groups, to acquire full combatant status with the attendant privileges?

It is important to note that 'no one is born a combatant ... without being a civilian first'²⁷⁶. However, once a civilian becomes a 'member of the armed forces of a belligerent party'²⁷⁷ (other than medical personnel and chaplains), they are presumed to acquire primary combatant status and secondary POW privileges upon capture²⁷⁸. Moreover, this combatant status is granted

unlawful at a domestic level for non-State-armed groups to recruit children under eighteen years of age.

²⁷³ Singer *Children at War* at 164 and 166.

²⁷⁴ *Idem* at 170.

²⁷⁵ Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 70.

²⁷⁶ Shlomy Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' (2005) 38 *Israel Law Review* 378 at 390.

²⁷⁷ Irrespective of whether they are 'regular or irregular, including paramilitary units incorporated *de facto* in the armed forces' (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 11).

²⁷⁸ GC III article 4A (1) and (3), Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 11. It is worth mentioning at this juncture that that in an armed conflict, only a recognised subject of international law can clothe their armed forces with authorised combatant status. This status is not given to the individual, but is granted as a result of his or her affiliation to a party to the conflict which is a subject of international law (Ipsen (1995) 'Combatants and Non-combatants' at 66-67). 'Private citizens and independent armed groups have always been excluded from entitlement to the combatant privilege and POW status' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 197); 'there is no room for hostilities in an international armed conflict being conducted by

irrespective of the 'specified task assigned to an individual within the military apparatus'²⁷⁹, their 'function, or contribution or lack thereof with respect to the war effort'²⁸⁰. The rule that combatant status derives from one's mere membership in the armed forces, rather than one's function²⁸¹, is widely acknowledged without any State practice to the contrary²⁸².

As a general rule combatants cannot forfeit their combatant status and POW privilege, even if they are found in breach of IHL²⁸³. There is however one exception to this rule - POW status can be forfeited in instances where the combatant is found in breach of the minimum obligations of distinction expressed in AP I article 44(3) (2nd sentence). If however, they fail to observe this minimum requirement for distinction²⁸⁴, they will then forfeit their POW status, and may be liable for prosecution²⁸⁵ for breach of the principle of distinction²⁸⁶. A classic example of an instance where POW status is forfeited is when a combatant is captured while spying²⁸⁷.

As a general rule, a recognised State's armed forces have always been clothed with combatant status and given the authorisation to participate directly in hostilities²⁸⁸. There has never been any minimum age limit required for the awarding of POW status²⁸⁹. Consequently, IHL has always recognised that any children, irrespective of their age, who 'enrolled in the armed forces' or who take 'part in a mass uprising of the population (*levée en masse*), do in fact have combatant status and are *ipso facto* entitled to prisoner-of-war

individuals on their own initiative' (Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* at 43).

²⁷⁹ Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* at 33.

²⁸⁰ Jensen 'Direct Participation in Hostilities' at 1535-1544.

²⁸¹ Jensen 'Direct Participation in Hostilities' at 1595-1604.

²⁸² Dale Stephens and Angeline Lewis 'The Targeting of Civilian Contractors in Armed Conflict' (2006) 9 *Yearbook of International Humanitarian Law* 25 at 30.

²⁸³ Ipsen (1995) 'Combatants and Non-combatants' at 95.

²⁸⁴ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 15. The requirement of visibility is now 'relevant with respect to a combatant's entitlement to POW status' (AP I article 44, Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 15 and rule 106).

²⁸⁵ If commanders do not try their soldiers for failing to distinguish themselves they will be found to be in violation of AP I articles 86 and 87, with liability flowing up the chain of command (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 20). The 'requirement of an internal disciplinary system supplements the provisions concerning command responsibility and is a corollary to the obligation to issue instructions which comply with IHL' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 16).

²⁸⁶ Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 22.

²⁸⁷ 'Spies are persons who clandestinely, or under false pretences, gather information in the territory controlled by the adversary. Even if they are members of the armed forces, they do not have the right to POW status. Persons who fall into the hands of the adversary while engaged in espionage shall be liable to punishment' (Ipsen (1995) 'Combatants and Non-combatants' at 110; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 16 and rule 106-108; Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 10).

²⁸⁸ As an exception to this general rule, there are a number of groups of service personnel (like medical and religious personnel), within the ranks of the armed forces who are denied authorisation (by national legislation) to 'use a weapon or a weapons system' and are consequently called non-combatants (HR article 3, GC I articles 24, 26 and 27, AP I article 43(2)).

²⁸⁹ Dutli 'Captured Child Combatants'.

status if captured²⁹⁰. If this is the position for the child soldiers recruited into the States armed forces or participating in the *levée en masse*, what do we make of the case of the under aged child soldier recruited into a non-State-armed group, who participates directly in an international armed conflict?

Non-State-armed groups have traditionally been singled out for more demanding treatment under IHL in so far as awarding them combatant status is concerned. While it was assumed that the 'regular armed forces would as a matter of course' do all that was necessary to merit their being clothed with combatant and POW status²⁹¹, the same was not true of non-State-armed groups. GC III article 4A(2) set out six criteria²⁹² required of these non-State-armed groups in order to afford them combatant and POW status²⁹³. The requirements are:

1. Belong to an organised group²⁹⁴;
2. Belong to a party to the conflict²⁹⁵;
3. 'Be commanded by a person responsible for his subordinates'²⁹⁶;
4. 'The group must ensure that its members have a fixed, distinctive sign recognisable at a distance'²⁹⁷;

²⁹⁰ Goodwin-Gill *Child Soldiers: The Role of Children in Armed Conflict - A Study on Behalf of the Henry Dunant Institute* at 63; Dutli *Captured Child Combatants*.

²⁹¹ While IHL (more particularly GC III article 4A (1) and (3)) presumes that members of the regular armed forces will always observe the requirements of a uniform, organised hierarchy and compliance with the laws of war, the same assumption is not made of irregular armed forces (Jean Pictet (1960) *ICRC Commentary on GC III* ICRC: Geneva at 63; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 15).

²⁹² If the members generally (i.e. as a collective) 'meet all 6 conditions all the of the time then individual members who fail to observe any of the 4-6 will not lose their privileged combatant or POW status upon capture' (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14).

²⁹³ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 15.

²⁹⁴ This requirement is normally characterised 'by discipline, hierarchy, responsibility and honour' (Pictet *ICRC Commentary on GC III* at 58), and can be 'filled by the most rudimentary elements of military organisation' (Thomas Mallison and Sally Mallison 'The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict' (1977) 9 *Case Western Journal of International Law* 39 at 50).

²⁹⁵ Put another way, they must fight 'on behalf of a State party that is engaged in an international armed conflict' as per GC common article 2, as there is still a 'customary law proscription against individuals or groups engaging in "private warfare" against a State party involved in an armed conflict' (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12). 'Tacit authorization, for example by delivery of weapons to the irregulars, or a *de facto* relationship between the resistance organisation and the State is sufficient' (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12).

²⁹⁶ 'The leader's qualifications or authority to lead are not prescribed, all that is required is that the leader must discipline his members who violate IHL, and as a leader he or she must bear ultimate responsibility for the actions taken on his or her orders' (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12).

²⁹⁷ Members of irregular armed groups need not wear traditional military dress, 'a helmet, headdress, cap, coat, shirt, badge, armband, brassard or a coloured sign worn on the chest', will suffice, provided it is worn constantly, in all circumstances and is 'visible during daylight and detectable at a distance by the naked eye' (*Idem* at 13; U.S. Department of the Army 'Field Manual 27-10: The Law of Land Warfare' available at www.aschq.army.mil/gc/files/fm27-10.pdf (accessed 26 December 2012) at 27 para 64(b); Pictet *ICRC Commentary on GC III* at 60).

5. 'The group must ensure that its members carry their arms openly; and
6. The group must ensure that its members conduct their operations in accordance with the laws of war'²⁹⁸.

These stringent requirements which were demanded of irregular armed forces under the Geneva Conventions, have been the cause for much controversy, and underlie suggestions that IHL is enforcing a double standard²⁹⁹. Irregulars have argued that the requirements are impossibly demanding, impossible to prove without endangering the group's identity and location³⁰⁰, with some even suggesting that compliance would be suicidal³⁰¹. It was this 'realisation of the inadequacy of these provisions to provide privileged combatant status for those who fight regular military forces in colonial wars, occupied territory and in struggles for self determination, which gave rise to strong initiatives to relax or abolish the 1949 Convention standards for "freedom fighters" under the 1977 Additional Protocols'³⁰².

The 1974-1977 Diplomatic Conference on IHL Applicable in Armed Conflict, set about drafting the APs, with the aim of creating 'a single and non-discriminatory set of rules applicable to all combatants regular and irregular alike'³⁰³. The task demanded a solution to ensure that guerilla forces were able to attain 'privileged combatant status without exposing the forces fighting them to the danger inherent in the use of civilian disguise in order to achieve surprise'³⁰⁴.

The essence of the compromise is reflected in AP I articles 43-47 (entitled 'combatant and POW status'), which set aside the distinction between regular forces and other armed groups. AP I now contains a 'presumption that anyone who participates in hostilities is entitled to POW status upon capture and the right to have their POW status adjudicated

²⁹⁸ Where these non-State-armed groups are found directing attacks at the civilian population, 'causing disproportionate civilian casualties, or otherwise causing unnecessary suffering and destruction', they would lose their right to claim combatant status (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14). This last requirement raises an interesting conundrum. Non-State-armed groups who forcibly abduct children under fifteen years of age from civilian communities, to be trained as child soldiers, would be violating IHL and would consequently compromise any claim that the armed group would have to combatant status. The same could be said of those groups who enlist children under the age of fifteen, even if they maintain that the children joined voluntarily. Moreover, if the straight-eighteen ban ever crystallises into customary IHL, and is applicable in international armed conflicts, then it is plausible that the very act of enlisting child soldiers would compromise the entire group's claim to combatant status, including the child's right to claim combatant status.

²⁹⁹ For example: irregular forces have to show individual compliance with the laws of war in order to get POW status, but regular soldiers can breach the laws of war without losing combatant and POW status (although they can be tried in a court martial for these breaches) (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14-15).

³⁰⁰ *Idem* at 14-16.

³⁰¹ Since most irregular fighters are part time combatants, the requirement that they wear a fixed distinctive emblem all of the time, even when not engaged in conflict, would 'be suicidal', yet that is what IHL demands of them (*Idem* at 15).

³⁰² Waldemar Solf 'Response to Douglas J Feith's Law in the Service of Terror - The Strange Case of the Additional Protocol' (1986-1987) 20 *Akron Law Review* 261 at 272.

³⁰³ George Aldrich 'Guerrilla Combatants and Prisoner of War Status' (1982) 31 *American University Law Review* 871 at 874.

³⁰⁴ Solf 'Response to Douglas J Feith's Law in the Service of Terror - The Strange Case of the Additional Protocol' at 273.

before a judicial tribunal³⁰⁵. The new definition of ‘armed forces’ puts all members of armed groups on an equal footing³⁰⁶, and all those armed forces (be they State forces or non-State forces) ‘fulfilling the conditions in article 43 of AP I are armed forces’³⁰⁷, and entitled to combatant status. No longer are non-State-armed groups required to prove that their armed group enjoys political recognition. Moreover, any failure to observe the laws and customs of war³⁰⁸ will not result in denial of their combatant and POW³⁰⁹ status, as was the case under the GCs.

The most notable effect of the new relaxed rule is that under the previous treaty regime, ‘failure to distinguish oneself from the civilian population’³¹⁰ (through the use of a fixed distinctive emblem), resulted in the forfeiture of ones combatant and POW status upon capture, and led to possible criminal prosecution for unauthorised participation in hostilities³¹¹. However, under the new relaxed rule, irregular combatants are required as a minimum, to distinguish themselves during and in preparation³¹² for an attack³¹³. Although AP I does not set out explicitly how this is to be achieved, an ‘authoritative commentary on the protocols suggests that ‘presumably a distinctive sign, which need not be fixed, or carrying arms openly would satisfy the requirement’³¹⁴. This relaxed expression of the principle of

³⁰⁵ AP I articles 45(1) and (2) and 43(2); Goldman ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 18.

³⁰⁶ AP I article 43(1).

³⁰⁷ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 16.

³⁰⁸ Instead, each individual may be held criminally responsible for their violations of the laws of war (AP I article 44(2)). The effect of this provision is to prevent the detaining power from denying the member of a non-State-armed group their POW status upon capture, on the grounds that the non-State-armed group failed to observe a provision of the laws and customs of war (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 16).

³⁰⁹ AP I article 43 and 44 (reaffirm GC III article 85) ‘POWs prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention’, that is to say that they retain their status’.

³¹⁰ Goldman ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 20.

³¹¹ *Ibid.*

³¹² The meaning of ‘military operations preparatory to an attack’, should be ‘broadly construed’ to include ‘logistical activities preparatory to an attack’, since these ‘are more likely to be conducted in a civilian environment and consequently involving a greater obligation for combatants to distinguish themselves from civilians’ (*Idem* at 21; Michael Bothe, Karl Partsch and Waldemar Solf (1982) *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* Martinus Nijhoff Publishers: The Hague at 252.

³¹³ AP I article 44(3).

³¹⁴ Goldman ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 19, Bothe *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* at 253. The second sentence of article 44(3) sets out the situations in which POW status can be forfeited ‘recognising, however that there are situations in armed conflicts where, owing to the nature of 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 launch of an attack in which he is to participate in acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of article 37 (1)(c)’. ‘This second sentence suggests that the

distinction acknowledges the complications inherent in 'part time combatancy'³¹⁵, and relieves irregular combatants of the previous obligation to distinguish themselves at all times, even whilst 'pursuing their civilian vocation or participating in a military operation not preparatory to an attack'³¹⁶. Having said that, even while pursuing their 'civilian vocations', the members of these non-State-armed groups 'remain combatants and may lawfully be attacked prior to capture'³¹⁷. However, if captured whilst engaged in their civilian vocation, they must nevertheless be accorded POW status³¹⁸.

It was the relaxation of the principle of distinction for irregular combatants (as expressed in articles 43 and 44 of AP I) which motivated the United States, amongst other States, to refuse to ratify AP I. At present there are 170 States that have ratified the protocol, but notably absent are the United States, Israel, Iran, Pakistan and Turkey³¹⁹. This is the legal dilemma which faced the U.S's 'military prosecutors who arraigned Omar Ahmed Khadr' at Guantanamo Bay, for crimes he allegedly committed as an al Qaeda affiliate in Afghanistan in 2002, when he was just fifteen years of age³²⁰.

As already mentioned, international law can, by way of crystallisation into custom, make treaty obligations binding upon non-signatory States once there is sufficient State practice and *opinion juris* to confirm that a treaty law principle has crystallised into customary international law. According to the ICRC's study conducted into the customary international law status of many of the IHL provisions found in the IHL treaties, the relaxed provisions contained in AP I, which determine combatant status, 'can be said to have achieved customary international law status'³²¹. Interestingly, the State practice relied upon to reach such a conclusion, included States like the U.S. who were not party to AP I. This analysis now confirms that the relaxed requirements for combatant status enjoy customary status and are 'applicable

open carrying of arms is the minimum requirement' (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 19).

³¹⁵ *Idem* at 20.

³¹⁶ This, for example, would include the following permissible military operations: 'gathering intelligence without deception, recruiting, training, general administration, law enforcement, aid to underground political authorities, collection of contributions and dissemination of propaganda' (Bothe *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* at 252).

³¹⁷ Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 21.

³¹⁸ *Idem* at 20; AP I article 44(5).

³¹⁹ Consequently in terms of the strict application of international treaty law obligations, in international armed conflicts involving non-State-armed forces and the nation States who have not ratified API, the stringent requirements contained in GC III article 4A(2) remain the prevailing law used to determine combatant and POW status of irregular forces (Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 23).

³²⁰ 'Since the government alleges that Khadr was taken to al Qaeda guest houses at age 10, sent to military training at age fifteen, and sent into battle shortly thereafter, any proceedings against him must take into account his lack of independence, relative culpability and vulnerability to outside influence as a child. In late 2003, the United States released three children (ages thirteen-fifteen) detained at Guantanamo to UNICEF to enable them to receive rehabilitation and reintegration assistance in Afghanistan'. Sadly Khadr was not among the three (Human Rights Watch 'The Omar Khadr Case: A Teenager Imprisoned at Guantanamo: II Culpability of Children' (2007) available at [http://www.essex.ac.uk/armedcon/story_id/us0607web\[1\].pdf](http://www.essex.ac.uk/armedcon/story_id/us0607web[1].pdf) (accessed 21 February 2012)).

³²¹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 15.

in both international and non-international armed conflicts³²², irrespective of whether States are party to AP I. Consequently, it is safe to conclude that in all international armed conflicts where non-State actors are involved, the definition of 'armed forces' as set out in AP I article 43, would apply and would be the means of determining combatant status. When non-State actors are captured, the provisions in AP I articles 44-47 would then be used to assess their POW status. In short then, the main focus in assessing the right to claim POW status, is the individual 'combatants' failure or otherwise to distinguish himself from the civilian population when engaging in an attack.

What then are we to make of under-aged child soldiers who are recruited³²³ into non-State-armed groups and who may participate directly in international armed conflicts. Firstly a distinction needs to be made between those recruited in 'armed force' as defined in AP I and those recruited into a group which is not an 'armed forces'³²⁴ as defined in AP I article 43(1). In the latter case, their lack of membership in an armed force will deny them combatant status, and since they are participating in hostilities they then forfeit their civilian immunity from attack and are classified as a 'civilian participating directly in hostilities'. The phrase 'unlawful combatant' is a short hand expression useful for describing those civilians who take up arms without being authorised to do so by international law. It has an exclusively descriptive character ... and does not corroborate the existence of a third category of persons³²⁵. As Solis opines, 'unlawful combatants/unprivileged belligerents are not a third battlefield category but a subcategory of civilian'³²⁶.

During such time as they persist in their unauthorised participation in hostilities, these child soldiers may be legitimately targeted and 'killing them within the context of combat is not murder'³²⁷. As Rogers explains, despite the fact that the 'recruitment of children might be a breach of the law of war, the rules on combatant status apply equally to adults and children' ... it is only upon capture that special rules for their treatment apply to children³²⁸. If they fall into enemy hands they can be prosecuted and do not enjoy normal

³²² *Idem* at 14.

³²³ I have excluded from this piece a discussion of children whose activities, within the non-State-armed group, do not reach the threshold required to be labeled 'direct participation in the hostilities' (such as cooks). Where children are recruited to cook or act as porters, those activities will not satisfy the three-pronged test for direct participation in hostilities. (David Crane and Daniel Reisner 'Jousting at Windmills' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (2011) at 1595-1604). 'All members of the regular armed forces were unconditionally and automatically presumed to enjoy full combatant and POW privilege without more' (GC III article 4A (1) and (3); Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 11), 'irrespective of their role, function, or contribution or lack thereof with respect to the war effort' (Crane 'Jousting at Windmills' at 1535-44). As Jensen points out - 'once an individual joins a nation's armed forces, even as a cook or court reporter, he or she immediately becomes targetable by the enemy ... it is membership that makes the difference.' (Jensen 'Direct Participation in Hostilities' at 2197-2204 and 2477-2485).

³²⁴ 'Private citizens and independent armed groups have always been excluded from entitlement to the combatant privilege and POW status' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 197).

³²⁵ *Idem* at 208.

³²⁶ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 207.

³²⁷ Michael W Brough 'Combatant, Noncombatant, Criminal: The Importance of Distinction' (2004) 11 *Ethical Perspectives* 176 at 178.

³²⁸ Rogers 'Unequal Combat and the Law of War' at 17.

POW privileges³²⁹. They still benefit from the special benefits extended to all children to participate in hostilities as listed in AP I article 77(3):

‘if, in exceptional cases, despite the provisions in paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this article, whether or not they are prisoners of war³³⁰’.

In essence what this means is that if detained, they will be entitled to be held in ‘separate quarters’ from adult detainees³³¹, and they shall not be subjected to the death penalty in respect of any offence committed before they turned eighteen³³². AP I article 77(3) flowed from the ICRC’s investigation into all the IHL principles which grant children special protections, but nowhere did the ICRC observe State practice revoking those special protections in the event that children are found taking part in hostilities³³³.

What then of children recruited (albeit unlawfully) into an armed force within the AP I article 43(1) meaning. Before one is clothed with combatant status, the armed force that one belongs to, and you as an individual, need to fulfill the IHL requirements set out in GC III 4A or AP I article 44(3). Since there is no minimum-age limit required for awarding POW status, I would argue that the same will be true of awarding combatant status. I think it would be wholly consistent with the ethos of IHL to award full POW status to any combatant who could fulfill the IHL requirements for combatant status, no matter how young they might be or how unlawful their recruitment. Ipsen supports this conclusion and notes that ‘children protected under article 77 can only be POW if they have previously attained the primary status of combatants by being unlawfully recruited into the armed forces of one of the parties to the conflict’³³⁴. So in principle there is no obstacle to awarding them combatant status, even though their recruiters will be found to be in violation of IHL, and can face prosecution for involving under-aged children in hostilities.

Now the question which begs asking is whether (as unlawful recruits) under-aged children have to meet (at a minimum) the more relaxed criteria under AP I article 44(3) in order to enjoy combatant and POW status, or does the unlawfulness of their recruitment exempt them from this requirement? What becomes of under-aged child soldiers who are recruited into a non-State-armed group and who individually fail to observe the minimum requirements of distinction? Despite the relaxation of the requirements for combatant status since GC III, it is a very big ask for a child soldier to appreciate what is expected of them by AP I, and to comply with those expectations. Certainly, for a child under fifteen years of age it is probably an impossible ask. The particular difficulty facing under-aged combatants is that their very youthfulness contradicts any attempts that they might be making to

³²⁹ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 207.

³³⁰ Ipsen (1995) ‘Combatants and Non-combatants’ at 74; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 487. There is no lower age-limit for claiming POW status.

³³¹ AP I article 77(4).

³³² AP I article 77(5); Ipsen (1995) ‘Combatants and Non-combatants’ at 87.

³³³ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 487.

³³⁴ Ipsen (1995) ‘Combatants and Non-combatants’ at 73.

distinguish themselves from civilians. It is as if their age speaks louder than their distinctive emblem (whatever that might be in the given circumstance) or the weapon that they carry. The crux of the problem is that children are often sought out by non-State-armed groups because their size and youthfulness makes them inconspicuous and easy to feign protected civilian status. When one considers that in many instances their recruitment is forcible, you have to question whether these unwilling child soldiers should legally be held responsible for their conduct.

Not only does a civilian lose their protection against the effects of hostilities when they elect to participate directly in hostilities, but they can in fact be legitimately targeted (without concerns for issues of proportionality³³⁵) for the duration of their participation in the hostilities. However, as Melzer points out 'continuous combat function does not, of course, imply *de jure* entitlement to combatant privilege' with its attendant immunity from prosecution³³⁶. Even once they are again classified as civilians they can nevertheless still face 'prosecution for violations of domestic and international law they may have committed'³³⁷ - in particular for their unauthorised participation in hostilities³³⁸. What is particularly problematic for civilians taking a direct part in hostilities or acting with a continuous combat function, is that they are very often found in the theatre of war acting so as to 'capture, injure, or kill an adversary and in doing so they fail to distinguish themselves from the civilian population in order to lead the adversary to believe that they are entitled to civilian protection against direct attack'. This alone is considered a serious violation of the IHL prohibition against perfidy³³⁹. Moreover, even if they had at all times respected the laws of war³⁴⁰, their direct participation in hostilities is what exposes them to prosecution.

If individuals are determined to participate in hostilities, it really is in their best long-term interests to satisfy the requirements for authorised combatancy. Admittedly, being a combatant will make them a legitimate military target, but they will also enjoy POW immunity from prosecution, plus they will still enjoy the child-focused protections set out in AP I article 77. Assigning them civilian status at all times (as Grover suggests) is not going to afford them the best protection in the event of their capture. If they cannot fulfill the legal requirements for combatant status, and yet continue to participate directly in hostilities without authorisation, they can also be legally targeted for so long as they continue to participate in hostilities, but also will face criminal prosecution for their unauthorised actions. As Ipsen notes - 'children protected under article 77 can only be POW if they have previously attained the primary status of combatants by being unlawfully recruited into the armed forces of one of the parties to the conflict. This is particularly significant because the combatant status protects the child against being

³³⁵ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 703.

³³⁶ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 847.

³³⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 83; Adam Roberts 'The Civilian in Modern Warfare' (2009) 12 *Yearbook of International Humanitarian Law* 13 at 41.

³³⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 12.

³³⁹ *Idem* at 85.

³⁴⁰ *Idem* at 84.

prosecuted upon capture for its direct participation in hostilities³⁴¹. Does this suggest that unlawful recruitment guarantees combatant status which can never be forfeited (even by feigning civilian status or spying)? It seems unlikely that such an important point would not be expressly stated in API article 77 if that was what the drafters had intended.

While article 77(3) ensures certain safeguards for all children, it is apparent that the leniency afforded under-aged child soldiers does not guarantee them complete immunity from all prosecution. The fact that they need protection from the death penalty (whether or not they have POW status) suggests that they are not exempt from prosecution and its consequences. This conclusion would support the argument that they can be prosecuted for violations of the laws of war, and what more fundamental violation is there but to feign civilian status and fail to observe the principle of distinction. I would argue, that like any adult combatant, they too can forfeit their POW privileges if they fail to observe the minimum requirement of distinction (carrying their arms openly). While this failure will render them liable of prosecution, the safeguards in article 77 of separate facilities for children and exemption from the death penalty, will be observed.

The real impact of this assessment (whether the result is one of combatant or civilian status), is felt at the moment that these child soldiers are captured. If they are afforded combatant status by virtue of their unlawful recruitment and observance of the principle of distinction, they will avoid prosecution for their participation in hostilities. If they are deemed to be unlawful combatants by virtue of their failure to observe the principle of distinction, they would likely face criminal prosecution upon capture. Ironically, many of these child soldiers would have committed the majority of their crimes at a time when they would probably not have had full criminal responsibility under the domestic legislation of their respective States. Sadly it is only upon facing prosecution that the real age of many of these young recruits will be accurately ascertained. It is to this aspect of prosecution which I now turn my focus. Perhaps here we can ameliorate the affect of this conundrum.

5.5 Prosecuting under-aged child soldiers recruited into non-State-armed groups

In terms of IHL, civilians who participate in hostilities without authorisation, or combatants who are found in breach of the laws of war, can face criminal prosecution. However, given that the recruitment of children under fifteen years of age is unlawful, under both treaty and customary IHL, the drafters of the AP I, through article 77(3), attempted to soften the application of this normal IHL consequence for unauthorised participation in hostilities - in instances where children under fifteen years of age are recruited to participate in hostilities and are captured. At the very least they might be spared the death penalty for their crimes.

Dutli argues that the rationale for this special allowance made for children under fifteen years of age stems from the fact that 'a child combatant under age fifteen, who is captured cannot be sentenced for having borne arms' since the breach of AP I article 77(2) lies at the door of the recruiting

³⁴¹ Ipsen (1995) 'Combatants and Non-combatants' at 73.

party, not on the shoulders of the under-aged child'³⁴². As Grover argues, it would be unjust to prosecute children under fifteen years of age for their participation in hostilities, given that IHL prohibits the recruitment of under fifteen's, and as civilians the State is obliged to protect these children against involvement in the conflict'³⁴³.

Neither the CRC nor the OP-AC (the two international treaties dealing specifically with the rights of children in conflict situations) contain 'a universal minimum age of criminal culpability for committing conflict-related international crimes'³⁴⁴. Neither does either of these treaties contain directives on when child soldiers should be 'prosecuted for having committed conflict-related international crimes, or having been part of any armed groups that did so'³⁴⁵. For the most part States set the minimum age for full criminal responsibility at eighteen years of age in their domestic legislation³⁴⁶. In light of this virtually universal position, Grover argues that children involved in armed conflicts under eighteen years of age, should enjoy blanket immunity from criminal prosecution. Grover argues that this same principle of guiltlessness should apply to child soldiers who were 'compulsorily recruited or recruited by non-State armed forces (as both are also breaches of international law)'³⁴⁷. Certainly, any practice that favours the non-prosecution of child soldiers under fifteen years of age endorses the IHL aim of shielding children from the horrors of war. I am not wholly convinced that a similar ban on prosecution applies in cases of child soldiers aged between fifteen and eighteen years of age. Certainly, AP I article 77(3) limits the special leniency afforded children found participating directly in hostilities, to those under fifteen years of age³⁴⁸.

In examining recent judicial practice we find that neither the International Criminal Tribunal for the former Yugoslavia (ICTY), nor the International Criminal Tribunal for Rwanda (ICTR), prosecuted any one under eighteen years of age, despite the fact that there was no provision precluding the prosecution of under eighteens in their statutes. The statute of the SCSL allowed for the prosecution of child soldiers over fifteen years of age. However the Prosecutor for the SCSL 'announced that child soldiers would not be prosecuted, as they were not legally liable for acts committed during the conflict'³⁴⁹. Instead, these types of cases were referred to the Sierra Leone Truth and Reconciliation Commission (TRC), because it was felt that a rehabilitative focus was more in tune with the prevailing international legal

³⁴² Dutli 'Captured Child Combatants'.

³⁴³ Grover "Child Soldiers" as "Non-Combatants": The Inapplicability of the Refugee Convention Exclusion Clause' at 57.

³⁴⁴ Grover "Child Soldiers" as "Non-Combatants": The Inapplicability of the Refugee Convention Exclusion Clause' at 55.

³⁴⁵ *Ibid.*

³⁴⁶ UNICEF *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict*.

³⁴⁷ Grover "Child Soldiers" as "Non-Combatants": The Inapplicability of the Refugee Convention Exclusion Clause' at 57.

³⁴⁸ The definitive answer to the plight of those between fifteen and eighteen years of age will lie in whether or not this practice of non-prosecution, for want of criminal capacity, can be said to have achieved customary international law status.

³⁴⁹ David Crane 'Prosecuting Children in Times of Conflict: The West African Experience' (2008) 15:3 *Human Rights Brief* 11 at 15. University of Toronto (Law Faculty) 'Omar Khadr as Child Soldier' available at http://www.law.utoronto.ca/documents/Mackin/Khadr_ChildSoldier.pdf (accessed 28 December 2011) at 15.

norm³⁵⁰. This 'rehabilitative' focus is favoured in the Paris principles which maintain that 'children accused of crimes under international law, allegedly committed while they were associated with armed forces or armed groups, should be considered primarily as victims of offences against international law, not only as perpetrators'³⁵¹. 'They must be treated in accordance with international juvenile justice standards and norms, and within a framework of restorative justice and social reintegration'³⁵². The ICC, for their part, has specifically limited its jurisdictional reach to those over eighteen years of age, as 'those who are universally accepted as not being children under international law'³⁵³.

The existing jurisprudence from the ICTY, ICTR, SCSL and ICC, suggests 'that children under age eighteen can expect to avoid criminal responsibility before international tribunals for grave violations of IHL'³⁵⁴. Moreover, 'no international criminal tribunal established under the laws of war, from Nuremberg forward, has prosecuted a former child soldier for violating the laws of war'³⁵⁵. Moodrick-Even Khen argues that this fact is 'owing to the belief that the factors which influence a child's participation in hostilities mitigate the requisite *mens rea* necessary for criminal culpability'³⁵⁶.

Despite this historic leniency shown towards children under eighteen years of age caught up in conflict situations, there is no explicit IHL provision which would legally 'exclude penal proceedings in respect of serious breaches of IHL committed by children'³⁵⁷. Unfortunately this leniency has also made child soldiers the ideal type of combatant - their age allows them to feign protected civilian status, and they have little incentive to observe the laws of war if they are unlikely to face prosecution. Brett and McCallin argue that the 'greater suggestability of children, and the degree to which they can be normalised into violence, means that child soldiers are more likely to commit atrocities than adults'³⁵⁸. Those fighting child soldiers can expect little respect for IHL from these children. Instead they should expect 'false surrenders, hiding among civilians, and POW executions'³⁵⁹. Singer reports that child soldiers often fail to observe the legal protections afforded *hors de combat*, and they have been known to target humanitarian workers and journalists³⁶⁰. In fact Amnesty International argues that where child soldiers have been voluntarily recruited, and satisfy the State's domestic law for criminal culpability, they should in fact face criminal prosecution for their actions³⁶¹.

While it may be compelling to make a case for the non-prosecution of child soldiers under eighteen years of age (regardless of whether the

³⁵⁰ David Crane 'Prosecuting Children in Times of Conflict: The West African Experience' at 14.

³⁵¹ UNICEF 'Machel Report' at 76; Francioni and Ronzitti *War by Contract: Human Rights, Humanitarian Law and Private Contractors* at 267.

³⁵² UNICEF 'Machel Report' at 76.

³⁵³ Freeland 'Mere Children or Weapons of War - Child Soldiers and International Law' at 51.

³⁵⁴ UNICEF 'Machel Report' at 203 and 205.

³⁵⁵ University of Toronto 'Omar Khadr as Child Soldier'.

³⁵⁶ Moodrick-Even Khen 'Children as Direct Participants in Hostilities' at 3036-3044.

³⁵⁷ Crimes of War Child Soldiers; Dutli 'Captured Child Combatants'.

³⁵⁸ Brett and McCallin *Children the Invisible Soldiers* at 25.

³⁵⁹ Singer *Children at War* at 168.

³⁶⁰ *Idem* at 102.

³⁶¹ Grover "Child Soldiers" as "Non-Combatants": The Inapplicability of the Refugee Convention Exclusion Clause' at 54.

recruitment was voluntary or forcible), until the straight-eighteen ban can be said to have achieved customary status, the voluntary recruitment of over fifteen's is technically not unlawful: an argument that has been used by those facing prosecution before the ICC for child recruitment³⁶². Without an element of force at the time of recruitment, there might very well be a legitimate case to be made for prosecuting children over fifteen years of age who participate in hostilities without authorisation, or who are found to be in breach of the laws of war. I would argue that any special practice of not actively prosecuting³⁶³ children under fifteen years of age under IHL³⁶⁴, must logically be extended to children under eighteen years of age where they are forcibly recruited, even in instances where the straight-eighteen ban is not legally applicable. This conclusion is supported by the jurisprudence from the ICTY, ICTR, SCSL and ICC. Unfortunately those over fifteen years of age, who voluntarily sign up to participate in hostilities, should be aware that there is no international legal prohibition against their prosecution.

While child rights advocates may disagree on whether to prosecute or not, there is generally agreement that in the event of such prosecutions, child soldiers 'should always be evaluated according to their age, and as a general rule educational measures, rather than penalties, will be decided on'³⁶⁵. 'There is no doubt that if children involved in military operations are captured, they must receive the special treatment and protections³⁶⁶ appropriate to their age, meaning that such children should be treated with pity rather than detestation'³⁶⁷. Even if children take part in hostilities and fall foul of the IHL requirements for combatant status³⁶⁸, API article 75 sets out the basic minimum humanitarian guarantees and fair judicial procedures which they are entitled to upon capture³⁶⁹ - for the protection of all persons including children. Despite these guarantees, in a number of countries (Burundi, DRC and Myanmar) child soldiers, some as young as nine years of age, have been arbitrarily detained, tortured and sentenced to death for participating in hostilities³⁷⁰.

The one thing that both sides of the debate can agree upon, however, is that international criminal law must be seen to be prosecuting those, like Lubanga, Ntaganda, Kony, Katanga and Chui - found recruiting child soldiers³⁷¹. Mercifully both the ICC³⁷² and the SCSL have insisted that

³⁶² It was the submission of the Special Representative before the ICC in the Lubanga trial, that the psychological voluntariness of these actions were questionable (Wakabi 'Lubanga Trial Highlights Plight of Child Soldiers').

³⁶³ Ipsen (1995) 'Combatants and Non-combatants' at 73.

³⁶⁴ *Ibid.*

³⁶⁵ Crimes of War 'Child Soldiers'; Dutli 'Captured Child Combatants'.

³⁶⁶ IHL specifically precludes the 'imposition of the death penalty on anyone under the age of eighteen at the time of the offences' (GC IV article 68, AP I article 77(5); Crimes of War 'Child Soldiers').

³⁶⁷ Udombana 'War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' at 76 and 77.

³⁶⁸ 'Even if child soldiers, as members of irregular forces which fall foul of the GC III requirements, and are deemed unlawful belligerents' (Ipsen (1995) 'Combatants and Non-combatants' at 68).

³⁶⁹ AP I article 75; GC III articles 99-108; Ipsen (1995) 'Combatants and Non-combatants' at 68).

³⁷⁰ Coalition against Child Soldiers *Child Soldiers Global Report* at 18.

³⁷¹ Cynthia Chamberlain (2010) 'Children and the International Criminal Court' in Noëlle Quénivet and Shilan Shah-Davis (eds) *International Law and Armed Conflict: Challenges in the 21st Century* TMC Asser Press: Netherlands at 246-7.

children under fifteen are unable to consent out of the international law protection afforded them against recruitment³⁷³. In light of the circumstances in which child soldiers are frequently 'enlisted' into non-State-armed groups, to 'accept consent as a defense would be to negate the whole policy behind such prohibitions'³⁷⁴. If a child lies about their age, or claims to truly volunteer - does this negate the unlawfulness of their recruitment and thereby make them vulnerable to prosecution?

In the words of Radhika Coomaraswamy, the U.N. Secretary-General's Special Representative for Children and Armed Conflict, 'leaders of armed groups could not hide behind the excuse of a child having joined their groups voluntarily'³⁷⁵. 'Failure to refuse the voluntary enlistment of children to the armed force is thus a war crime'³⁷⁶. Sadly, those child soldiers over fifteen years of age are still legally able to consent to recruitment, and without domestic legislation to the contrary (pursuant to the ACRWC or OP-AC), their participation is strictly speaking not prohibited.

5.6 Conclusion

Existing IHL reveals that while a child (defined as anyone under the age of eighteen years of age) can become a combatant, the recruitment of child soldiers under fifteen years of age is strictly prohibited in all armed conflicts. At an international criminal law level, the Rome Statute dictates that 'conscripting or enlisting children under fifteen years into any armed forces, or using them to participate actively in hostilities' (in both international and internal conflicts) are prosecutable war crimes³⁷⁷. At present, customary international law prohibits recruitment of children under fifteen years of age, and this customary obligation binds non-State actors even without domestic legislation, in both international and non-international armed conflicts. For the most part, non-State-armed groups may recruit children as young as fifteen years of age to participate in hostilities, and this fact immediately raises issues around how they are to be classified in terms of IHL.

While IHL might 'prohibit the recruitment and participation of children less than fifteen-years old in armed conflict, those who do decide to

³⁷² 'The manner in which a child was recruited, and whether it involved compulsion or was "voluntary", are circumstances which may be taken into consideration by the Chamber at the sentencing or reparations phase, as appropriate. However, the consent of a child to his or her recruitment does not provide an accused with a valid defence' (*Prosecutor v Thomas Lubanga Dyilo* ICC Public judgment pursuant to article 74 of the statute at 617).

³⁷³ This position echoes the dicta of the Appeal chamber of the SCSL, which concluded that 'where a child under the age of fifteen years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence to those facing prosecution for unlawful enlistment' (*Prosecutor v Fofana* ICC Judgment (28 May 2008) SCSL-04-14-A at para 140; Rosen 'Who is a child? The Legal Conundrum of Child Soldiers' at 110). For those facing prosecution before the ICC under the Rome statute, 'the line between lawful recruitment and unlawful recruitment is drawn based solely on age'... 'all "voluntary" acts or statements or other indications or interpretations of consent by children under the legal age for recruitment are legally irrelevant' (Coomaraswamy, *Amicus Curiae* Submission in Lubanga Trial, at para 10).

³⁷⁴ *Ibid.*

³⁷⁵ Wakabi 'Lubanga Trial Highlights Plight of Child Soldiers'. Coomaraswamy made a submission before the ICC as *amicus curiae* in the Lubanga trial.

³⁷⁶ Yoram Dinstein (2010) *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd Ed) Cambridge University Press: Cambridge at 158.

³⁷⁷ Articles 8.b.xxvi and 8.e.vii.

participate are recognised as combatants and lose the protections afforded civilians under IHL³⁷⁸, although once captured these child soldiers do enjoy the special treatment afforded to children³⁷⁹.

Where these child soldiers are recruited into a non-State-armed group which does not satisfy the IHL requirements for an 'armed group', they are classified as civilians, albeit participating in hostilities. In applying the ICRC's guidelines on what activities amount to 'direct participation', it is apparent that the criteria extend beyond active participation in combat and military activities, and includes many of the direct support functions³⁸⁰ which child soldiers traditionally carry out. Children who carry out these restricted functions lose their civilian immunity from attack, and may become liable for 'criminal prosecution for their unauthorised participation in hostilities, even children below the lawful recruitment age'³⁸¹, and even if their recruitment was involuntary. They may be legitimate military targets for so long as they participate directly in hostilities. Furthermore, as members of armed groups, their civilian immunity from attack is suspended for so long as they engage in the continuous combat function, and until they disassociate themselves from the group.

On the other hand, children recruited into an 'armed force' as defined in IHL, are granted presumptive POW status upon capture and the right to have their POW status adjudicated on before a judicial tribunal³⁸². However, while IHL does afford special protections to children involved in conflict situations, it does still require these young combatants to meet, at a minimum, the more relaxed criteria under AP I in order to ensure they do not forfeit their POW status for failing to distinguish themselves from the civilian population.

Certainly, the prohibition against prosecuting child soldiers under fifteen years of age would reflect the ethos of shielding children from the horrors of war, which underpins much of IHL. While there is a pattern of historic leniency shown towards children under eighteen caught up in conflict situations, in so far as their prosecution is concerned, the special protections extended to children in armed conflicts do not 'exclude penal proceedings in respect of serious breaches of IHL committed by children'³⁸³. In fact, Amnesty International's argues that where child soldiers have been voluntarily recruited and satisfy the State's domestic law for criminal culpability, they should face criminal prosecution for their unlawful actions³⁸⁴.

³⁷⁸ Mulira 'International Legal Standards Governing the Use of Child Soldiers' at 29.

³⁷⁹ AP I article 77 (3).

³⁸⁰ UNICEF *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* at 14.

³⁸¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 50.

³⁸² AP I article 45(1) and (2) and 43(2); Goldman 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 18.

³⁸³ Crimes of War 'Child Soldiers'; Dutli 'Captured Child Combatants'.

³⁸⁴ Grover "'Child Soldiers'" as "'Non-Combatants'": The Inapplicability of the Refugee Convention Exclusion Clause' at 54.

CHAPTER 6

THE COMBATANT STATUS OF PRIVATE MILITARY AND SECURITY CONTRACTORS IN INTERNATIONAL ARMED CONFLICTS, IN LIGHT OF THE INTERNATIONAL HUMANITARIAN LAW NOTION OF DIRECT PARTICIPATION IN HOSTILITIES¹

6.1 Introduction

When the Cold War ended in the 1990s, 'more than six² million soldiers' were demobilised, and many military and security functions were simultaneously outsourced³ at unprecedented⁴ levels to a new player in international

¹ This chapter is based on two articles, one published under the title 'Private Security Contractors and International Humanitarian Law - A skirmish for recognition in international armed conflicts' (2007) 16(4) *African Security Review* 34-52 available at <http://www.tandfonline.com>, and revised with permission of the publisher (Taylor & Francis Ltd); and the other entitled 'Private military and security contractors: Violating the prohibition against civilian direct participation in hostilities, in international armed conflicts', which is undergoing peer review with the *Journal for Juridical Science*. This later article reflects subsequent developments in the concept of combatant status under customary IHL, and incorporates the ICRC's Interpretive Guide on the Notion of Direct Participation in Hostilities, which was published in 2009.

² Peter Warren Singer (2006) 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' in Victoria Wheeler and Adele Harmer (eds) *Resetting the Rules of Engagement: Trends and Issues in Military-Humanitarian Relations*, HPG Report 22 at 2.

³ This chapter does not address the controversy around whether States should be permitted to outsource 'activities which are inherently governmental and military in nature'. For more on this issue see Mirko Sossai (2011) 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' in Francesco Francioni and Natalino Ronzotti (eds) *War By Contract: Human Rights, Humanitarian Law and Private Contractors* Oxford University Press: Oxford at 198. As Gillard points out 'international humanitarian law does not address the lawfulness or legitimacy of PMCs/PSCs or of States' outsourcing to them certain activities. Rather, its aim is to regulate the activities of these actors if they are operating in situations of armed conflict' (Emanuela-Chiara Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' (2005) *Third Expert Meeting on the Notion of Direct Participation in Hostilities* Geneva at 1). Neither does it address the issue of State responsibility for the actions of these contracted PMSCs (for more on this topic see Shannon Bosch 'Private Security Contractors and State Responsibility' (2009) 41(3) *Comparative and International Law quarterly of South Africa* 353-382). Neither will I address the issue around regulating the industry, save to make mention of the specific provisions in the Montreux Document and Code of Conduct which pertain to IHL status and direct participation in hostilities (for more on this see 'The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' (Montreux Document) available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf (accessed 14 June 2012), and 'International Code of Conduct for Private Security Service Providers' available at http://www.icoc-ppsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf (accessed 7 July 2012)).

⁴ In 1991 the ratio of military personnel to contractors was 50:1; by 2003 the ratio was less than 10:1 (Peter Warren Singer (2003) *Corporate Warriors: The Rise of the Privatised Military*

humanitarian law (IHL): the private military and security contractor (PMSC)⁵. Subsequent, general military downsizing has presented private security companies with a vast pool of ex-military personnel⁶, and a burgeoning market for their services. Not surprisingly, names like DynCorp International LLC, Triple Canopy Inc, EOD Technologies Inc, Aegis Defence Services Limited, ArmorGroup International plc, and Blackwater Security, feature prominently in the international armed conflicts which followed (notably in Iraq and Afghanistan)⁷. Today there are an estimated⁸ 310⁹ registered private military and security companies, operational in 'over fifty countries'¹⁰ 'from Albania to Zambia'¹¹, with 'access to an international, mobile, and largely anonymous pool of labor'¹². In 2010, the industry itself was estimated to be worth between 200 and 300 billion U.S. dollars annually¹³.

Industry Cornell University Press: New York at 277). At the end of the Iraqi conflict, contractors working for the U.S. government and military outnumbered U.S. troops in Iraq (Amnesty International 'Private Military Contractors: Questions and Answers', available at <http://www.amnestyusa.org/business/pmc/HousePartyToolKit.pdf> (accessed 19 July 2012); Ellen L Frye 'Private Military Firms in the New World Order: How Redefining "Mercenary" can Tame the "Dogs of War"' (2005) May *Fordham Law Review* 2607 at 2610). Moreover, 'there are an estimated 10,000 security contractors in Afghanistan, including local nationals, third-party nationals, and Afghan security companies' (Erica Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' (2008) 49(1) *Harvard International Law Journal* 221 at 223).

⁵ Won Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' (2010) 38(3) *Denver Journal of International Law and Policy* 361 at 364; Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 3.

⁶ Blackwater (founded by a U.S. Navy SEAL) is staffed by 'former military, intelligence, and law enforcement personnel'; Triple Canopy Inc (founded by a member of the U.S. Special Forces' Delta Force) is 'comprised of former operators from tier-one special operations units'; and Aegis Defence Services Limited was founded by a retired British lieutenant-colonel (Jennifer K Elsea, Moshe Schwartz and Kennon H. Nakamura 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' (2008) available at <http://www.fas.org/sqp/crs/natsec/RL32419.pdf> (accessed 10 July 2012) at 8-10).

⁷ Renée De Nevers 'Private Security Companies and the Laws of War' (2009) 40 *Security Dialogue* available at <http://sdi.sagepub.com/content/40/2/169> (accessed 10 July 2012) at 175; Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 9-11.

⁸ 'There is no exhaustive list of companies operating in the international private security sector, and a notorious lack of verifiable data on the magnitude of the industry' (Caroline Holmqvist 'The Private Security Industry, States and Lack of an International Response' Prepared for the Seminar on Transnational and Non-State Armed Groups convened by the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University, in cooperation with the Graduate Institute of International Studies (Geneva) and the Radcliffe Institute for Advanced Study (Harvard University, Cambridge) (9-10 March 2007) at 7).

⁹ De Nevers 'Private Security Companies and the Laws of War' at 175.

¹⁰ Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 3.

¹¹ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 364.

¹² Holmqvist 'The Private Security Industry, States and Lack of an International Response' at 7; De Nevers 'Private Security Companies and the Laws of War' at 175.

¹³ Holmqvist 'The Private Security Industry, States and Lack of an International Response' at 7; Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 3; Paul Keilthy (2004) 'Private Security Firms in War Zones Worry NGOs' available at <http://reliefweb.int/report/afghanistan/private-security-firms-war-zones-worry-ngos> (accessed 25 September 2012).

This boom in the private security industry has been met with mixed responses. While the early PMSCs like Sandline International and Executive Outcomes openly advertised their combative activities, 'today's PMSC downplay a willingness to provide direct combat support'¹⁴. Some tout themselves as the world's future peacekeeper¹⁵. While others brand PMSCs as 'mercenaries'. In line with the two international anti-mercenary treaties¹⁶, some States have even introduced measures to ban or regulate the activities of PMSCs¹⁷. The official U.N. position, expressed through the U.N. Working Group on the Use of Mercenaries, is that 'many private military and security companies are operating in a "grey zone" which is not defined at all, or at the least not clearly defined by international legal norms'¹⁸.

Whatever individual States conclude regarding the legality of PMSCs, one thing is clear: PMSCs 'are becoming more mainstream and acceptable'¹⁹. In Iraq, even the Chief of the Coalition Provisional Authority (Paul Bremmer) and visiting dignitaries, were seldom without a Blackwater Security escort²⁰, and in the Green Zone in Baghdad, it was not uncommon for Blackwater personnel to be involved in 'prolonged gun battles ... defending the U.S.

¹⁴ Aril McDonald 'Private Military Contractors' (no date) *Transnational and Non-State Armed Groups Project* available at <http://www.tagsproject.org> (accessed 14 July 2012) at 2.

¹⁵ Damian Lilly 'The Privatization of Peacekeeping: Prospects and Realities in Peace Keeping Evolution or Extinction?' (2000) 3 *UNIDAR* available at http://www.unidir.org/bdd/fiche-periodique.php?ref_periodique=1020-7287-2000-3-en (accessed 19 July 2012); Lindsey Cameron 'Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation' (2006) 88:863 *International Review of the Red Cross* 573.

¹⁶ 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (1989) 2163 *U.N. Treaty Series* 75 (A/RES/44/34) ('U.N. Mercenary Convention') which entered into force on 20 October 2001 - by July 2012 only 32 States had become party to the convention (Katherine Fallah 'Corporate Actors: The Legal Status of Mercenaries in Armed Conflict' (2006) 88:863 *International Review of the Red Cross* 599 at 603). 1977 Convention for the Elimination of Mercenarism in Africa (XXXIX) Annex II Rev. 3 OAU CM/817 ('O.A.U. Mercenaries Convention') available at http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention_on_Mercenaries.pdf (accessed 14 July 2012).

¹⁷ The U.S. and South Africa are amongst the biggest producers of PMSCs, 'so it is perhaps not surprising that they have come the furthest in regulating the industry' (Holmqvist 'The Private Security Industry, States and Lack of an International Response' at 50). To this end, South Africa has passed the Regulation of Foreign Military Assistance Act 15 of 1998, and proposed the Prohibition of Mercenary Activities and Regulation of Certain Activities in the Country of Armed Conflict Act 27 of 2006 (for more on this see Shannon Bosch and Marelle Maritz 'South African Private Security Contractors Active in armed Conflicts: Citizenship, Prosecution and the Right to Work' (2011) 14:7 *Potchefstroom Electronic Review* 71).

¹⁸ Marina Mancini, Faustin Z Ntoubandi and Thilo Marauhm (2011) 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' in Francesco Francioni and Natalino Ronzotti (eds) *War By Contract: Human Rights, Humanitarian Law and Private Contractors* Oxford University Press: Oxford at 340.

¹⁹ Christopher H Lytton 'Blood for Hire: How the War in Iraq has Reinvented the World's Second Oldest Profession' (2006) Summer *Oregon Review of International Law* at 307. 'The United Nations (U.N.) is beginning to realise this fact and in its most recent guidance they have begun addressing "other security actors" in recent U.N. guidelines' (Colonel Cliff D Crofford, Jr 'Private Security Contractors on the Battlefield' (15 March 2006) *USAWC Strategy Research Project* available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil320.pdf> (accessed 10 July 2012) at 8).

²⁰ Frye 'Private Military Firms in the New World Order: How Redefining "Mercenary" can Tame the "Dogs of War"' at 2611.

government headquarters'²¹. In 2004, graphic images of the bodies of a former Army Ranger and a former Navy SEAL, now Blackwater Security Contractors, being 'mutilated, burned, dragged through the streets, and hung from a bridge over the Euphrates River' - made news headlines around the world²².

It is not only actual States who are making greater use of PMSCs - 'private corporations, international and regional inter-governmental organisations, as well as non-governmental organisations'²³ are also increasingly needing to employ PMSCs, in order to operate in situations of armed conflict²⁴. These private contractors have reportedly provided anything from direct frontline military assistance, to security, advice and training, logistical support, maintenance, interrogation, guarding and intelligence services²⁵.

While some texts draw a distinction between 'private military companies (which may replace or back-up an army or armed group)²⁶, and private security companies (which provide services to protect businesses and property from criminal activity)²⁷, I have adopted the blanket term 'private military and/or security contractors' (PMSCs) to refer to individual contractors who provide either military services²⁸ or security services²⁹. I have chosen to

²¹ Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 11; Frye 'Private Military Firms in the New World Order: How Redefining "Mercenary" can Tame the "Dogs of War"' at 2611.

²² Frye 'Private Military Firms in the New World Order: How Redefining "Mercenary" can Tame the "Dogs of War"' at 2607. These Blackwater personnel were ambushed 'while escorting trucks carrying supplies for a private company that provided food services to U.S. military dining facilities in Iraq' (Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 11).

²³ That said, in order to secure their funding, they often prefer 'to work with low-profile security providers like Olive, Hart, Armorgoup-DSL' (Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 3).

²⁴ Emanuela-Chiara Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' 2006 88:863 *International Review of the Red Cross* 525 at 525.

²⁵ EOD Technologies Inc, claims to provide 'munitions response, security services, and critical mission support. Its security services include armed security, guard force, reaction force training, surveillance and surveillance detection, counter IED response services, and security consulting' (Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 364). ArmorGroup International plc provides 'protective security; [a] risk management consultancy; security training; development, humanitarian, and construction support; weapons reduction and mine action services ... to more than 5,000 security professionals, government officials, and corporate executives and their families worldwide' (Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 11). DynCorp International LLC provided 'police training and related services in Iraq' (*Idem* at 9). Singer *Corporate Warriors: The Rise of the Privatised Military Industry* at 91-92; De Nevers 'Private Security Companies and the Laws of War' at 175; Holmqvist 'The Private Security Industry, States and Lack of an International Response' at 5.

²⁶ 'These offer direct, tactical military assistance, including serving in combat roles' (Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 3).

²⁷ Rikke Ishøy (2008) *Handbook on the Practical Use of International Humanitarian Law* (revised edition) Danish Red Cross: København at 106-107.

²⁸ As defined in the Draft Convention on Private Military and Security Companies (PMSCs), as 'specialised services related to military actions, including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or

use this approach, because, as the Montreux Document acknowledges³⁰: the reality on the ground is that the line between purely security functions often blurs into functions with a military flavour, and so it seems to be pragmatic to deal with all permutations of the 'beast'. Consequently, throughout this chapter I will refer to PMSCs, with the caveat that under this umbrella-term, will be individuals performing any range of tasks from active combat, military support³¹, training³² and non-lethal support³³, through to passive defence, and the 'protection and defense of civilians and their property'³⁴.

IHL treaties³⁵ (drafted 'prior to and during the Cold War'³⁶), and human rights treaties, currently make no specific reference to PMSCs by this appellation³⁷. At present, the legal response to PMSCs is focused upon enforcing some legal accountability for their actions, and 'little effort seems to have been made to assess their general status under IHL'³⁸. In 2008, a joint initiative between the Swiss government and the ICRC gave rise to a code of good practices for the private security industry called the Montreux Document. The Montreux document contained a list of twenty-seven obligations, requiring States to ensure that private security companies comply

unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities' (Human Rights Council 'Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination' (2010) A/HRC/15/25 ('Draft PMSC Convention').

²⁹ As defined in the Draft PMSC Convention, as: 'armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities'.

³⁰ Montreux Document at 37.

³¹ Which includes the provision of 'logistics, intelligence and maintenance services', as performed by Halliburton and its KBR subsidiary (Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatized Military Industry for the Humanitarian Community' at 3).

³² 'Retired senior and non-commissioned officers' are often contracted 'to provide military advice and training', as was the practice of Washington-based Military Professional Resources Incorporated (MPRI) (*Ibid*).

³³ Who 'provide logistical support such as de-mining, laundry and food services' (Douglas Brooks 'Protecting People: The PMC Potential: Comments and Suggestions for the U.K. Green Paper on Regulating Private Military Services' (2002) available at <http://www.ipoaonline.org> (accessed 17 September 2010) at 2-3).

³⁴ Zoe Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' (2008) 40 *International Law and Politics* 853 at 857.

³⁵ IHL is unusual in that it applies 'to all individuals who find themselves in a territory in which there is an armed conflict (international or non-international), whether they are State or non-State actors', and consequently is binding on PMSCs (Lindsey Cameron 'International Humanitarian Law and the Regulation of Private Military Companies' (2007) available at <http://www.baselgovernance.org/fileadmin/docs/pdfs/Non-State/Cameron.pdf> (accessed 20 August 2010) at 2).

³⁶ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 364.

³⁷ Montreux Document at 37.

³⁸ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 365.

with international law³⁹. The document then goes on to propose a list of seventy-three 'good practices', intended to assist States in ensuring that private security companies are both responsible under, and respect IHL and human rights law. At the same time that the Swiss initiative was drafting the Montreux document, there were also a variety of national and regional associations being formed, with the aim of self regulating the private security industry of their members. These associations include the British Association of Private Security Companies (BAPSC), the Pan African Security Association (PASA), the International Peace Operations (IPOA), and the Private Security Company Association of Iraq (PSCAI). One year later in 2009 the UN Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination⁴⁰ proposed a Draft Convention on Regulation Oversight and Monitoring of Private Military and Security Companies⁴¹. The draft convention proposes a regulatory framework which addresses a variety of issues including:

- regulating the relationship between States and private security companies⁴²;
- State responsibility⁴³;
- international humanitarian law and human rights law obligations⁴⁴;
- limitations upon States against outsourcing inherent government functions or prohibited activities to PMSCs⁴⁵.

The Draft Convention aims to establish mechanisms through its 'Oversight Committee'⁴⁶ and through its complaint procedures⁴⁷, to monitor⁴⁸ and enforce the provisions at both a domestic⁴⁹ and international level.

With PMSCs fast outnumbering traditional armed forces on the ground in international armed conflicts⁵⁰, and with the prospect that PMSCs are likely to be a permanent feature in 'humanitarian, peacekeeping, and peace-enforcement operations'⁵¹, there is an urgent and pragmatic need for IHL to

³⁹ These include legislating, investigating, prosecuting and enforcing IHL obligations, including provision for the payment of reparations in instances where private security companies violate IHL.

⁴⁰ Published under HRC Res 2005/2.

⁴¹ (13 July 2009) available at

<http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf> (accessed 20 May 2013).

⁴² *Idem* article 6.

⁴³ *Idem* article 4.

⁴⁴ *Idem* article 7.

⁴⁵ *Idem* articles 8-11.

⁴⁶ *Idem* article 33.

⁴⁷ *Idem* article 34 and 37.

⁴⁸ *Idem* article 35.

⁴⁹ *Idem* article 4(5).

⁵⁰ This chapter focuses solely on international armed conflicts, as defined by the 1949 Geneva Conventions, common article 2 and Additional Protocol I, because the legal regime that applies to international armed conflicts differs vastly from that which regulates non-international armed conflicts (Mahmoud Cherif Bassiouni 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98(3) *Journal of Criminal Law and Criminology* 711 at 728), and the issue 'combatant status ...exists only in international armed conflicts' (De Nevers 'Private Security Companies and the Laws of War' at 173; Jean-Marie Henckaerts and Louise Doswald-Beck (2005) *Customary International Humanitarian Law Volume 1: Rules* Cambridge University Press: Cambridge at 11).

⁵¹ Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the

address the issue of 'where the modern PMSCs fit into existing international law'⁵². Without an 'international convention which governs the activities of PMSCs specifically, the 'status of today's private military contractors is ambiguous at best'⁵³. That said, 'in situations of armed conflict certain well-established rules and principles do... regulate both the activities of PMSC staff, and the responsibilities of the States that hire them'⁵⁴ under IHL. Beyond the prospect of tribunals being flooded with cases involving the IHL status of PMSCs, lie other motivations for this analysis: first, opposition forces need clarity as to whether PMSCs may be legitimately targeted in the theatre of armed conflict; secondly, PMSCs need to know whether they are permitted to participate directly in hostilities (and exactly what activities amount to direct participation in hostilities), and lastly, PMSCs must appreciate the consequences which might follow from their actions if they do participate directly in hostilities⁵⁵. In short, it is crucial to assess their specific primary status as combatants or civilians⁵⁶, and to ascertain what actions amount to direct participation in hostilities. At this juncture it is useful to note that while some PMSCs might fulfil the definitional criteria for Mercenarism, and consequently be found to be in violation of IHL⁵⁷, their direct participation in hostilities alone is 'neither prohibited nor privileged'⁵⁸ according to the ICRC Interpretive Guide. What is crucial however, is understanding that these actions which amount to direct participation in hostilities do compromise the immunity from direct targeting, which is otherwise enjoyed by civilians in situations of armed conflict.

I turn now to address these two issues in turn: the primary status of PMSCs under IHL, and how the notion of direct participation in hostilities affects them in the roles they have assumed in international armed conflicts.

6.2 The importance of primary status under IHL and its legal consequences

At the heart of IHL is the notion that 'armed hostilities should as far as possible be between organised armed forces, not entire societies'⁵⁹. To this end, IHL attempts to maintain a 'firebreak distinguishing legitimate military targets, from civilian objects and people not involved in armed hostilities'⁶⁰, in order to 'insulate civilians from the prospect of attack in war'⁶¹. For this

Privatised Military Industry for the Humanitarian Community' at 3.

⁵² Lytton 'Blood for Hire: How the War in Iraq has Reinvented the World's Second Oldest Profession' at 307.

⁵³ *Ibid*; Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 364; De Nevers 'Private Security Companies and the Laws of War' at 170.

⁵⁴ Montreux Document at 37.

⁵⁵ Cameron 'Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation' 582.

⁵⁶ De Nevers 'Private Security Companies and the Laws of War' at 175.

⁵⁷ And potentially face prosecution at the hands of States party to the U.N. Mercenaries Convention or the O.A.U. Mercenaries Convention, or under a State's municipal law.

⁵⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL* at 83.

⁵⁹ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 363.

⁶⁰ *Ibid*.

⁶¹ Yoram Dinstein (2004) *The Conduct of Hostilities Under the Law of International Armed Conflict* Cambridge University Press: Cambridge at 35.

firebreak to be effective, every individual in the theatre of war must have a recognised primary status as either a combatant or a civilian⁶². The determination of one's primary status informs not only the protections which individuals are afforded in the theatre of war, but also the legal consequences that flow from their actions⁶³, and the international legal obligations imposed upon their captors⁶⁴.

It is important to note that 'no one is born a combatant ... without being a civilian first'⁶⁵. However, once a civilian becomes a 'member of the armed forces of a belligerent party'⁶⁶ (as defined by IHL⁶⁷), they acquire primary combatant status⁶⁸, and are expected to distinguish themselves from the civilian population⁶⁹. Every one else who is found in the theatre of war, and who do not fit within the definition of a combatant⁷⁰, are then by default classified as civilians⁷¹.

With 'combatant' privilege comes the exclusive authorisation to lawfully participate directly in hostilities⁷². This authorisation does not vest in combatants individually, 'but results from the affiliation of the individual combatant to an organ (i.e. the armed forces) of a party to the conflict, which is itself a subject of international law'⁷³. Since combatants are acting as

⁶² Kurt Ipsen (1995) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* (1st ed) Oxford University Press: Oxford at 65; Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 363; De Nevers 'Private Security Companies and the Laws of War' at 172; Moreover, there is no intermediate 'quasi-combatant' category under IHL (Donald Rothwell 'Legal Opinion on the Status of Non-combatants and Contractors Under International Humanitarian Law and Australian Law' (2004) available at http://www.aspi.org.au/pdf/ASPIlegalopinion_contractors.pdf (accessed 17 July 2012).

⁶³ A civilian who participates directly in hostilities might face criminal prosecution for their unauthorised actions; while combatants are not prosecuted for participating in hostilities, provided they observe the rules of war.

⁶⁴ Ipsen (1995) 'Combatants and Non-combatants' at 65.

⁶⁵ Shlomy Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' (2005) 38 *Israel Law Review* 378 at 390.

⁶⁶ '... whether regular or irregular, including paramilitary units incorporated *de facto* in the armed forces' (Robert Goldman and Brian Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' (2002) December *ASIL Task Force Paper* available at <http://www.asil.org/taskforce/goldman.pdf> (accessed 21 February 2012) at 11).

⁶⁷ Medical personnel and chaplains enjoy unique status under IHL (GC III article 33).

⁶⁸ GC III articles 4A (1) and (3); Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 11.

⁶⁹ AP I article 44(3); Gary Solis (2010) *The Law of Armed Conflict: International Humanitarian Law in War*. Cambridge University Press: New York at 209-210.

⁷⁰ De Nevers 'Private Security Companies and the Laws of War' at 173.

⁷¹ AP I article 50(1). That said, some academics like Watkin propose more than just the two categories of participant. Watkin lists: 'lawful combatants (API article 43); otherwise lawful combatants (API article 44(4)); members of organised armed groups who are not lawful combatants; civilians who take a direct part in hostilities; and uninvolved civilians' (Kenneth Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' (2010) 42 *International Law and Politics* 641 at 665-667).

⁷² De Nevers 'Private Security Companies and the Laws of War' at 173.

⁷³ It is worth mentioning at this juncture, that in an armed conflict, only a recognised subject of international law can clothe their armed forces with authorised combatant status (Ipsen (1995) 'Combatants and Non-combatants' at 66-67). 'Private citizens and independent armed groups have always been excluded from entitlement to the combatant privilege and POW

'representatives of a sovereign'⁷⁴, they are exempt from criminal liability for their 'authorised acts'⁷⁵ of hostility, and cannot be punished for their mere participation in the hostilities⁷⁶. Without their primary combatant status, such participation in hostilities would render them liable for criminal prosecution upon capture⁷⁷.

While combatants are authorised to participate directly in hostilities, this authorisation is subject to the expectation that they adhere to the laws of war, and individuals can be prosecuted for their failure to do so⁷⁸. While a failure to observe the laws of war does not result in the loss of their primary 'combatant status'⁷⁹, they shall nevertheless 'be called to account in accordance with the ... military penal law of their party to the conflict'⁸⁰. The obligation to punish violations of IHL committed by individual combatants is viewed very seriously⁸¹.

As a further incentive for individual combatants to abide by the laws of war⁸², combatant privilege brings with it secondary prisoners of war (POW) status, in the event of a combatant falling into enemy hands. This secondary POW privilege, flows from the rationale that a detained combatant's 'ability to fight is limited'⁸³, which consequently neutralises their 'military threat to the enemy'⁸⁴. Their detention renders them *hors de combat*, for the duration of

status' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 197).

'There is no room for hostilities in an international armed conflict being conducted by individuals on their own initiative' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 43).

⁷⁴ Eric Talbot Jensen (2011) 'Direct Participation in Hostilities' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* at 2020-28.

⁷⁵ *Idem* at 1897-1906 and 1906-14.

⁷⁶ Michael Brough 'Combatant, Noncombatant, Criminal: The Importance of Distinction' (2004) 11:2-3 *Ethical Perspectives* 176 at 177; Zachary 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?' at 380; Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 4; Ipsen (1995) 'Combatants and Non-combatants' at 93.

⁷⁷ De Nevers 'Private Security Companies and the Laws of War' at 172; Brough 'Combatant, Noncombatant, Criminal: The Importance of Distinction' at 177.

⁷⁸ Combatants who breach the laws of war may be subjected to disciplinary proceedings or military prosecutions (AP I articles 85 and 86; GC III articles 82-88; Ipsen (1995) 'Combatants and Non-combatants' at 81; Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 363).

⁷⁹ A breach of the laws of war does not, however, result in the forfeiture of their secondary POW status, unless they also breach the fundamental obligation of distinction (Claude Pilloud, Yves Sandoz and Bruno Zimmermann (1987) *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* Martinus Nijhoff Publishers: Geneva at 511; Ipsen (2008) 'Combatants and Non-combatants' at 95).

⁸⁰ Ipsen (2008) 'Combatants and Non-combatants' at 82.

⁸¹ *Idem* at 95; AP I articles 85 and 86.

⁸² De Nevers 'Private Security Companies and the Laws of War' at 173.

⁸³ Ipsen (1995) 'Combatants and Non-combatants' at 65-6; The Regulations respecting the Laws and Customs of War on Land, Annex to the Hague Convention IV of 18 October 1907 (Hague Regulations 'HR') 1910 *U.K. Treaty Series* 9 article 3(2), GC III articles 4A(1-3) and (6); AP I articles 43 and 44(1); Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 197.

⁸⁴ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 197.

the conflict⁸⁵. At the cessation of hostilities those lawful combatants (held as POWs) are repatriated 'to their own country, free to continue life unimpeded by their lawful hostile acts'⁸⁶.

While combatant status brings with it certain privileges, it also carries with it the risk associated with identifying oneself openly as a member of the armed forces⁸⁷. As such, they remain a 'continuing lawful target'⁸⁸ for the opposing forces, at all times and at all locations⁸⁹, whether in or 'out of uniform'⁹⁰... 'even when they are not on active duty'⁹¹. This status quo continues as long as they retain membership of the armed force, and until they either retire from the military⁹², or 'gain immunity from attack by becoming *hors de combat*'⁹³.

All those who do not enjoy combatant status, and who are consequently classified as civilians, are expected⁹⁴ not to partake in hostilities. Civilians are protected against the effects of hostilities, cannot be targeted, and are to be respected. In order to enjoy this protection, they must ensure that their actions do not compromise their civilian status⁹⁵. The moment a civilian elects to participate in the hostilities, he/she loses not only their immunity against targeting, but if captured can face criminal prosecution for their actions (even for actions which do not amount to a war crime were they to be committed by a combatant, like for example 'killing an enemy soldier')⁹⁶.

While IHL operates primarily on these 'two stark classifications – combatant and civilian – it must fit a range of actors within them'⁹⁷. Consequently we find within IHL a few anomalous categories of individuals, which challenge the stark combatant/civilian distinction. The first is the group labelled 'persons accompanying the armed forces'. Although these non-combatative service personnel accompany the armed forces, and for that are granted POW status upon capture, they are not authorised to participate

⁸⁵ Nathaniel Berman 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 *Columbia Journal of Transnational Law* 1 at 5; Zachary 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?' at 380.

⁸⁶ Jensen 'Direct Participation in Hostilities' at 1906-14.

⁸⁷ *Idem* at 2020-28.

⁸⁸ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 188.

⁸⁹ Which includes those 'on a front line or a mile or a hundred miles behind enemy lines' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 34).

'Whether eating, washing, watching television, or even sleeping, a lawful combatant is targetable by an opposing force at any time, regardless of his actions' (Jensen 'Direct Participation in Hostilities' at 2020-28).

⁹⁰ Yoram Dinstein (2007) 'The System of Status Groups in International Humanitarian Law' in Wolff Heintschel von Heinegg, Volker Epping (eds.) *International Humanitarian Law Facing New Challenges* Springer: Germany at 150-151.

⁹¹ Dinstein 'The System of Status Groups in International Humanitarian Law' at 150-151; Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 188.

⁹² ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* ('Interpretive Guide') (2009) ICRC: Geneva at 23.

⁹³ 'Only combatants can become *hors de combat* through surrender or incapacitation' - it does not cover civilians (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 34; Jensen 'Direct Participation in Hostilities' at 2197-2204).

⁹⁴ De Nevers 'Private Security Companies and the Laws of War' at 173.

⁹⁵ *Ibid*; GC IV article 3.

⁹⁶ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 363.

⁹⁷ De Nevers 'Private Security Companies and the Laws of War' at 173.

directly in hostilities, and consequently enjoy primary civilian status⁹⁸. As a result of their essentially civilian status, ‘they cannot be targeted deliberately, although if they are co-located within legitimate military targets, attacks against those locations are nonetheless legitimate’⁹⁹. As a further consequence of their civilian status, they are restricted from participating directly in hostilities, and by taking up arms they effectively forfeit their POW privilege upon capture, and can face criminal prosecution¹⁰⁰. Another anomalous category is that of the ‘*levée en masse*’¹⁰¹. These are civilians who acquire the secondary protections afforded combatants (against prosecution), when they are forced to take up arms spontaneously in the face of an occupation.

Clearly, IHL is accustomed to a somewhat muddled response to the ambiguous scenarios encountered in the theatre of war. Moreover, ‘as the privatisation of military-related activities becomes ever more commonplace, the formerly strict differentiation between “soldier” and “civilian” appears simplistic and difficult to implement’¹⁰². PMSCs are just one of many recent challenges which are facing international humanitarian lawyers. Nevertheless, IHL does operate ‘on the basis of the fundamental principle of distinction between combatants and civilians’¹⁰³, and that in cases of doubt an individual is ‘presumed to have protected status until such time as their status is determined by a competent tribunal’¹⁰⁴. So, as much as the stark delimitation between the two categories does not meet the current reality of international armed conflict, it remains ‘crucial as it determines the rights and privileges afforded individuals by law, and the legal consequences deriving from the conduct of those persons’¹⁰⁵.

6.3 PMSCs as ‘combatants’

The term ‘combatant’ does not have a codified definition¹⁰⁶ in IHL. However, it is widely believed that the ‘enumerated categories of those entitled to POW

⁹⁸ GC III article 4A(4); AP I article 50(1); Ipsen (1995) ‘Combatants and Non-combatants’ at 65.

⁹⁹ De Nevers ‘Private Security Companies and the Laws of War’ at 173.

¹⁰⁰ *Ibid.*

¹⁰¹ This essentially civilian group are afforded primary combatant status if: ‘they have spontaneously taken up arms against invading troops; without having had time to form themselves into armed units; and they carry their arms openly and respect the laws and customs of war in their military operations’ (GC III article 4(6); AP I article 43(1)). This primary combatant status ensures that if captured, these individuals will be afforded secondary POW status.

¹⁰² David M Crane and Daniel Reisner (2011) ‘Jousting at Windmills’ in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (Columbia Studies in Terrorism and Irregular Warfare) at 1566-72 (ebook).

¹⁰³ Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 197.

¹⁰⁴ GC III article 5; AP I article 45(1).

¹⁰⁵ Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 197.

¹⁰⁶ David Whippman ‘Redefining Combatants’ (2006) 39 *Cornell International Law Journal* 699 at 701; Jensen ‘Direct Participation in Hostilities’ at 1888-97. ‘As James Spaight stated in 1911: the delegates to the 1907 Conference had “almost shirked their task - a task of great difficulty, it must be admitted” in attempting to define combatant status’ (Kenneth Watkin ‘Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over

status'¹⁰⁷, set out in GC III article 4¹⁰⁸, define the meaning of the term combatant¹⁰⁹, since it is implied that all those individuals who qualify for POW status *a priori* enjoy combatant privilege¹¹⁰. GC III shifted the focus from the activity-based understanding of combatant status which had existed under the Hague law, to a membership-based understanding, wherein 'all members of the armed forces are combatants, regardless of what their function within the armed forces might be'¹¹¹. Put another way, 'membership in an identifiable and organised armed force' is what determines whether one qualifies for combatant status¹¹².

Legitimacy' Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series (Winter 2005) 2 at 3-4). Some academics argue that 'there is no consensus definition of the term combatant in international law' (Jensen 'Direct Participation in Hostilities' at 1888-97).

¹⁰⁷ Daphne Richmond-Barak (2011) 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (Columbia Studies in Terrorism and Irregular Warfare) at 2372-79; Whippman 'Redefining Combatants' at 701.

¹⁰⁸ Article 4(A):

'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:

- (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 organised 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 organised 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 recognisable 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 recognised by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of 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 authorisation, 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.' (1949 Geneva Convention Relative to the Treatment of Prisoners of War (GC III) of August 12 (1950) 75 *U.N. Treaty Series* 135).

¹⁰⁹ Albeit in a rather inconvenient place, in a convention dealing with the rights of POWs (Richmond-Barak 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' at 2477-85 and 2372-79; Whippman 'Redefining Combatants' at 701).

¹¹⁰ This customary law position is codified in GC II article 87 (Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 4).

¹¹¹ Richmond-Barak 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' at 2477-85; Crane and Reisner 'Jousting at Windmills' at 1595-1604.

¹¹² Richmond-Barak 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' at 2386-94; Toni Pfanner 'Military Uniforms and the Law of War' (2004) 86

i. Members of the armed forces of a Party to the conflict

Regular armed forces

In IHL there is a rebuttable presumption¹¹³ that all members of a State's regular armed forces automatically enjoy full primary combatant privilege¹¹⁴. While it appears as if there are no conditions¹¹⁵ attached to this presumption, the U.K. Privy Council¹¹⁶ maintained that States must ensure that their forces observe the conditions expressed in GC III article 4A(2), 'notwithstanding the fact that it is not stated *expressis verbis* in the GC's or the HR's'¹¹⁷.

When one looks at the criteria set out in GC III article 4A(2), it is obvious that 'these conditions were fashioned on the operations of regular armed forces', who traditionally have been organised 'subject to hierarchical discipline'¹¹⁸, and normally have belonged to a belligerent party, such that the 'issue of allegiance scarcely arises'¹¹⁹. Moreover there is a 'proud tradition of wearing uniforms'¹²⁰, carrying their arms openly¹²¹, and being 'trained to respect the law of international armed conflict'¹²².

International Review of the Red Cross 93 at 115; Ipsen (2008) 'Combatants and Non-combatants' at 86.

¹¹³ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 43.

¹¹⁴ Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 10 and 11. The one exception to this presumption arises when members of the regular armed forces are caught spying while out of uniform. In these cases, they lose their primary combatant status as a result of their perfidious actions (Pfanner 'Military Uniforms and the Law of War' at 115).

¹¹⁵ Although Pfanner notes that based on the 'ordinary reading of GCIII article 4A(1), and the *travaux préparatoires* it is clear that the regular armed forces (including members of militia and volunteer corps forming part of them) do not have to formally fulfil the four criteria to qualify as POW' (*Idem* at 114-115).

¹¹⁶ In *Bin Haji Mohamed Ali and Another v Public Prosecutor, Judicial Committee of the Privy Council* (U.K.) (29 July 1968) [1969] 1 A.C. 430.

¹¹⁷ Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* at 42; Pfanner 'Military Uniforms and the Law of War' at 11.

¹¹⁸ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 47.

¹¹⁹ *Ibid.*

¹²⁰ One of those unspoken requirements, is that members of the regular armed forces observe the principle of distinction, which they have traditionally done by wearing uniforms (Jean Pictet (1960) *ICRC Commentary on Geneva Convention III* ICRC: Geneva at 63; Pfanner 'Military Uniforms and the Law of War' at 94 and 103-104). The only personnel who were exempted from this requirement were those individuals (like war correspondents, civilian contractors, civilian members of military aircraft crews, merchant marine and civil aircraft crews) who by their vocation were not authorised to participate in hostilities directly. In fact, the expectation that the State's armed force would be 'uniformed was so unquestioningly assumed that no effort was made in any of the IHL treaties to define what constitutes a uniform' (Michael Cowling and Shannon Bosch 'Combatant Status at Guantanamo Bay - International Humanitarian Law Detained Incommunicado' (2009) 42:1 *Comparative and International Law Quarterly of South Africa* at 1). Academics agree that the term 'uniform' is used very loosely to apply to any myriad of 'distinguishing symbols' and even to camouflage dress, which is considered a 'lawful ruse of war' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 44). This clearly calls into question the requirement that the 'uniform' is recognisable at a distance (Yves C Sandoz, Christopher Swinarski and Bruno Zimmermann (eds) (1987) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* ICRC/ Martinus Nijhoff: Geneva/Dordrecht at 566). 'Special forces often wear non-standard uniforms, a phenomenon which is unobjectionable, provided that the combatants retain some distinctive feature telling them apart from civilians' ... is worth remembering that the principle of distinction is not concerned

*Irregular armed forces*¹²³

As war evolved, and other voluntary militia groups began to participate more regularly in the theatre of war (often without clothing their members in traditional military uniform), IHL responded¹²⁴ by setting out more stringent criteria¹²⁵ which these irregulars had to fulfil before they could enjoy combatant status¹²⁶. The conditions initially set out in GC III article 4A(2), can be summarised as follows:

- a) belonging to an organised group¹²⁷.
- b) 'belonging to a party to the conflict'¹²⁸;

so much with whether 'combatants can be seen, but whether (if observed) they are likely to be mixed up with civilians' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 43 and 44). As Watkins explains: 'camouflage and disguise as an ordinary civilian going about his normal pacific activities are different' (Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' at 29-30).

¹²¹ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 47.

¹²² *Ibid.*

¹²³ Also referred to as 'members of other militias and members of other volunteer corps' (GC III article 4A(2)).

¹²⁴ Amongst the changes made to the Hague law, GC III sought to 'explicitly recognise independent irregular militias, volunteer corps' and now also organised resistance movements, on condition that they could prove that they belonged to a party to the conflict (Anthony PV Rogers 'Unequal Combat and the Law of War' (2004) 7 *Yearbook of International Humanitarian Law* 3 at 14; Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 9).

¹²⁵ Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 11.

¹²⁶ *Idem* at 7. A status which their colleagues in the State's armed forces seemed to enjoy automatically (*Idem* at 9 and 11; Cherif Bassiouni 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' at 750-751).

¹²⁷ According to most legal commentators, this requirement can be 'filled by the most rudimentary elements of military organisation' (Thomas Mallison and Sally Mallison 'The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict' (1977) 9 *Case Western Reserve Journal of International Law* 39 at 50; Pictet *ICRC Commentary on Geneva Convention III* at 58).

¹²⁸ In other words they must fight on behalf of a State party that is engaged in an international armed conflict. According to the commentary, any form of tacit authorisation, control or 'a *de facto* relationship between the group and a party to an international armed conflict' is sufficient to satisfy this requirement (*Prosecutor v Tadić* ICTY Appeals Chamber (1999) 38 *International Legal Materials* 1518 at 1537). According to the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals chamber in *Tadić*, 'a relationship of dependence and allegiance of these irregulars vis-à-vis that party to the conflict will satisfy this requirement' (*Ibid.*). This 'implicitly refers to 'a test of control ... by co-ordinating or helping in the general planning of [the associated group's] military activity' (Dale Stephens and Angeline Lewis 'The Targeting of Civilian Contractors in Armed Conflict' (2006) 9 *Yearbook of International Humanitarian Law* 25 at 32; Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12). Richmond-Barak maintains that the 'belonging' requirement set out in article 4A(2), did not require either 'formal incorporation into the State's armed forces nor the authorisation of all the armed group's activities by the State' (Richmond-Barak 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' at 2534-41). In short, it was included as a requirement to ensure that the 'customary law proscription against individuals or groups engaging in private warfare against a State party involved in an armed conflict' would be observed (Goldman *et al* 'Unprivileged Combatants and the Hostilities in

- c) the 'group must be commanded by a person responsible for his subordinates'¹²⁹;
- d) the 'group must ensure that its members have a fixed, distinctive sign recognisable at a distance'¹³⁰;
- e) the group's members 'must carry their arms openly'¹³¹;
- f) 'the group must ensure that its members conduct their operations in accordance with the laws of war'¹³².

It is necessary to verify that the armed group as a whole is organised, has a responsible commander, and belongs to a belligerent party. Should that be the case, all members of the armed group will benefit from combatant status. Thereafter the last three conditions (d-f) are applicable to the group's individual members, and must be met 'continuously and not intermittently'¹³³. Authorities generally agree that all six conditions¹³⁴ are applicable to the irregular group as a collective¹³⁵. Consequently, if the group is in the habit of

Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12).

¹²⁹ The exact qualifications which the leader needs, or 'how he obtained his authority is not specified' - in essence all that is required is that 'the leader must be responsible for the action taken on his orders' and he must discipline 'his members to ensure compliance with the laws of war' (Goldman and Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12).

¹³⁰ Much like the confusion surrounding the definition of the term uniform, there is little by way of guidance in either treaty law or soft law as to what 'constitutes a distinctive sign' (*Idem* at 12-13). Goldman suggests that provided 'the dress or sign worn be such that it is visible during daylight and detectable at a distance by the naked eye', that this would satisfy the requirement (*Ibid*). From various legal opinions, it is probably safe to conclude that the following items are believed sufficient to constitute a distinctive sign recognisable at a distance: a helmet, headdress, cap, scarf, coat, shirt, badge, 'armlet or brassard permanently affixed to their clothing, or an emblem or coloured sign worn on the chest, provided it is worn constantly, in all circumstances'. While Dinstein notes that 'it is not clear whether visibility is determined solely by the naked eye or if it also includes observation by means of binoculars and even infra-red equipment' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 53; Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12-13; Pictet *ICRC Commentary on Geneva Convention III* at 60; U.S. Department of the Army Field Manual 27-10 'The Law of Land Warfare' at 27 para 64(b)).

¹³¹ Which is intended to ensure that the opposition are not unfairly taken by surprise by irregulars who approach with pistols concealed beneath their clothing (Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 13).

¹³² *Idem* at 14. For example: 'not directly attacking civilians; causing disproportionate civilian casualties, or otherwise causing unnecessary suffering and destruction' (*Ibid*). Immediately we can appreciate that those engaging in terrorist acts, aimed at spreading fear amongst the civilian population, would fall foul of this criteria, and would not be classified as combatants in terms of GC III.

¹³³ *Idem* 14 -15; Cowling and Bosch 'Combatant Status at Guantanamo Bay - International Humanitarian Law Detained Incommunicado' at 25.

¹³⁴ Yoram Dinstein maintains that the 'requirements of a lawful combatant' can be reduced to seven general-cumulative-conditions: (i) subordination to a responsible command, (ii) a fixed distinctive emblem, (iii) carrying arms openly, (iv) conduct in accordance with *jus in bello*, ... (v) organisation, (vi) belonging to a party to the conflict, ... [and] (vii) lack of duty of allegiance to the Detaining Power' (Jensen 'Direct Participation in Hostilities' at 1914-21).

¹³⁵ While the actions of a few 'bad apples' in a group will not strip the entire group of its combatant status (provided most of the group observe IHL), it will certainly expose those

flouting any or all of the six requirements, 'the groups general pattern of behaviour will be extrapolated' to each individual member, denying them privileged combatant status, and classifying them 'as civilians participating unlawfully in hostilities'¹³⁶. Similarly, if the group 'generally meet all six conditions, all of the time then an individual member who fails to observe any of the last three criteria (d-f) will not lose his privileged combatant ...status upon capture'¹³⁷, but he will be liable for judicial prosecution for his non-compliance.

Over time, the requirements of article 4A(2) have proved 'extremely difficult if not, in fact, impossible for irregulars to comply with, without jeopardising their military operations'¹³⁸. In 1977 AP I¹³⁹ addressed the issue of 'fashioning new rules'¹⁴⁰ to 'create a single and non-discriminatory set of rules, applicable to all combatants regular and irregular alike, ... and to provide presumptions and procedures to prevent abuse of the exceptions'¹⁴¹.

In AP I article 43(1), we find a new definition of 'armed forces' (applicable to regular and irregular voluntary corps, militia and other organised groups¹⁴²), and these are described as:

rogue combatants to 'individual judicial or administrative prosecution' for their violations of IHL (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 50; Cowling and Bosch 'Combatant Status at Guantanamo Bay - International Humanitarian Law Detained Incommunicado' at 25; Evan Wallach 'Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?' (2003) November *Army Lawyer* at 5; Arfan Khan 'International and Human Rights Aspects of the Treatment of Detainees' (2005) 69:2 *The Journal of Criminal Law* 168 at 178; Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14). In instances where 'there is no conclusive evidence on the groups compliance, each individual will be judged on his own compliance' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 50).

¹³⁶ William J Fenrick 'Combatant and POW Status' (1998) *ICRC Seminar on IHL* (Lecture delivered at New York University Law School); Cowling and Bosch 'Combatant Status at Guantanamo Bay - International Humanitarian Law Detained Incommunicado' at 25.

¹³⁷ Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 50.

¹³⁸ Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14-16. This fact was recognised in AP I articles 1(4) and 44(3) which reads as follows: 'recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself' (Waldemar Solf 'A Response to Douglas J Feith's Law in the Service of Terror - The Strange Case of the Additional Protocol' (1986) 20 *Akron Law Review* 261 at 272).

¹³⁹ AP I was drafted to deal with international armed conflicts, while AP II was limited in scope to non-international armed conflicts. Since this chapter is focused on the combatant status of non-State groups in situations of international armed conflict, I shall restrict the following discussions to the developments which arose in respect of AP I only.

¹⁴⁰ Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 16.

¹⁴¹ George Aldrich 'Guerilla Combatants and Prisoner of War Status' (1982) 31 *American University Law Review* 87 at 874.

¹⁴² Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 17-18; Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 199-200.

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

This functional-based¹⁴³ definition ‘of “armed forces” widens the scope of actors brought within combatant status’¹⁴⁴, replacing the membership-based regime under GC III¹⁴⁵, and substituting the six onerous ‘rules for combatant status’ set out in GC III, with only two conditions:

- a) ‘responsible command under a party to the conflict’¹⁴⁶; and
- b) behaviour in accordance with the laws of war’¹⁴⁷.

What is key, is that the irregulars ‘conduct hostilities on behalf and with the agreement of that party’¹⁴⁸. As Rogers points out, ‘it is a matter of [a measure of] organisation and discipline, which goes to the root of the definition of armed forces’¹⁴⁹. No longer do irregulars have to prove use of a uniform¹⁵⁰ and that they carried their arms openly¹⁵¹, or that they enjoyed political recognition¹⁵². AP I article 43(2) then goes on to state that ‘all members of the armed forces (other than the medical personnel and chaplains) are combatants having the right to directly participate in hostilities’ - effectively clothing all these newly-defined ‘armed forces’ with combatant status.

¹⁴³ Richmond-Barak ‘Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity’ at 2509-17.

¹⁴⁴ *Idem* at 2495-2502.

¹⁴⁵ *Idem* at 2502-9.

¹⁴⁶ The relationship of belonging may ‘be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting’ (Goldman *et al* ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 18).

¹⁴⁷ Richmond-Barak ‘Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity’ at 2502-9.

¹⁴⁸ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 23; Goldman *et al* ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 18.

¹⁴⁹ Rogers ‘Unequal Combat and the Law of War’ at 14-15; Fritz Kalshoven and Liesbeth Zegveld (2011) *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th ed) Cambridge University Press: Cambridge at 87; Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 200.

¹⁵⁰ According to Melzer ‘visibility is no longer a collective defining element of the armed forces, but an individual obligation, the respect of which may be relevant for a member’s entitlement to POW status or combatant privilege, but not for his unit’s legal qualification as an armed force of a party to the conflict’ (Nils Melzer (2009) *Targeted Killings in International Law* Oxford University Press: Oxford at 307).

¹⁵¹ Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 87.

¹⁵² Goldman *et al* ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 18.

Another innovation for irregular forces, brought about by the regime under AP I, is that once an individual is clothed with combatant status, they cannot lose that status - even by actions prior to their capture which might have violated IHL¹⁵³. This is a remarkable change from the consequences which used to pertain under GC III, where irregular forces were at risk of losing their POW status for their failure to observe IHL¹⁵⁴. Now, any failure to observe the rules of war (even if it is found that an individual has committed war crimes¹⁵⁵), will be an offence for which they can be court-martialled and face punishment, but they shall now nevertheless continue to be treated as combatants¹⁵⁶.

While the new customary law definition of the armed forces does away with the visibility requirement previously contained in GC III article 4A(2)¹⁵⁷, the AP I regime does take the obligation to observe the principle of distinction¹⁵⁸ very seriously. Since 'combatant privilege'¹⁵⁹ makes one a legitimate military target, combatants are duty bound to distinguish themselves from the civilian population¹⁶⁰. The new regime in AP I dictates that 'the failure to distinguish oneself from the civilian population...warrants forfeiture of POW status'¹⁶¹. Moreover, other IHL provisions effectively

¹⁵³ Garth Abraham "Essential Liberty" Versus "Temporary Safety": The Guantanamo Bay Internees and Combatant Status' (2004) 121 *South African Law Journal* 829 at 844. 'While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a POW, except as provided in paragraphs 3 and 4' (AP I article 44(2)).

¹⁵⁴ Ipsen (2008) 'Combatants and Non-combatants' at 93; Christopher Greenwood (1991) 'Customary Law Status of the 1977 Additional Protocols' in Astrid JM Delissen and Gerard J Tanja (eds) *Humanitarian Law of Armed Conflict: Challenges Ahead* TMC Asser Instituut/Martinus Nijhoff Publishers: Netherlands at 107.

¹⁵⁵ Colonel Draper states bluntly that 'members of the armed forces who persistently violate the laws of war do not lose their POW status upon capture' (Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 10).

¹⁵⁶ 'Any guerrilla who fails to distinguish himself during such military operations ... can be punished only by applicable disciplinary or penal sanctions, not by forfeiture of his status as a lawful combatant or ... as a POW.' George Aldrich 'New Life for the Laws of War' (1981) 75 *American Journal of International Law* at 773; Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 20.

¹⁵⁷ The 'requirement of visibility' is not a prerequisite for one's entitlement to POW status' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 15-16).

¹⁵⁸ In the whole of API, article 48 ('parties shall at all times distinguish between the civilian population and combatants) 'may be its most cardinal provision' (Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 86).

¹⁵⁹ HR article 3; AP I article 43(2). It is worth noting that failure to observe the laws of war will not render the combatant an unlawful combatant. It will, however, expose him or her to military prosecution provided he or she meets the other requirements for combatant status (GC III article 82ff; Ipsen (1995) 'Combatants and Non-combatants' at 68). There have already been cases of PMSCs attempting to claim immunity, by virtue of combatant status, from civil claims brought against them for their hostile actions (*Ibrahim v Titan*, civil action no. 04-1248 (JR), and *Saleh v Titan* case no. 04CV1143 R (NLS)). It must be noted that these privileges may be forfeited as a result of the actions of the particular individuals, for example engaging in spying (Ipsen (1995) 'Combatants and Non-combatants' at 65-66).

¹⁶⁰ AP I article 44(3).

¹⁶¹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 16 and rules 106-108; Ipsen (2008) 'Combatants and Non-combatants' at 93; AP I articles 44(3) and (4).

transfer the liability to observe the principle of distinction up the chain of command, by making commanders, who elect not to court-martial their soldiers for failing to distinguish themselves, personally liable for violating articles 86 and 87 of AP I¹⁶². In fact, Rogers argues that consistent violation of IHL that goes unpunished 'is strong evidence that the group does not qualify as an "armed forces", since it fails to meet the criterion of an internal disciplinary system'¹⁶³. In effect, what Rogers proposes is that ill-disciplined forces might not enjoy full combatant status¹⁶⁴.

Admittedly, the additional protocols did not receive the widespread ratification that the GCs did, and some of their provisions have proved controversial and sometimes devious¹⁶⁵. Before the AP I definition of a combatant can be said to have replaced the GC III article 4A(2) criteria, it needs to be shown that AP I articles 43 and 44 have attained customary international law status. In Henckaerts and Doswald Beck's publication on the customary international law status of various IHL principles, we read in rule 3 that: State practice endorses the conclusion that as a matter of customary international law 'all members of the armed forces of a party to the conflict are combatants, except medical and religious personnel'¹⁶⁶. The study then goes on in rule 4, to state that it is accepted as customary international law that 'the armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates'¹⁶⁷. Henckaerts goes on to say that the definitions contained in AP I articles 43 and 44 are replicated in 'numerous military manuals'¹⁶⁸, 'official statements and reported practice', even by States that were not, or are still not 'party to Additional Protocol I'¹⁶⁹. Consequently, it can be concluded that as a matter of customary international law (applicable to all parties to an international armed conflict), combatant status is extended to all persons (irrespective of whether they are members of a regular or irregular armed force), who:

- a) fight in an international armed conflict;
- b) 'on behalf of a party to a conflict'; and

¹⁶² Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 20.

¹⁶³ This raises some concerns for PMSCs who are affiliated to the State's armed forces, since 'the obligation to search out and prosecute individuals suspected of breaching IHL rests with States', and yet these obligations are so rarely enforced in the case of these PMSC that PMSC 'executives and employees do not even consider the possibility of a prosecution under international law in their planning' (Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 24).

¹⁶⁴ Rogers 'Unequal Combat and the Law of War' at 16.

¹⁶⁵ The definitions set out in AP I articles 43 and 33 are 'disputed by a number of nations, including the U.S.' (Jensen 'Direct Participation in Hostilities' at 1888-97; Richmond-Barak 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' at 2517-25).

¹⁶⁶ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 11.

¹⁶⁷ *Idem* at 11, and rule 4.

¹⁶⁸ See, for example, the military manuals of Argentina, Australia, Belgium, Benin, Cameroon, Canada, Colombia, Croatia, the Dominican Republic, Ecuador, France, Germany, Hungary, Indonesia, Israel, Italy, Kenya, South Korea, Madagascar, Netherlands, New Zealand, Nigeria, Russia, South Africa, Spain, Sweden, Togo, the United Kingdom, and the United States (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 12).

¹⁶⁹ See, for example, the practices of France, Indonesia, Israel, Kenya, the United Kingdom and the United States (*Ibid*).

c) who subordinate themselves to its command¹⁷⁰.

ii. Non-combatant members of the armed forces

As with most rules there is an exception to the general rule that all members of the armed forces (be they regular or irregular) are authorised to participate in hostilities. There are, within the membership ranks of the armed forces, 'service personnel'¹⁷¹, including quartermasters, 'cooks, court reporters, judges, government officials and blue-collar workers'¹⁷². These service personnel are denied authorisation (by national legislation¹⁷³) to 'use a weapon or a weapons system'¹⁷⁴, they do not engage in combat operations¹⁷⁵, and are consequently dubbed 'non-combatants'¹⁷⁶.

Their status as members of the armed forces - albeit non-combatant members - guarantees their secondary status as POWs upon capture. Although they are not authorised to participate directly in hostilities, save for defending themselves¹⁷⁷, they are nevertheless not classified as civilians.¹⁷⁸ As members of the armed forces, non-combatants are not protected by a prohibition against attack (as is the case with civilians) - they are susceptible to attack without special considerations or collateral damage calculations¹⁷⁹, as they remain fundamentally a 'military objective'¹⁸⁰ and subject to the 'dangers arising from military operations'¹⁸¹.

Hors de combat

Within this broader sub-category of 'non-combatants', are 'those who, but for their injuries would be classified as ordinary combatants (the wounded, sick and shipwrecked)¹⁸². When an ordinary combatant 'become *hors de combat*

¹⁷⁰ *Idem* at 16.

¹⁷¹ Dale Stephens and Angeline Lewis 'The Targeting of Civilian Contractors in Armed Conflict' (2006) 9 *Yearbook of International Humanitarian Law* 25 at 30.

¹⁷² Ipsen (2008) 'Combatants and Non-combatants' 99; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 13.

¹⁷³ This national legislation 'has no impact on the international law position affording combatant status to all members of the armed forces' (Ipsen (2008) 'Combatants and Non-combatants' at 99).

¹⁷⁴ AP I article 43(2); Ipsen (2008) 'Combatants and Non-combatants' at 81.

¹⁷⁵ The only exception - as affirmed in AP I article 43(2) - are medical and religious personnel' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 33).

¹⁷⁶ HR article 3.

¹⁷⁷ GC I article 22(1); GC II article 35(1); AP I article 13(2)(a). 'Non-combatants, too, have the right to defend themselves or others against any attacks ... the attack activates the latent combatant status irrespective of whether the attack was in contravention of the laws of war' (Ipsen (2008) 'Combatants and Non-combatants' at 103-104).

¹⁷⁸ AP I article 50(1) precludes this by its restrictive definition of a civilian (Ipsen (2005) 'Combatants and Non-combatants' at 84).

¹⁷⁹ *Idem* at 85.

¹⁸⁰ AP I article 51(1); Ipsen (1995) 'Combatants and Non-combatants' at 84. A military objective is defined as 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.' (AP I article 52(2)).

¹⁸¹ Ipsen (2008) 'Combatants and Non-combatants' at 99.

¹⁸² The protections afforded these non-combatants are explored comprehensively in GC I and GC II.

... he does not become a civilian; but he is entitled to special protections and he must be accorded privileges of POW'¹⁸³.

Religious and medical personnel

Medical and religious personnel enjoy a unique primary status under IHL¹⁸⁴. They are a unique category of non-combatant member of the armed forces, because while they are undoubtedly still 'members of the armed forces'¹⁸⁵, they are 'expressly prohibited from participating directly in hostilities and enjoy special protection as a result of this limitation'¹⁸⁶. They are issued with special armbands¹⁸⁷ to 'mark the wearers as non-combatants and not lawful targets'¹⁸⁸. Moreover, were they to fall into enemy hands, they would not hold POW status *strictu sensu*. 'Although they are POWs to all outward appearances, their status is "retained personnel", or retainees'¹⁸⁹.

Persons accompanying the armed forces

GC III article 4A(4) includes under the umbrella of those enjoying POW, 'persons who accompany the armed forces without actually being members of the armed forces'. This is an interesting category to find in a discussion on combatant status, since these persons accompanying the armed forces lack the membership-link to the armed forces, necessary to clothe them with combatant status. They are, however, clothed with POW status in the event that they fall into enemy hands. So, while it is possible to argue that all POWs must necessarily have enjoyed primary combatant status when one is speaking of regular and irregular armed forces, this does not apply in the case of 'persons accompanying the armed forces'. These persons (like civilian contractors), are 'not members of the armed forces'¹⁹⁰, and because of their

¹⁸³ Dinstein 'The System of Status Groups in International Humanitarian Law' at 148.

¹⁸⁴ GC I articles 24-27 afford protected status to medical and auxiliary personnel who collect and care for the wounded, and who administer medical units. During armed conflict, they are to be respected and protected and can never form part of the military objective, as do other non-combatants. Any attack upon these specially protected personnel is unlawful. While they may not participate directly in hostilities, medical personnel, in particular, are nevertheless entitled to use small arms to defend themselves and the injured in their care (AP I article 13(2)(a)). Upon capture they are granted the same legal protections afforded POWs (although they are not technically POWs (GC I articles 28 and 30; GC II articles 36 and 37; GC III article 33; Ipsen (1995) 'Combatants and Non-combatants' at 85-92).

¹⁸⁵ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 13.

¹⁸⁶ GC I articles 24, 26 and 27; Dinstein 'The System of Status Groups in International Humanitarian Law' at 147.

¹⁸⁷ The armband bears a red cross on a white background.

¹⁸⁸ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 192.

¹⁸⁹ However, 'if a physician or a chaplain refuses to employ his professional abilities ... he will be removed from the category of retained personnel and be detained as an ordinary POW' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 42).

¹⁹⁰ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 13.

non-combatative roles, enjoy primary civilian status¹⁹¹. I will discuss this category further under the heading of ‘civilians’.

Levée en masse, merchant mariners and civil aviators

For the sake of completeness, it is worth mentioning that POW status is also extended to ‘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’¹⁹², and the ‘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’. I will not explore these two categories any further here, since they are not relevant to PMSC which are the focus of this chapter.

PMSC – can they enjoy combatant status in international armed conflicts in terms of customary¹⁹³ IHL?

There are potentially two ways in which PMSC might enjoy combatant status during an international armed conflict. The first is if they are ‘employees working for the State and are integrated into their armed forces’¹⁹⁴. The second is if they are ‘member of an organised armed group under a command responsible’ to a party to the conflict¹⁹⁵. Both of these means of attaining combatant status require that PMSC to fulfil certain criteria:

- a) they need to be acting on behalf of a party to a conflict;
- b) the organised group needs to subordinate themselves to the party’s command¹⁹⁶; and
- c) they need to behave in accordance with the laws of war¹⁹⁷.

a) Acting on behalf of, or belonging to a party to a conflict¹⁹⁸

¹⁹¹ GC III article 4A(4) and AP I article 50(1); Ipsen (1995) ‘Combatants and Non-combatants’ at 65 and 79; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 13.

¹⁹² GC III article 4A(5).

¹⁹³ Prior to the crystallisation of the AP I article 43 definition of a combatant, these PMSCs would have had to satisfy the stringent requirements set out in GC III article 4A(2), in order to enjoy combatant status. However, ‘in general, PMSCs do not meet all the criteria required for non-State armed groups or militias, to merit combatant status’ (De Nevers ‘Private Security Companies and the Laws of War’ at 176).

¹⁹⁴ Marie-Louise Tougas ‘Some Comments and Observations on the Montreux Document’ (2009) 12 *Yearbook of International Humanitarian Law* 321 at 338.

¹⁹⁵ Tougas ‘Some Comments and Observations on the Montreux Document’ at 338.

¹⁹⁶ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 16.

¹⁹⁷ Richmond-Barak ‘Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity’ at 2502-9.

¹⁹⁸ Goldman *et al* ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 18.

This 'belonging' requirement formed part of the stringent GC III article 4A(2) criteria, and has a long-standing history in IHL. The rationale behind this requirement was to ensure that the 'customary law proscription against individuals or groups engaging in private warfare against a State party involved in an armed conflict'¹⁹⁹ would be observed.

The clearest way in which this requirement can be met, is if the State formally incorporated PMSCs into their armed forces. International law does not stipulate who qualifies for incorporation²⁰⁰, or how States go about incorporating individuals into their armed forces; this is a matter purely within a State's internal law (usually by way of an act of parliament)²⁰¹. Thereafter, once a State's internal laws have endorsed the incorporation of individuals into the armed forces, all that IHL requires of States is that the opposition forces are notified of their incorporation²⁰². In theory then, there is no legal bar to States incorporating PMSCs into their traditional armed forces²⁰³. Some argue that formal incorporation is the only way 'to put the private contractors within the military chain of command and control' required of AP I article 43(3)²⁰⁴.

Some academics, like Richemond-Barak, argue that this belonging requirement does not require either 'formal incorporation into the State's forces nor the authorisation of all the armed group's activities by the State'²⁰⁵. To adhere to such a 'highly formalistic, membership based' notion of combatant status, would exclude 'a number of non-State entities from the definition'²⁰⁶. He argues that short of formal incorporation, there are other means of satisfying the belonging requirement²⁰⁷. In cases where the 'relationship of belonging' is not 'officially declared', it will have to be 'judged on the facts'²⁰⁸, 'expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting'²⁰⁹. As is evidenced by

¹⁹⁹ *Idem* at 12.

²⁰⁰ Since there are a number of civilians who are in fact officially incorporated into the armed forces as reservists, it is not impossible for this act of incorporation to take place, provided the opposition forces are informed (AP I article 43(3); Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 3; Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 532).

²⁰¹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 16; Cameron 'International Humanitarian Law and the Regulation of Private Military Companies' at 3. However, it is estimated that eighty percent of PMSCs are not contracted by States, which automatically excludes them from being incorporated or assimilated into the States' armed forces (Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 532).

²⁰² GC III article 4A(2); AP I article 43(3).

²⁰³ Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 534.

²⁰⁴ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 200.

²⁰⁵ Richemond-Barak 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' at 2534-41.

²⁰⁶ *Idem* at 2364-72.

²⁰⁷ *Ibid.*

²⁰⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 16.

²⁰⁹ Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 18.

academic debate, the exact degree of relationship required to reach a conclusion that the group acts 'on behalf of', or 'belongs to a party to an international armed conflict', has been controversial.

Early commentary on the belonging requirement (as expressed in GC III article 4A(2)), concludes that 'any form of tacit authorisation, control or a *de facto* relationship between the group and a party to an international armed conflict is sufficient' to satisfy this requirement²¹⁰. On the other hand 'mere fighting in support of a party is not sufficient' to meet the belonging requirement²¹¹. There needs to be some '*de facto* link' between the group and a party to the conflict²¹².

Gillard suggests that the following factors might indicate affiliation to the armed forces of a State:

'whether they have complied with national procedures for enlistment or conscription, where they exist;
whether they are employees of the department of defense;
whether they are subject to military discipline and justice;
whether they form part of and are subject to the military chain of command and control;
whether they form part of the military hierarchy;
whether they have been issued with the identity cards envisaged by the Third Geneva Convention or other forms of identification similar to those of 'ordinary' members of the armed forces; and
whether they wear uniforms'²¹³.

Some have argued that, for reasons of pragmatism, when PMSCs are contracted to work for a State alongside their armed forces, one can conclude that the contract establishes the necessary incorporation, and that they are 'legally indistinguishable from a national army'²¹⁴. Others argue that if PMSC 'have been entitled by a State to participate directly in hostilities on its behalf, they should be included within the members of the armed forces'²¹⁵ and 'considered combatants'²¹⁶. This view is endorsed by the ICRC's Interpretive Guide on the Notion of Direct Participation in Hostilities (hereafter ICRC's Interpretive Guide), which states that:

'contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict, whether through formal procedures under national law or *de facto* by being given a "continuous combat function"... such personnel would become members of an organised armed force, or group or unit under

²¹⁰ *Idem* at 12; *Prosecutor v Tadić* ICTY Appeals Chamber at 1537.

²¹¹ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 199.

²¹² *Ibid.*

²¹³ Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 533.

²¹⁴ Lytton 'Blood for Hire: How the War in Iraq has Reinvented the World's Oldest Profession' at 307.

²¹⁵ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 200.

²¹⁶ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 16.

a command responsible to a party to the conflict and, for the purposes of the principle of distinction, would no longer qualify as civilians²¹⁷.

There is academic support for the conclusion that 'when a State hires PMSCs for 'coercive services, the existence of the factual link required for "membership in the armed forces: within the API article 4(1) meaning" is possible'²¹⁸.

Those who oppose the notion that PMSCs can 'belong to a party to the conflict', without formal incorporation in to the State's armed forces²¹⁹, raise several issues. Firstly, they argue that while 'participating in hostilities "on behalf of" one party and against another' (as set out in the ICRC's Interpretive Guide) might amount to direct participation in hostilities, it does not necessarily satisfy the belonging requirement necessary for affording combatant status to that party²²⁰. They argue that the belonging requirement is more stringent, and that one can be found to be participating directly in hostilities (on behalf of a party to the conflict), without enjoying the necessary 'belonging' to enjoy combatant status. They also point out that, although PMSCs 'share some characteristics with militias', and often perform military type functions or tasks traditionally performed by members of the armed forces (even non-combatant functions), that alone is not sufficient to satisfy the 'belonging requirement'²²¹, and 'is also not a key element for determining whether they "form part" of the armed forces'²²². Even when they 'have been hired to provide assistance to a State's armed forces', that alone is not relevant *per se*²²³ to a determination of their combatant status. 'Simply being under contract to the government is insufficient to merit combatant status'²²⁴.

In fact, 'many contractors are hired on the basis of individual short-term contracts ... suggesting 'that allegiance to a State is not what guides employees' actions'²²⁵. State practice does indeed seem to support this viewpoint. We see from State practice that commercial contracts, on their own, are not considered by States to be sufficient to incorporate PMSCs into the armed forces, despite the fact that State responsibility may be invoked as a result of the contract alone²²⁶.

It is noteworthy that most States making use of PMSCs deliberately refuse to officially incorporate them into their armed forces, citing a variety of reasons. Sometimes the State's domestic law precludes or limits the number of combatants they can enlist. In order to circumvent the State's 'national laws

²¹⁷ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 201.

²¹⁸ *Idem* at 203.

²¹⁹ *Idem* at 213.

²²⁰ *Ibid.*

²²¹ De Nevers 'Private Security Companies and the Laws of War' at 176.

²²² Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 3.

²²³ *Ibid.*

²²⁴ De Nevers 'Private Security Companies and the Laws of War' at 176.

²²⁵ *Idem* at 177.

²²⁶ Ipsen (1995) 'Combatants and Non-combatants' at 69; Cameron 'Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation' at 584; Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 533.

that would prevent them from sending their own armed forces²²⁷, they hire PMSCs from States that are not party to the conflict. Other times, as Gillard points out, States outsource activities ‘traditionally carried out by the armed forces to PMSCs, in order to reduce numbers of the armed forces and related costs’²²⁸. Whatever the motivation might be, the benefit gained from outsourcing these functions would be lost if the relationship between the State and these PMSCs was interpreted as incorporating these individuals into the State’s armed forces. States are at pains to ensure that the outsourcing is not interpreted as incorporation.

That said, it is not impossible for a State to incorporate PMSCs into their own armed forces. However, it seems very unlikely ‘that instances in which PMSC staff are incorporated into the armed forces, to the extent necessary for them to be considered ... forming part thereof, for the purposes of a determination of status under IHL’²²⁹. In particular, there will be legal difficulties where PMSC are ‘sub-contracted by private firms who have government contracts’²³⁰, and ‘not directly for the government whose combat they may be supporting’²³¹. In these cases, the direct contractual link is once removed, obscuring the required *de facto* link²³². Certainly, where PMSCs are hired (even to engage in combat-related activities) by ‘NGOs, companies or government ministries or departments other than a ministry of defence’, they will not satisfy the belonging requirement, and will be ‘considered to fall into the category of civilians under IHL’²³³.

That said, the belonging requirement is only one of the criterion necessary for PMSCs to achieve combatant status. Before they can be said to enjoy combatant status, it still needs to be shown that: ‘the contract defines precisely the [combative] tasks to be performed by the company; the State authorities assure adequate oversight and co-ordination of the activities, and the PMSCs employees are subject to criminal jurisdiction’²³⁴. Without each criterion being met, these PMSCs remain classified as civilians, albeit participating directly in hostilities.

b) Subordinating themselves to the Party’s command

In essence, this criterion requires that the ‘group must be commanded by a person responsible for his subordinates’²³⁵, who takes his orders from the

²²⁷ Cameron ‘International Humanitarian Law and the Regulation of Private Military Companies’ at 5.

²²⁸ Gillard ‘Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations’ at 3.

²²⁹ *Ibid.*

²³⁰ Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 203.

²³¹ De Nevers ‘Private Security Companies and the Laws of War’ at 176.

²³² Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 203.

²³³ Tougas ‘Some Comments and Observations on the Montreux Document’ at 338.

²³⁴ Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 203.

²³⁵ Goldman *et al* ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’ at 12.

party to the conflict, and has 'to answer to the party for its actions'²³⁶. The rationale behind this IHL requirement, is that combatants follow orders, and that legitimate orders can only come from the party to a conflict who authorised the individuals to fight on its behalf. Commanders issuing orders are held responsible for their subordinates' actions, and are expected to discipline their subordinates when they disobey orders. Traditionally, this is the model used by the military, which operates based on hierarchy and rank. That said, 'command responsibility does not necessitate "command by a military officer"'²³⁷, and there is nothing in IHL which stipulates "the leaders qualification, or how he obtained his authority"²³⁸.

Technically it is not impossible for an organised group of PMSCs to mimic these practises by being 'hierarchically organised and providing some sort of supervision analogous to command'²³⁹. According to Mallison and Mallison, being an organised group requires only 'the most rudimentary elements of military organisation'²⁴⁰. A form of hierarchy in the organisation will assist in satisfying the 'command responsibility' requirement²⁴¹. In fact, some academics argue that it is highly likely that PMSCs will be able to satisfy the 'command responsibility' requirement, given that so many are ex-military personnel and naturally operate subject to a military command 'supervisory structure'²⁴². This is endorsed in the ICRC's Interpretive Guide, which claims that 'such personnel ... [are] under a command responsible to a party to the conflict'²⁴³. However, the ICRC does caution that "the "command responsible" criterion requires more than the mere "express or tacit" authorisation of the State party to the conflict"²⁴⁴ - the chain of command must link back to the party to the conflict. What is key, is that PMSCs must 'conduct hostilities on behalf of, and with the agreement of that party'²⁴⁵. It is not sufficient that they fight alongside the State's force, and for the same goal. They need to be under the State party to the conflict's command. Not only does the contractor have 'to report to the hiring State, but the latter has to establish a supervision

²³⁶ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 202.

²³⁷ Sandoz *et al* 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' at 59.

²³⁸ Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 12.

²³⁹ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 199.

²⁴⁰ Mallison and Mallison 'The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict' at 50.

²⁴¹ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 199.

²⁴² Michael Schmitt 'War, International Law and Sovereignty: Re-evaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' 2005 *Chi J Int'l L* 511 at 529; De Nevers 'Private Security Companies and the Laws of War' at 176.

²⁴³ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 201.

²⁴⁴ *Idem* at 201.

²⁴⁵ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 23; Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 18.

mechanism²⁴⁶. Moreover, as Sossai points out, the ‘conclusion of the contract between the State and the private firm would not be sufficient to meet the condition’ of command responsibility²⁴⁷. ‘The “command responsible” condition requires a certain degree of oversight by the party to the conflict’²⁴⁸. Having said that, there is ‘a trend towards the exercise of military jurisdiction over the employees of private firms’²⁴⁹ - which would satisfy the ‘command responsibility’ requirement.

While it might be possible for PMSCs to satisfy the ‘command responsibility’ criterion, evidence on the ground in the recent conflicts in Iraq and Afghanistan, reveal that PMSCs ‘work on the basis of a “leader” or “agent in charge”, who directs the other “operators” who work with him or her on a particular mission’²⁵⁰. However, it is not always evident whether the leader has authority ‘over others on his or her team’²⁵¹. Some academics question whether the quasi-military appearance adopted by PMSCs really ensures the ‘stable, fixed hierarchy within the relevant companies’, needed to satisfy the command responsibility criterion²⁵². De Nevers suggests that the rate at which the industry has grown, has sometimes been at the cost of traditional military discipline, ‘particularly as more companies hire contractors of different backgrounds and nationalities’²⁵³. The ‘incident in the Nisoor Square on the 16 September 2007’, and the incident where Blackwater employees, while ‘running an armed convoy through Baghdad, killed seventeen civilians’²⁵⁴, suggest that command responsibility can, and does break down. ‘It was even reported that in some cases contractors were actually supervising government personnel, instead of the other way around’²⁵⁵. Some argue that PMSCs are freed up to mobilise with speed, precisely because they ‘work outside the chain of command and on a mandate basis only’²⁵⁶. Certainly, where PMSCs are hired by ‘third parties’²⁵⁷, the ‘government and military do not have command over these contractors’²⁵⁸. In the end, while it is possible that PMSCs satisfy the command responsibility criterion necessary for combatant status, that assessment needs to be made on the specific facts in each case.

c) Behaving ‘in accordance with the laws of war’²⁵⁹

²⁴⁶ Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 202.

²⁴⁷ *Idem* at 201.

²⁴⁸ *Ibid.*

²⁴⁹ *Idem* at 203; Uniform Code of Military Justice (amended 17 October 2006).

²⁵⁰ De Nevers ‘Private Security Companies and the Laws of War’ at 176.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.* Particularly in the case of ‘third country nationals’, the parties to the conflict have little jurisdiction-reach over them (*Ibid.*).

²⁵⁴ Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 202.

²⁵⁵ *Ibid.*

²⁵⁶ Montreux Document at 36.

²⁵⁷ For example, by a ‘company that has the government contract - not directly for the government whose combat they may be supporting’ (De Nevers ‘Private Security Companies and the Laws of War’ at 176).

²⁵⁸ This is mentioned in the U.S. Army’s guidelines for working with contractors (U.S. Department of the Army, 2003: 1-6-1-7).

²⁵⁹ Richemond-Barak ‘Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity’ at 2502-9.

The group must 'ensure that its members conduct their operations in accordance with the laws of war'²⁶⁰ - in short observe the principles of distinction, proportionality and military necessity. In fact, Rogers argues that consistent violation of IHL, that goes unpunished, 'is strong evidence that the group does not qualify as an 'armed force', since it fails to meet the criterion of an internal disciplinary system'²⁶¹.

Concluding remarks on the combatant status of PMSC

The crystallisation into customary IHL of the API definition for combatant status, means that PMSCs no longer have to show that they enjoy political recognition²⁶² before they can be afforded combatant status, nor do they have to make use of a uniform²⁶³ or fixed distinctive emblem²⁶⁴. In fact, as evidence from Iraq and Afghanistan confirms, PMSCs are not routinely confused with civilians because they 'have a uniform "look" that makes them distinguishable from civilians'²⁶⁵, although 'they have sometime been confused by the civilian population with members of the regular armed forces'²⁶⁶. PMSCs on the whole carry 'their weapons openly, as required by IHL'²⁶⁷, which is crucial in order to avoid being in breach of the IHL prohibition against perfidy.

The drafters of the Montreaux Document concluded that PMSCs were 'protected as civilians under IHL', unless they were formally incorporated into the State's armed forces, or unless they fulfilled the customary IHL criteria for combatant status²⁶⁸. As we have seen, it is rarely the case that PMSCs are formally incorporated or 'deputised as parts of a State's armed forces'²⁶⁹. Whether they manage to satisfy the belonging and command responsibility requirements, while still observing the laws of war, will have to be assessed

²⁶⁰ In other words 'not directly attack civilians; cause disproportionate civilian casualties, or otherwise cause unnecessary suffering and destruction' (Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 14).

²⁶¹ Rogers 'Unequal Combat and the Law of War' at 16.

²⁶² Goldman *et al* 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' at 18.

²⁶³ 'Generally the U.S. Department of Defence does not allow contractors' staff to wear military or military look alike uniforms' (Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 199).

²⁶⁴ PMSCs 'have been known to dress in anything from full army fatigues to bermuda shorts and jeans' (José Luís Gomez del Prado 'Mercenaries, Private Military and Security Companies and International Law' (2008) available at http://www.law.wisc.edu/gls/documents/gomez_del_prado_paper.doc (accessed 5 January 2011); Schmitt 'War, International Law and Sovereignty: Re-evaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' at 527). Most contractors do wear company hats or polo shirts with the company logo (Richmond-Barak 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' at 2386-94).

²⁶⁵ While they are often 'caricatured as trying to look like "badasses" or "tough guys"... they do not wear uniforms' (De Nevers 'Private Security Companies and the Laws of War' at 177).

²⁶⁶ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 199.

²⁶⁷ De Nevers 'Private Security Companies and the Laws of War' at 177.

²⁶⁸ Montreaux Document, principle 26(b).

²⁶⁹ De Nevers 'Private Security Companies and the Laws of War' at 179.

based on the facts of each case. In some instances ‘both the companies themselves and their employees’ will fall foul of these requirements, effectively denying them combatant status under IHL²⁷⁰.

While ‘a few scholars have argued that private military companies could be considered combatants under IHL²⁷¹, the ‘majority of commentators share the view that a private company, considered as a distinct group, could rarely match ... the standards²⁷² demanded by the definition of combatants²⁷³. ‘The Geneva conventions generally regard them as civilians because they do not meet the formal requirements of combatant status²⁷⁴. While PMSCs may be ‘involved in almost every aspect of military activity²⁷⁵, ‘they are not part of the military; they are not bound to a chain of command, nor have they sworn any oath of office²⁷⁶. In the end, ‘there is a widely held consensus that PMSCs are civilians and cannot be considered combatants under IHL²⁷⁷.

6.4 PMSCs as ‘civilians’

According to the ICRC’s commentary, ‘nobody in enemy hands can be outside of the law²⁷⁸: if they are not combatants there exists a presumption that where there is ‘doubt a person shall be considered to be a civilian²⁷⁹, whether or not their actions amount to direct participation in hostilities. IHL defines a civilian as any person who is not a combatant²⁸⁰. Unlike combatants, civilians are not obliged to identify themselves as civilians²⁸¹.

With the exception of the ‘*levée en masse*’, civilians are not authorised to participate directly in hostilities. Civilians who take an active part in hostilities open themselves up to attack from the opposition acting in self-

²⁷⁰ *Idem* at 176; Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 107.

²⁷¹ De Nevers ‘Private Security Companies and the Laws of War’ at 176.

²⁷² Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 199.

²⁷³ Montreux Document at 36; William Banks (2011) ‘Introduction’ in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (Columbia Studies in Terrorism and Irregular Warfare) at 228-35.

²⁷⁴ Richemond-Barak ‘Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity’ at 2341-47.

²⁷⁵ John Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ (2005) 57 *Air Force Law Review* 155 at 179.

²⁷⁶ Singer ‘Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community’ at 24.

²⁷⁷ De Nevers ‘Private Security Companies and the Laws of War’ at 176; Michael Schmitt ‘Humanitarian law and direct participation in hostilities by private contractors or civilian employees’ (2004) 5:2 *Chicago Journal of International Law* 511 at 526–527; Gillard ‘Business Goes to War: Private Military/Security Companies and International Humanitarian Law’ at 531–536).

²⁷⁸ Jean Pictet (1952) *The Geneva Conventions of 1949: Commentary IV Geneva Convention* ICRC: Geneva at 51.

²⁷⁹ AP I article 50(1). Where PMSCs fail to satisfy the criterion for the status of ‘persons accompanying the armed forces’, and are not incorporated (*de facto* or *de jure*) into the armed forces, ‘they are clearly civilians under IHL’ (Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 204).

²⁸⁰ AP I article 50(1).

²⁸¹ Hans-Peter Gasser (1995) ‘Protection of the Civilian Population’ in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford 209 at 210.

defence, during and ‘for such time as they continue to actively participate in hostilities’²⁸². Furthermore, they are unable to claim the protections traditionally afforded civilians under IHL²⁸³. Exactly when the actions of a civilian might be said to amount to direct participation in hostilities has been the source of some academic debate, which I shall deal with below.

Provided they do not take part in the hostilities, civilians are to be respected²⁸⁴, shielded from the effects of hostilities and direct targeting²⁸⁵, and may not be ‘taken prisoner without sufficient reason’²⁸⁶. The obligation to respect and protect civilians, demands not only that armed forces refrain from acts which would cause harm to civilians, but also that they are required to take steps to ensure the safety of civilians²⁸⁷. Consequently, even attacks on military objects must first be assessed to establish that the loss caused to civilian life is not excessive in relation to the ‘concrete and direct military advantage anticipated’²⁸⁸ from the attack. Incidental harm caused to civilians and civilian objects, is only lawful when it is an ‘unavoidable and proportionate side effect of lawful attacks on military objective’²⁸⁹. In every attack, precautions must be taken to ensure that civilian losses are kept to a minimum, that civilians are warned of imminent attacks, and where feasible, civilians must be removed from the vicinity of the military objective²⁹⁰.

i. ‘Persons accompanying the armed forces’

This sub-category of civilian (sometimes also referred to as civilian contractors), who ‘accompany the armed forces’²⁹¹, provide the necessary specialised expertise which the armed forces might be lacking. Traditionally, IHL listed them as: ‘civilian members of aircraft crew, war correspondents, supply contractors, or members of labor units’, and those providing ‘services for the welfare of the armed forces’²⁹². This list is not exhaustive²⁹³, and

²⁸² AP I articles 51(8) and 51(3).

²⁸³ AP I article 51(3). While civilians maintain their IHL civilian status, ‘notwithstanding the fact that’... they are ... ‘taking a direct part in hostilities’ ... ‘it would be wrong to include injury to these individuals in the evaluation based on the principle of proportionality’ (Giulio Bartolini (2011) ‘Private Military and Security Contractors as “Persons who Accompany the Armed Forces”’ in Francesco Francioni and Natalino Ronzotti (eds) *War By Contract: Human Rights, Humanitarian Law and Private Contractors* Oxford University Press: Oxford at 227).

²⁸⁴ GC I article 27(1).

²⁸⁵ Gasser (1995) ‘Protection of the Civilian Population’ at 210; GC IV article 27(1).

²⁸⁶ AP I article 51(2); AP II article 13(2).

²⁸⁷ Gasser ‘Protection of the Civilian Population’ at 212.

²⁸⁸ AP I article 51(b).

²⁸⁹ Gasser ‘Protection of the Civilian Population’ at 214.

²⁹⁰ AP I articles 57 and 58(a).

²⁹¹ ‘Persons who accompany the armed forces without actually being members thereof, such as civilian members of 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’ (GC III article 4(4)). ‘The status of civilians accompanying the armed forces does not apply in non-international armed conflicts’ (Montreux Document at 36).

²⁹² Kidane ‘The Status of Private Military Contractors Under International Humanitarian Law’ at 395; GC III article 4(5).

'civilian contractors can be hired to perform almost any service a State requires'..., including to 'train, feed, equip, and house an army'²⁹⁴. What is evident from the listed activities²⁹⁵, is that the drafters of IHL treaties never intended that these individuals would 'carry out activities that amount to taking a direct part in hostilities'²⁹⁶. In fact, 'the majority of functions carried out by persons who accompany the armed forces, are generally considered as 'indirect' participation, as they only provide 'general support'. It has been 'unanimously accepted'²⁹⁷ that these activities do not compromise their protection against direct attacks. It also seems unlikely that activities which 'materially and directly cause harm to the opposing party' would ever be 'officially entrusted to these persons accompanying the armed forces, as combat operations are inherently governmental functions and cannot involve private sector performance'²⁹⁸. As Bartolini maintains, seldom are these contractors 'de facto, ... given a "continuous combat function" by the State armed forces'²⁹⁹. In fact, many 'States expressly prohibit persons who accompany the armed forces from carrying out certain activities which are commonly considered as direct participation in hostilities'³⁰⁰.

While these civilian contractors may not participate directly in hostilities, they are in the 'business of providing support for weapons and infrastructure', often 'maintaining the effectiveness of a piece of hardware' which might be used to win a military advantage over the opposition³⁰¹. Even though the assistance they render to the armed forces is critical, they do not

²⁹³ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 4.

²⁹⁴ J Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' (2005) 57 *Air Force Law Review* at 186.

²⁹⁵ Together with the fact that GC IV article 4(4) labels these personnel and non-combatants as 'civilian'.

²⁹⁶ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 4; Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 537; Bartolini 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' at 220.

²⁹⁷ Bartolini 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' at 223. So, for example, U.S. Department of Defence Instruction 3020.41 'Contractor Personnel Authorised to Accompany the U.S. Armed Forces' (2005) available at <http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf> (accessed 1 September 2010), characterises 'transporting munitions ...and performing maintenance functions for military equipment as indirect participation in military operations' (Bartolini 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' at 224). While the 2004 U.K. Military Manual confirms that 'civilians working in military vehicle maintenance depots or ... driving military transport vehicles are not "taking a direct part in hostilities"' (Bartolini 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' at 224).

²⁹⁸ Bartolini 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' at 222.

²⁹⁹ *Idem* at 221.

³⁰⁰ For example: U.S. Department of Defence Instruction 'Contractor personnel authorised to accompany the U.S. armed forces' maintains that personnel authorised to accompany the U.S. armed forces should not be employed to protect military objectives such as military supply routes, military facilities, military personnel, or military property (*Idem* at 223).

³⁰¹ Richard Parrish 'The International Legal Status of Voluntary Human Shields' (2007) available at <http://www.polisci.wisc.edu> (accessed 19 July 2012) at 10.

fulfil the definitional requirements of a combatant, they are not enlisted into the armed forces³⁰², they do not wear a uniform, and are not permitted to engage in hostilities in any direct way³⁰³. They are consequently clothed with primary civilian status³⁰⁴, and are not themselves military targets for direct targeting. That said, some academics have argued that IHL needs to be developed 'to make it permissible to target those accompanying civilians who provide direct and essential support to military combat operations'³⁰⁵, given the 'the vital role accompanying civilians play in the military capacity of States'³⁰⁶.

As IHL stands at the moment, these 'persons accompanying the armed forces' retain their civilian status. That said, this group of civilians are unique in that they enjoy 'a number of combatant-like privileges'³⁰⁷. The most important privilege which they enjoy in the event that they fall into enemy hands, is POW³⁰⁸ status,³⁰⁹ which is traditionally reserved only for the State's authorised combatants³¹⁰. POW status brings with it distinct advantages - not only does a POW enjoy 'several protections while in captivity', but they must be 'repatriated to their country as soon as hostilities cease'³¹¹. Another combatant-like privilege afforded these 'civilians accompanying the armed forces', is that they can be armed with 'light weapons for their own protection or for the protection of other civilians'³¹². Using these light arms in self-defence will not compromise their entitlement to POW status, or expose them to criminal prosecution, 'provided that their conduct does not rise to the level of war crimes'³¹³.

³⁰² Which some suggest is 'itself dispositive evidence of a state's understanding that the civilian in question does not enjoy [associative combatant status]' (Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 22).

³⁰³ Ipsen (1995) 'Combatants and Non-combatants' at 95.

³⁰⁴ GC III article 4A(4) and AP I article 50(1); Ipsen (1995) 'Combatants and Non-combatants' at 65 and 79; 'This finding is endorsed by the 'ICRC's Interpretive Guidance and the Montreux Document' (Bartolini 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' at 221).

³⁰⁵ They argue that to do so, would remove 'the incentive for states to favor staffing positions with civilians rather than military members', which decreases the risk to the general civilian population (Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 206).

³⁰⁶ *Ibid.*

³⁰⁷ Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 33.

³⁰⁸ GC III article 4A(4).

³⁰⁹ Ipsen (1995) 'Combatants and Non-combatants' at 95; GC III article 4A (4).

³¹⁰ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 4; Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 155. So, for example, the U.K. Military Manual states: 'civilians who are authorised to accompany the armed forces in the field ... remain non-combatants, though entitled to POW status, so long as they take no direct part in hostilities' (Bartolini 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' at 233).

³¹¹ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 384.

³¹² *Idem* at 396.

³¹³ *Ibid.*

Since POW status is not usually enjoyed by civilians, only the ‘the armed forces, through a specific authorisation’ are empowered under IHL to designate certain individuals as ‘persons accompanying the armed forces’³¹⁴. This special ‘authorisation to undertake their civilian activities’³¹⁵, is recorded on an identity card which confirms their function³¹⁶. The privileges of POW status cannot be afforded to ‘contractors providing support to other branches of the State administration ... during an armed conflict’³¹⁷. In order to enjoy these benefits, ‘civilians must have a real link with (i.e. provide a service to) the armed forces, not merely the State’³¹⁸. Contractors working for other branches of the State administration, or indeed for other ‘international or non-governmental organisations, and private entities’, which accounts for a ‘large part of the situations involving contractors’, also cannot claim POW status³¹⁹.

While there need not be ‘a formal and direct contractual link between the individual [contractor] and the armed forces’³²⁰, all that is needed is ‘a contract between the armed forces and the commercial entity that undertakes to supply resources or perform services’³²¹. Because these civilian contractors are not enrolled in the armed forces, there are ‘limited options for dealing with their misconduct’³²². Military ‘commanders do not have direct control over contractors or their employees’ ... ‘only contractors manage, supervise, and give directions to their employees’³²³, and the military has ‘limited supervisory control’³²⁴. While misconduct might go unpunished³²⁵, there are serious consequences applied in cases where ‘persons accompanying the armed forces’ are found to be performing combat related functions beyond their ‘civilian duties’³²⁶, or otherwise using their ‘civilian status to cause harm to the enemy’³²⁷. If it is ever discovered that these civilian contractors have been participating directly in hostilities³²⁸, they ‘not only ... lose their protection as

³¹⁴ Bartolini ‘Private Military and Security Contractors as “Persons who Accompany the Armed Forces”’ at 220.

³¹⁵ Kidane ‘The Status of Private Military Contractors Under International Humanitarian Law’ at 395.

³¹⁶ GC III Annex IV A.

³¹⁷ Bartolini ‘Private Military and Security Contractors as “Persons who Accompany the Armed Forces”’ at 220.

³¹⁸ Montreux Document at 36.

³¹⁹ According to the Montreux Document ‘contractors employed ... by private companies do not fall into this category’ (Bartolini ‘Private Military and Security Contractors as “Persons who Accompany the Armed Forces”’ at 229).

³²⁰ *Ibid.*

³²¹ *Idem* at 230.

³²² Elsea *et al* ‘Private Security Contractors in Iraq: Background, Legal Status, and Other Issues’ at 17.

³²³ *Ibid.*

³²⁴ Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 179.

³²⁵ When the Abu Ghraib scandal broke, the U.S. ‘Military Extraterritorial Jurisdiction Act (MEJA)’ was amended ‘to cover contractors hired by agencies other than the Department of Defence’ (De Nevers ‘Private Security Companies and the Laws of War’ at 178).

³²⁶ Kidane ‘The Status of Private Military Contractors Under International Humanitarian Law’ at 396.

³²⁷ *Idem* at 412.

³²⁸ So, for example, where ‘a civilian who is charged with providing welfare services to troops’, [takes] ‘up arms in order to repel an on-going attack on the military structures where he is performing his duties ... the support provided can be considered as direct participation, thus

civilians³²⁹ [and become a legitimate military target for so long as they persist in these combat-related activities³³⁰], but they would also lose POW status³³¹ and may be prosecuted for war crimes³³². Moreover, while they themselves retain their civilian status, the critical assistance that contractors render to the armed forces, and their 'proximity to military objectives'³³³, exposes them to an increased risk of collateral injury³³⁴ than is the case for other civilians.

ii. PMSCs as civilians or 'persons accompanying the armed forces'

Given the type of support activities often performed by PMSCs, there could be a case made for concluding that they should be classified as civilian contractors who accompany the armed forces. While they are often 'not part of a standing army, private military contractors are a far cry from ordinary civilians'³³⁵. They are, in fact, providing similar services to those who traditionally accompany the armed forces, including: 'preparing food and building bases to deliver armaments and fuel, planning combat operations alongside ordinary troops, gathering intelligence, providing personal security for senior military and civilian officials, and training soldiers in the use of military hardware'³³⁶.

Certainly there is no prohibition under IHL to classify PMSCs with 'persons accompanying the armed forces', and affording them the benefit of POW status should they be captured. In fact, the U.S. generally views 'PSCs contracting with the military' ... 'as civilians accompanying the force'³³⁷.

exposing the contractor to lawful direct attack' (Bartolini 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' at 226).

³²⁹ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 396.

³³⁰ Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 17.

³³¹ 'If they lose POW status they fall within the ambit of GC IV, they are not unlawful or enemy combatants' (Bartolini 'Private Military and Security Contractors as "Persons who Accompany the Armed Forces"' at 233) 'On the contrary, other authors, including recent authoritative national documents such as the U.S. Department of Defence Instruction 1100.22, maintain that persons who accompany the armed forces do not lose entitlement to POW status upon capture, even if they have taken a direct part in hostilities' (*Idem* at 231).

³³² Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 396.

³³³ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 174.

³³⁴ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 5.

³³⁵ Richemond-Barak 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' at 2341-47.

³³⁶ *Ibid.*

³³⁷ Cameron 'International Humanitarian Law and the Regulation of Private Military Companies' at 3; Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' at 520. That said, in the U.S. there is a distinction drawn between 'civilian employees [who] fall under the command of a military commander and are subject to supervision, control, and discipline by the commander or his subordinate', and 'contractors who work for themselves or a private company. They are not subject to being controlled and supervised by a military commander to the same degree as civilian employees' (Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 15).

Admittedly this view is taken in order to deny PMSCs the right to claim incorporation into the armed forces (by way of contract)³³⁸. There might then be room to argue that where States have contracted PMSCs to assist the armed forces, it is sufficient to infer protected status as civilian contractors, even if the contract itself is insufficient to actively incorporate them into the armed forces. However, as the Montreaux Document points out, they are expected to 'fulfil the requirements of article 4A(4) of the Third Geneva Convention'³³⁹. While the 'support functions' carried out by PMSCs 'doubtlessly do fall within article 4(4)', it is also worth noting that 'it is unlikely that *all* PMC/PSC staff, hired by States, would fall within this category'³⁴⁰, especially where their activities bring them closer to the 'heart of military operations'³⁴¹. In the end it will require individual 'case-by-case' analysis of the 'nature of the activities carried out'³⁴².

Probably the greatest hurdle to overcome when arguing that PMSCs be classed with 'persons accompanying the armed forces', is that States do not normally issue PMSCs with identification cards reflecting this status. Before PMSCs can claim POW status, they will need to overcome the treaty requirement that they carry identification as 'persons accompanying the armed forces'³⁴³. It is, however, true that when the convention drafters included the provision regarding the identity card for those accompanying the armed forces, it was agreed that 'possession of one was a supplementary safeguard for the person concerned, but not an indispensable prerequisite for being granted POW status'³⁴⁴. When PMSCs can overcome this technical requirement, they might be classified as 'persons accompanying the armed forces' and enjoy the associated POW status³⁴⁵. Having said that, it is clear that this argument cannot be made where PMSCs are hired by other State departments³⁴⁶ (other than the department of defence³⁴⁷), or sub-contracted³⁴⁸ by non-State actors without any affiliation to the armed forces³⁴⁹.

³³⁸ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 12).

³³⁹ Montreaux Document, principle 26(c).

³⁴⁰ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 4.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ Cameron 'International Humanitarian Law and the Regulation of Private Military Companies' at 6.

³⁴⁴ Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 537.

³⁴⁵ 'PMSC personnel are entitled to POW status when, in an international armed conflict, they are hired to work as civilians accompanying the armed forces. The armed forces should provide such civilians with identity cards identifying them as such' (Montreaux Document at 37).

³⁴⁶ 'Many PSCs operating in war zones today are working under contracts signed by other government agencies - such as the U.S.'s Department of State, Department of the Interior, or Central Intelligence Agency, or the U.K.'s Department for International Development' (De Nevers 'Private Security Companies and the Laws of War' at 184).

³⁴⁷ 'It is likely that only Department of Defence contractors can be considered CAFs, because they are "accompanying" the armed forces and clearly support the military mission, while PSCs working for other branches of government do not warrant that status' (*Idem* at 178).

³⁴⁸ 'At least 135 companies have subcontracted on U.S. government contracts in Iraq since 2003, so the number of employees affected could be quite high' (*Ibid.*).

Gillard concludes that 'it seems safe to conclude that the majority of PMCs/PSCs staff hired by States can be considered "ordinary" civilians'³⁵⁰. As the Montreux Document states, 'this is probably the case for the large majority of PMSC personnel. As such, they benefit from the protection afforded to civilians in situations of armed conflict'³⁵¹. As civilians, PMSCs 'may not be the object of an attack, unless and for such time as they directly participate in hostilities'³⁵², and during this window they 'constitute legitimate targets'³⁵³. At no time do they lose their civilian status, but they do 'lose their protection from attack for the duration of their participation'. Moreover, if they were entitled to POW status by virtue of being classified as 'persons accompanying the armed forces', 'they may lose their POW status' if they are found to be participating directly in hostilities.³⁵⁴ Without the benefit of POW status, if PMSC fall into enemy hands after having participated directly in hostilities, they can 'be tried under the national law of the State that is holding them'³⁵⁵. They do, however, remain subject to the the protections under GC IV, API article 75 'and the customary law rules applicable in international conflicts'³⁵⁶.

6.5 Are PMSCs, today's mercenaries in a new guise?³⁵⁷

As PMSCs became a more common feature in recent international armed conflicts, the 'first immediate response' ... [was] to label them mercenaries ... tainted with illegality and illegitimacy'³⁵⁸. While Enrique Bernales-Ballesteros was the Special Rapporteur on Mercenarism, the official position of the Special Rapporteur's office was that PMSCs were mercenaries³⁵⁹, 'a finding

³⁴⁹ Cameron 'Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation' at 593. 'PSCs work not only for States but also for international and private actors, providing security to corporations, non-governmental organisations, and international organisations ... they are clearly civilians under IHL' (De Nevers 'Private Security Companies and the Laws of War' at 178); Tougas 'Some Comments and Observations on the Montreux Document' at 338; Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 5.

³⁵⁰ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 5.

³⁵¹ Montreux Document at 36.

³⁵² *Ibid.*

³⁵³ Richemond-Barak 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' at 2341-47.

³⁵⁴ McDonald 'Private Military Contractors' at 3.

³⁵⁵ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 5.

³⁵⁶ *Ibid.*

³⁵⁷ The focus of this section will be limited to mercenarism, as it is understood under IHL in international armed conflicts. While the few States party to the U.N. Mercenaries Convention and the O.A.U. Mercenaries Convention, might be obliged criminalise a broader range of related activities, these obligations are necessarily limited to those few States who are party to these conventions. I have thus chosen to focus on the customary law provisions enshrined in IHL.

³⁵⁸ Andrew Clapham 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88:863 *International Review of the Red Cross* 491 at 498.

³⁵⁹ 1997 U.N. Report 'On the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self Determination'.

that most of the international community chose to reject³⁶⁰. In '2006 the U.N. General Assembly adopted a resolution prohibiting 'private companies offering international military consultancy and security services', from 'intervening in conflicts or being used against governments'³⁶¹. Thereafter, in 2007, the U.N. Working Group on the Use of Mercenaries, reported to the U.N. General Assembly, that PMSCs 'represent the new modalities of mercenarism'³⁶². Although to be fair - these PMSCs 'have more in common with the mercenary of the pre- rather than post- Westphalian period'³⁶³.

Against this backdrop, it is interesting to note that the two anti-mercenary conventions, both received generally 'low levels of ratification'³⁶⁴ and lax implementation by States³⁶⁵. Meanwhile, PMSCs continued to operate in over fifty States, often on government contracts³⁶⁶. In addition, the 'heavy reliance on PMSCs by the USA and the U.K. has led observers to argue that it simply is too late to seek to ban PMSCs: the goal instead should be to sort out accountability issues'³⁶⁷. PMSCs, for their part, have always maintained that 'they are not mercenaries, and that existing international law condemning mercenaries cannot be applied to them'³⁶⁸. Furthermore, endeavours by the International Committee for the Red Cross (ICRC) to dialogue with those in the private security industry, in order to promote their compliance with IHL, lends credibility to the position that PMSCs are not as a general rule mercenaries³⁶⁹. The prevailing legal opinion is that 'treating private contractors as mercenaries is not productive'³⁷⁰, neither is it supported under

³⁶⁰ Cameron 'Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation' at 575.

³⁶¹ De Nevers 'Private Security Companies and the Laws of War' at 175.

³⁶² Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 321.

³⁶³ McDonald 'Private Military Contractors' at 2. 'Until the middle Ages, mercenaries were an integral part of the States' armies, but after the Treaty of Westphalia they increasingly fell into disrepute with the rise of nationalism' (*Ibid*). After WW II, the use of mercenaries in post-colonial struggles became 'increasingly delegitimised because it potentially prolonged certain conflicts and undermined international principles of self-determination' (Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 232). The impetus for the U.N. Mercenaries Convention 'came primarily from post-colonial African States and often over the objection of Western States' (*Ibid*).

³⁶⁴ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 879.

³⁶⁵ Only a small number of States have taken steps to enact legislation specifically aimed at regulating the PMSC industry within their territory. Many of these instances of regulation have come about only after nationals of these States have been accused of mercenary-type activities, coup attempts and human rights abuses (Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 528). For more on the issue of regulation, see Shannon Bosch and Marelle Maritz 'South African Private Security Contractors Active in armed Conflicts: Citizenship, Prosecution and the Right to Work' 2011 14:7 *Potchefstroom Electronic Review* 71.

³⁶⁶ Not surprisingly, those 'States that rely most heavily on PMSCs have not signed' the U.N. Mercenaries Convention (De Nevers 'Private Security Companies and the Laws of War' at 175).

³⁶⁷ *Ibid*.

³⁶⁸ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 855.

³⁶⁹ Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 527.

³⁷⁰ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 855.

customary international law for want of State practice³⁷¹ and 'opinio juris'³⁷².

State practice reveals that 'outside of the community of African States that championed it, the mercenary ban has never received the type of widespread support that would make enforcement likely'³⁷³. Not surprisingly, 'prosecutions for the crime of mercenarism ... are rare'³⁷⁴, and even in the instances of 'some quite well-known trials of mercenaries'³⁷⁵, States have often resorted to charging these 'mercenaries' with other 'violations of national law' (like arms possession), rather than for mercenarism *per se*³⁷⁶.

It is, however, not impossible for an individual PMSC to satisfy the definitional requirements for mercenary status. Having said that, it must be noted that at present there are no 'provisions, in treaty or customary IHL, which explicitly prohibit mercenarism'³⁷⁷ under IHL. Moreover, nowhere in any treaty is there a provision making it an offence for a State to make use of mercenaries, and most treaty provisions (like AP I article 47) target only individual mercenaries³⁷⁸. The IHL provisions dealing with mercenarism are considered 'one of the weaker provisions'³⁷⁹ in IHL. Instead of criminalising the behaviour of mercenaries, IHL approaches the issue of mercenarism by restricting the status to be granted to these individuals, if captured³⁸⁰. In effect, AP I article 47 treats mercenaries like other civilians who participate directly in hostilities without authorisation³⁸¹. Consequently, if captured, they are not entitled³⁸² to claim combatant and POW status under IHL, because they are 'not members of the armed forces'³⁸³. Moreover, they are not

³⁷¹ Peter Warren Singer 'War, Profits and the Vacuum of Law: Privatised Military Firms and International Law' (2004) 42 *Columbia Journal of Transnational Law* 521 at 533.

³⁷² Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 879.

³⁷³ Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 232.

³⁷⁴ Amnesty International 'Equatorial Guinea: Trial of Alleged Coup Plotters Seriously Flawed' (30 November 2004) *AI Index* AFR 24/017/2004.

³⁷⁵ *Ibid.*

³⁷⁶ The trials which took place in 2004, of those accused of plotting a coup in Equatorial Guinea, did not mention mercenarism (*Ibid.*). Similarly, the charges in Zimbabwe with regard to the same plot, revolved around 'firearms and immigration infractions' (*BBC News* "'Mercenaries" Appeal in Zimbabwe' (9 December 2004) available at <http://news.bbc.co.uk/1/hi/world/africa/4082481.stm> (accessed 19 July 2012).

³⁷⁷ Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 230.

³⁷⁸ Clive Walker and Dave Whyte 'Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom' (2005) *International and Comparative Law Quarterly* 679 at 679-680. 'Although such provisions were proposed, Western States rejected them, arguing that States are incapable of controlling the actions of their nationals abroad' (Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 232).

³⁷⁹ Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 232.

³⁸⁰ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 2.

³⁸¹ *Ibid.*

³⁸² AP I article 47 'does not prohibit States from giving mercenaries POW status. It merely provides that mercenaries, unlike members of States' armed forces, are not entitled to it as a matter of right' (*Idem* at 3).

³⁸³ Rogers 'Unequal Combat and the Law of War' at 23; Clapham 'Human Rights Obligations of Non-State Actors in Conflict Situations' at 98; Montreux Document at 40.

immune from prosecution, and ‘can be tried under national law for the mere fact of having participated in hostilities’³⁸⁴. As with any civilians who are captured after having participated in hostilities, GC IV will apply in the case of captured mercenaries, and ‘lays down minimum standards to regulate their deprivation of liberty, as well as minimum judicial guarantees to be respected in any criminal proceedings’³⁸⁵. Should a captured mercenary fall outside of the scope of GC IV, they are, nevertheless, still entitled to claim a ‘proper trial’ and the minimum fundamental guarantees enshrined in AP I article 75³⁸⁶. Consequently, an individual who fulfills the IHL definition of a mercenary will not face criminal prosecution for ‘mercenarism’³⁸⁷ *per se*, neither will they face potential prosecution under the Rome Statute of the International Criminal Court³⁸⁸. At most, they might face prosecution under the domestic laws of a detaining State that is party to either of the two anti-mercenary treaties³⁸⁹. However, having said that, it is acknowledged by most jurists that the ‘legal standards within these instruments are difficult to meet’³⁹⁰.

i. Defining a mercenary under IHL

The term mercenary is defined in AP I article 47(2), as any person who (in the context of an international armed conflict):

‘(a) is specially recruited locally or abroad in order to fight in an armed conflict’³⁹¹;

³⁸⁴ Gillard ‘Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations’ at 3.

³⁸⁵ *Ibid.*

³⁸⁶ Fallah ‘Corporate Actors: The Legal Status of Mercenaries in Armed Conflict’ at 606; Rogers ‘Unequal Combat and the Law of War’ at 23; Gillard ‘Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations’ at 3.

³⁸⁷ Gillard ‘Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations’ at 2.

³⁸⁸ Fallah ‘Corporate Actors: The Legal Status of Mercenaries in Armed Conflict’ at 610.

³⁸⁹ Offenders can be prosecuted in domestic courts of States party to the Mercenaries Conventions, provided the individuals fulfill all the definitional criteria of a ‘mercenary’ set out in these treaties (Lindsey Cameron ‘International Humanitarian Law and the Regulation of Private Military Companies’ (February 2007) Plenary Lecture at Conference on Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide Switzerland, available at <http://www.baselgovernance.org/fileadmin/docs/pdfs/Non-State/Cameron.pdf> (accessed 20 August 2007) at 7; Fallah ‘Corporate Actors: The Legal Status of Mercenaries in Armed Conflict’ at 608). The enforcement provisions in these two treaties require ‘implementing legislation by the relevant State party’ (Gaston ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement’ at 232). For more on this issue, see Bosch and Maritz ‘South African Private Security Contractors Active in armed Conflicts: Citizenship, Prosecution and the Right to Work’.

³⁹⁰ Gaston ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement’ at 232.

³⁹¹ ‘This provision was intended to exclude volunteers who enter service on a permanent or long-lasting basis in a foreign army, whether as a result of a purely individual enlistment (French Foreign Legion, Spanish Tercio) or an arrangement concluded by their national authorities (for example, the Nepalese Gurkhas in India, the Swiss Guards of the Vatican)’ (Salzman ‘Private Military Contractors and the Taint of a Mercenary Reputation’ at 885).

- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party³⁹²;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces’.

Given that all six criteria have to be fulfilled cumulatively, the threshold is difficult to attain and, PMSCs fail to fulfill many of the six criteria required by the IHL definition of a ‘mercenary’. Consequently, the term ‘mercenary’ is rarely used in its legally accurate sense, and the definition is widely regarded as being unworkable³⁹³ and ‘easy to evade’³⁹⁴.

Are PMSCs ‘specially recruited’?

There is some academic debate about whether PMSCs can be said to be ‘specially recruited’. Most PMSCs work on a freelance basis, with their names on several databases³⁹⁵. Where they do work ‘on long-term contracts’³⁹⁶, moving from one conflict zone to another, they cannot be said to have been ‘specially recruited’³⁹⁷. However, where they are ‘awarded a particular contract’³⁹⁸ that might be sufficient to conclude that they were “specially recruited”³⁹⁹.

Do PMSCs take a direct part in international hostilities?

³⁹² ‘According to the ICRC’s commentary, this requirement was introduced to distinguish the mercenary from the noble volunteer (*Ibid*).

³⁹³ Cameron ‘International Humanitarian Law and the Regulation of Private Military Companies’ at 6; Cameron ‘Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation’ at 578; Foreign Commonwealth Office ‘Private Military Companies: Options for Regulation’ (Green paper) (2002) available at http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_privatemilitarycompanies (accessed 28 February 2011) at para 6.

³⁹⁴ Clapham ‘Human Rights Obligations of Non-State Actors in Conflict Situations’ at 98.

³⁹⁵ Salzman ‘Private Military Contractors and the Taint of a Mercenary Reputation’ at 882.

³⁹⁶ *Ibid*.

³⁹⁷ Walker and Whyte ‘Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom’ at 679-680.

³⁹⁸ Like, for example, where Executive Outcomes (EO) was hired in 1993 by the Angolan Government ‘to regain control of the territory’, or where EO was hired in 1995 by Sierra Leone ‘to retrain its troops and to help them defeat the rebels of the RUF’ (Mancini *et al* ‘Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?’ at 331). It would be entirely possible to interpret these cases as fulfilling the ‘specially recruited’ criterion.

³⁹⁹ Salzman ‘Private Military Contractors and the Taint of a Mercenary Reputation’ at 882; Mancini *et al* ‘Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?’ at 331.

Many PMSCs are not recruited to fight, but are contracted to provide support services⁴⁰⁰, advisory services⁴⁰¹, training, logistical support, security⁴⁰², or to act as bodyguards⁴⁰³. Provided PMSCs are providing 'non-combat services' or military advice, they are not considered to be 'taking a direct part in the hostilities', and will not fall foul of AP I article 47(2)(b)⁴⁰⁴. This position is endorsed by the ICRC in their commentary on AP I, where it is stated that: military advice, training, and technical maintenance of weapons are not 'mercenary activities', and do not in and of themselves amount to direct participation in hostilities⁴⁰⁵. PMSCs are 'quick to deny that they provide tactical military services, claiming to provide purely defensive and protective services'⁴⁰⁶. PMSCs also 'tend not to openly advertise their more combat-like services'⁴⁰⁷. Some academics argue that 'so long as private contractors are not contracted specifically to engage in combat, and do so only in self-defense, they fall outside of the definition of article 47'⁴⁰⁸.

The reality on the ground reveals that, although private contractors may have initially fulfilled purely support roles, they have today 'spread across the full spectrum of government activities'⁴⁰⁹, effectively blurring the line 'between combat and non-combat services'⁴¹⁰. So, for example, in Afghanistan and Iraq, the U.S. and U.K. governments hired a variety of PMSCs (Blackwater, Dynacorp International, Military Professional Resources Inc, Triple Canopy, EOD Technology, Aegis, ArmorGroup, Control Risks and Erinys⁴¹¹) to provide 'services including static security of sites, escort security, convoy security and personal security details of high ranking individuals'⁴¹². While they might have initially been recruited as 'security guards', they often became 'private soldiers militarily armed'⁴¹³... 'often receiving *ad hoc* military training before

⁴⁰⁰ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 882.

⁴⁰¹ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 58.

⁴⁰² Clapham 'Human Rights Obligations of Non-State Actors in Conflict Situations' at 300.

⁴⁰³ Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 233.

⁴⁰⁴ Walker and Whyte 'Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom' at 679; Rogers 'Unequal Combat and the Law of War' at 23; Yves Sandoz (1999) 'Private Security and International Law' in Jakkie Cilliers and Peggy Mason (eds) *Peace, Profit or Plunder?: The Privatisation of Security in War-torn African Societies* Institute for Security Studies: South Africa at 209. It is interesting to note that the U.N. Mercenaries' Convention excludes the requirement that the individual must in fact take part in hostilities (Fallah 'Corporate Actors: The Legal Status of Mercenaries in Armed Conflict' at 609).

⁴⁰⁵ Marie-France Major 'Mercenaries and International Law' (1992) 22 *Georgia Journal of International and Comparative Law* 103 at 103.

⁴⁰⁶ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 883. ArmorGroup is quoted as saying 'We don't do military replacement. We won't take part in offensive action of any kind. We protect people on the ground' (Christopher Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism' (2008) 39 *Security Dialogue* at 363).

⁴⁰⁷ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 883.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*; Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 179.

⁴¹¹ Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 331.

⁴¹² *Ibid.*

⁴¹³ *Idem* at 332.

being dispatched to Iraq or Afghanistan⁴¹⁴.

So 'while it may be true that certain private contractors do not meet the direct participation requirement, an increasing number do'⁴¹⁵. As was the case in Iraq, many PMSCs were hired to carry out tasks in 'combat-like situations' ('from maintaining complex weapons such as the B-2 bomber, to performing interrogations, to selecting targets and flying surveillance missions'⁴¹⁶), which clearly satisfy the 'direct participation requirement'⁴¹⁷. Sometimes PMSCs were even 'permitted to join coalition forces in combat operations, for the purposes of self-defense and for the defense of people specified in their contract'⁴¹⁸.

Admittedly it will sometimes be difficult to establish when security contractors cross the line over to 'direct combat activity'⁴¹⁹. So, for example, while 'armed security contractors cannot be considered as recruited to fight in an armed conflict if they are hired to protect military objectives against common criminals'⁴²⁰, it is also true that 'there is no distinction based on the offensive or defensive nature of the participation in combat'⁴²¹. Legally, only those PMSCs specifically recruited to actively participate in hostilities⁴²² directly, will satisfy these criteria. As for the rest, they would retain their civilian status⁴²³.

Are PMSCs motivated by the desire for private gain, substantially in excess of that promised or paid to combatants of similar ranks and functions?

It is generally uncontested that PMSCs are 'private agents, principally motivated by profit'⁴²⁴ and that they 'are paid substantially more than their counterparts in the national armed forces'⁴²⁵. To illustrate the extent of their remuneration, Blackwater staff (of U.S. nationality) undertaking a protective security detail, cost the U.S. government 'six-nine times more than an equivalent U.S. soldier'⁴²⁶. When one considers that PMSCs take up risky assignments in countries far from their homes, 'the desire for private gain appears to be the primary motivator'⁴²⁷. Similarly, there is no consensus on whether being hired by private security companies behind a 'corporate veil',

⁴¹⁴ *Ibid.*

⁴¹⁵ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 884.

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 233.

⁴²⁰ Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 332-333.

⁴²¹ Elesa *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 19.

⁴²² Rogers 'Unequal Combat and the Law of War' at 23.

⁴²³ Claude Pilloud, Yves Sandoz and Bruno Zimmermann (1987) *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* Martinus Nijhoff Publishers: Geneva at 57.

⁴²⁴ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 885.

⁴²⁵ *Ibid.*

⁴²⁶ Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 337.

⁴²⁷ 'In fact, the U.N. Working Group on the Use of Mercenaries found that many of the contractors interviewed on its field missions were essentially motivated by private gain' (*Ibid.*).

protects the individual PMSCs from questions regarding ‘their monetary motivations’⁴²⁸. That said, legal scholars are generally in agreement that the legal proof of their motivation would be extremely difficult to satisfy⁴²⁹. After all, many ‘members of the State’s own armed forces are motivated to enlist for monetary gain’, while many PMSCs might well have ‘non-monetary motivations’⁴³⁰ based on ‘moral or political ideals’⁴³¹. As Gaston points out, ‘even if they are not actually motivated by a sense of patriotic duty, it may be difficult to prove otherwise’⁴³². As the Diplock Report concluded, ‘any definition of mercenaries which required proof positive of motivation would ... either be unworkable or ... haphazard’⁴³³.

Are PMSCs ‘not nationals of a Party to the conflict or residents of territory controlled by a Party to the conflict’?

In an arbitrary manner, any PMSCs emanating from States party to the conflict, would automatically be exempt from mercenary status under this criterion⁴³⁴, while fellow employees of the same private security company would fall foul of this requirement due to their citizenship or residence alone. So, for example, in the ‘specific context of Iraq or Afghanistan, security contractors who are citizens of either the United States or coalition partners’⁴³⁵, or ‘Iraqi or Afghan nationals hired by these countries’⁴³⁶, would be exempt from AP I article 47, while PMSCs ‘emanating from Honduras, Peru, Chile and other third world countries’⁴³⁷ would have fulfilled the nationality requirement of the test for mercenarism⁴³⁸. Sometimes PMSCs have avoided this provision by being immediately granted nationality or citizenship by the host State (‘as in the case of the Executive Outcomes and Sandline helicopter pilots in Sierra Leone’)⁴³⁹.

⁴²⁸ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 58.

⁴²⁹ Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries (Diplock report) (1976) at para 7; Fallah ‘Corporate Actors: The Legal Status of Mercenaries in Armed Conflict’ at 605; Salzman ‘Private Military Contractors and the Taint of a Mercenary Reputation’ at 885; Elsea *et al* ‘Private Security Contractors in Iraq: Background, Legal Status, and Other Issues’ at 19.

⁴³⁰ Salzman ‘Private Military Contractors and the Taint of a Mercenary Reputation’ at 885.

⁴³¹ Walker and Whyte ‘Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom’ at 679.

⁴³² Gaston ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement’ at 233.

⁴³³ Walker and Whyte ‘Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom’ at 679.

⁴³⁴ So, for example, the U.S.-based MPRI ‘only hires ex-U.S. forces personnel’, and thus in Iraq these PMSCs would not meet the definitional requirements of a mercenary under AP I (Salzman ‘Private Military Contractors and the Taint of a Mercenary Reputation’ at 884).

⁴³⁵ Gaston ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement’ at 233.

⁴³⁶ *Ibid.*

⁴³⁷ De Nevers ‘Private Security Companies and the Laws of War’ at 119.

⁴³⁸ Mancini *et al* ‘Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?’ at 338; Elsea *et al* ‘Private Security Contractors in Iraq: Background, Legal Status, and Other Issues’ at 19.

⁴³⁹ Walker and Whyte ‘Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom’ at 679; Mancini *et al* ‘Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?’ at 338.

Are PMSCs not 'member of the armed forces of a Party to the conflict'?

As was discussed in length above, States are reluctant to officially incorporate PMSCs into their armed forces. However, there is evidence of host States clothing PMSCs with a special designation which links them to the armed forces. So, for example, PMSCs employed by Sandline in Papua New Guinea, 'were designated as Special Constables'⁴⁴⁰, which then exempted them from AP I article 47.

Are PMSCs 'sent by a State which is not a Party to the conflict on official duty as a member of its armed forces'?

While States are reluctant to officially incorporate PMSCs into their armed forces, some jurists have argued that the contract of employment is sufficient to conclude that they are contractors of their employing State⁴⁴¹, which will ensure that they are not classified as mercenaries.

In July 2010, the U.N. Working Group on the use of mercenaries submitted a 'draft of a possible convention on PMSC' to the Human Rights Council⁴⁴². The draft 'establishes an outright ban on the direct participation of contractors in hostilities'⁴⁴³, and required States party 'to take such legislative, administrative and other measures as may be necessary to prohibit and make illegal the direct participation of PSMC's and their personnel in hostilities, terrorist acts and military actions in violation of international law'⁴⁴⁴.

What we can surmise from this recent development, is not that PMSCs are necessarily mercenaries, but that their direct participation in hostilities does violate IHL – which has always been the legal position, irrespective of whether one views them as mercenaries or not. The U.N. working group conceded that 'although their activities have characteristics in common with mercenaries, save in exceptional cases, they do not fit the technical definition provided in the U.N. anti-mercenary convention'⁴⁴⁵, and 'many activities performed by PMSCs cannot be considered as mercenary activities under the existing international treaties'⁴⁴⁶.

In conclusion then, it seems that, in theory, it is possible for a PMSC (in the context of an international armed conflict) to fulfill all the complicated requirements of the IHL definition of a mercenary⁴⁴⁷, although it would be a

⁴⁴⁰ Walker and Whyte 'Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom' at 679. 'New Guinea stipulated that Sandline International personnel would be enrolled as "special constables, but were to hold military ranks commensurate with those they hold within the Sandline command structure" - allowing them to avoid being labelled as mercenaries' (Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 339).

⁴⁴¹ Jackson Maogoto and Benedict Sheehy 'Contemporary Private Military Firms Under International Law: An Unregulated 'Gold Rush'' (2006) 1345 *Bepress Legal Series Paper* 245 at 250.

⁴⁴² Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 336.

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Idem* at 340.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 855.

rare occurrence⁴⁴⁸. For the most part, PMSCs are 'not contracted to fight in military operations', 'many are nationals of one of the parties to the conflict', and proving motivation of private gain has eluded most prosecutors⁴⁴⁹. In most cases, the term mercenary is not useful in determining the status of PMSCs under IHL⁴⁵⁰, and 'is largely inapplicable to the relatively new phenomenon of PMSCs'⁴⁵¹.

6.6 Conclusions on the primary status of PMSCs

In short then, most legal scholars agree that there is no legal obstacle to PMSCs being afforded primary combatant status and secondary POW status upon capture⁴⁵². PMSCs will enjoy the privileges associated with combatant status when they are 'formally incorporated into the States armed forces'⁴⁵³, or 'they fulfil the customary IHL criteria for combatant status'⁴⁵⁴. However, most commentators agree that the attainment of either of these conditions is likely to be rare⁴⁵⁵. As for the allegation that PMSCs might be classified as mercenaries, in theory it is possible for a PMSC (in the context of an international armed conflict) to fulfill all the requirements of the IHL definition of a mercenary⁴⁵⁶, although it would be a rare occurrence⁴⁵⁷.

If PMSCs do not fulfil the criteria for combatant status, 'they are protected as civilians'⁴⁵⁸, 'to whom the normal rules of civilian status apply'⁴⁵⁹. In order to ensure their civilian immunity is not compromised, PMSCs must take care not to 'dress like members of the armed forces'... or to 'engage in combat-related activities'⁴⁶⁰. Since most PMSCs are employed 'to provide support functions'⁴⁶¹... they are considered to be civilians⁴⁶². As the Montreux Document concludes: 'the status of PMSC personnel depends on their exact employment and functions'⁴⁶³.

As civilians, PMSCs are not permitted to participate directly in hostilities, but are still by law permitted to carry 'light, personal weapons for their own self-defence or the defence of those they are protecting'⁴⁶⁴. Whether

⁴⁴⁸ Kevin O'Brien (2006) *Private Military Companies: Options for Regulation* RAND Europe: Cambridge at 3; Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 107; Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 24.

⁴⁴⁹ Montreux Document at 40.

⁴⁵⁰ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 396.

⁴⁵¹ Montreux Document at 37.

⁴⁵² De Nevers 'Private Security Companies and the Laws of War' at 176.

⁴⁵³ Montreux Document, principle 26(b) at 39; Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 107.

⁴⁵⁴ Montreux Document at principle 26(b).

⁴⁵⁵ *Idem* at 36; Banks 'Introduction' at 228-35.

⁴⁵⁶ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation' at 855.

⁴⁵⁷ O'Brien *Private Military Companies: Options for Regulation* at 3.

⁴⁵⁸ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 107.

⁴⁵⁹ Rogers 'Unequal Combat and the Law of War' at 22.

⁴⁶⁰ *Idem* at 22-23.

⁴⁶¹ For example, equipment maintenance, logistic services, guarding diplomatic missions or other civilian sites, and catering.

⁴⁶² Montreux Document at principle 39.

⁴⁶³ *Idem* at 39.

⁴⁶⁴ Rogers 'Unequal Combat and the Law of War' at 22.

they compromise their civilian status, will depend on ‘the activities they are undertaking at the time, as well as how they use force’⁴⁶⁵. If they do exceed these limitations, they ‘may only be attacked if, and so long as, they take part directly in hostilities’⁴⁶⁶. If PMSCs are captured after being found to be participating in hostilities, ‘they run the risk, ... of being accused of perfidy, [or] unprivileged belligerency’⁴⁶⁷, and can ‘be prosecuted for mere involvement in hostilities’⁴⁶⁸, without any benefit of POW status⁴⁶⁹.

There might then be room to argue that where States have contracted PMSCs to assist the armed forces, it is sufficient to infer protected status, as ‘persons accompanying the armed forces’, even if the contract itself is insufficient to actively incorporate them into the armed forces. In such cases, PMSCs will need to be in possession of a card identifying them as ‘civilians accompanying the armed forces’⁴⁷⁰. The benefit for PMSCs of this special category, is that these individuals are granted POW status upon capture⁴⁷¹.

In conclusion, it is misleading to say that PMSCs are without status under IHL⁴⁷². As Gillard explains ‘IHL contains criteria for determining this status as well as clear consequent rights and obligations’⁴⁷³. Moreover, under IHL, every individual in the theatre of an international armed conflict has a primary status as either a combatant or a civilian⁴⁷⁴. What is true, however, is that ‘there is no single simple answer applicable to all’⁴⁷⁵ PMSCs. Much will turn on ‘the nature of their relationship with the State that hires them’, the ‘nature of the activities that they carry out’⁴⁷⁶, the ‘given time and place’⁴⁷⁷, and the circumstances surrounding the performance of their functions⁴⁷⁸. As Kidane points out, ‘not all activities of private military contractors can easily be classified as legal or illegal’⁴⁷⁹. Moreover, ‘most of the private military

⁴⁶⁵ De Nevers ‘Private Security Companies and the Laws of War’ at 171.

⁴⁶⁶ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 107; Rogers ‘Unequal Combat and the Law of War’ at 22.

⁴⁶⁷ Rogers ‘Unequal Combat and the Law of War’ at 22.

⁴⁶⁸ ‘Since judicial proceedings against PMSC employees have been very rare, several commentators have already emphasised the difficulties and limitations in the exercise of criminal jurisdiction’ (Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 215; Montreux Document at 39).

⁴⁶⁹ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 199.

⁴⁷⁰ McDonald ‘Private Military Contractors’ at 3.

⁴⁷¹ *Ibid.*

⁴⁷² Gillard ‘Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations’ at 2.

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*; Cliff Crofford ‘Private Security Contractors on the Battlefield’ (2006) available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil320.pdf> (accessed 15 August 2012) at 8.

⁴⁷⁵ Gillard ‘Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations’ at 2; Kidane ‘The Status of Private Military Contractors Under International Humanitarian Law’ at 412.

⁴⁷⁶ Gillard ‘Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations’ at 2; Montreux Document at 36.

⁴⁷⁷ Kidane ‘The Status of Private Military Contractors Under International Humanitarian Law’ at 412.

⁴⁷⁸ *Idem* at 419; Montreux Document at principle 24.

⁴⁷⁹ Kidane ‘The Status of Private Military Contractors Under International Humanitarian Law’

contractors perform legitimate activities most of the time⁴⁸⁰. 'Until State and international laws catch up to the advent of PMSCs' their legal 'status will have to be ascertained on a case-by-case basis'⁴⁸¹. Even the U.N. working group concedes that its most recent draft treaty on PMSCs does not aim to ban outright their use; rather it aims at setting standards and 'regulating the activities of PMSCs and their personnel'⁴⁸².

6.7 PMSCs and the notion of direct participation in hostilities

From the analysis so far, it seems that most PMSCs will fall into the IHL classification of civilians (possibly enjoying privileges as contractors accompanying the armed forces). Civilian status brings with it immunity against attack on account of the 'fundamental principle of the law of war that those who do not participate in the hostilities shall not be attacked'⁴⁸³. Consequently, 'civilians are protected persons, for so long as they do not act to compromise their protected status by engaging in 'combat related activities'⁴⁸⁴, 'normally ... undertaken only by members of the armed forces'⁴⁸⁵. When a civilian engages in these combat-related activities (or to put it another way, 'participates directly in hostilities'), that action 'suspends their (civilian) protection against the dangers arising from military operations'⁴⁸⁶, exposes them to legitimate targeting⁴⁸⁷, and potential criminal prosecution for their unauthorised participation in hostilities⁴⁸⁸. As the ICRC's commentary on AP I article 51(3) explains: 'only some specific actions will result in the civilian losing their immunity, and ... their loss of protection is limited to the length of time'⁴⁸⁹ during which they persist in their direct participation'⁴⁹⁰. The corollary

at 412.

⁴⁸⁰ *Ibid.*

⁴⁸¹ Crofford 'Private Security Contractors on the Battlefield' at 8.

⁴⁸² Montreux Document at 36.

⁴⁸³ Michael Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *International Law and Politics* 697 at 715.

⁴⁸⁴ *Idem* at 714.

⁴⁸⁵ Rogers 'Unequal Combat and the Law of War' at 19. Rogers cites the following examples: 'attacks with roadside bombs on military patrols, sabotage of military communications installations, electronic interference with weapons systems or capturing members of the armed forces' (Rogers 'Unequal Combat and the Law of War' at 19). These activities must be distinguished from 'support activities, such as provision of supplies and services ... which do not amount to taking a direct part in hostilities' (Rogers 'Unequal Combat and the Law of War' at 19).

⁴⁸⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

⁴⁸⁷ 'The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts ... thus a civilian who takes part in an armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities' (Jensen 'Direct Participation in Hostilities' at 1995-2003). The targeting decision in such instances does not have to take into account the principle of proportionality (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 703).

⁴⁸⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

⁴⁸⁹ 'Once he ceases to participate, the civilian regains his right to the protection under this section ...and he may no longer be attacked' (Jensen 'Direct Participation in Hostilities' at 2003-12).

⁴⁹⁰ *Idem* at 2003-12 and 1995-2003.

of this principle, is that 'combatants' (as understood by IHL), by virtue of their IHL status alone, are authorised to participate directly in hostilities,⁴⁹¹ and do so without the threat of possible prosecution for their hostile actions.

The restrictions upon civilian direct participation in hostilities can be traced back to Geneva law, and is codified in the four Geneva Conventions of 1949⁴⁹². It is reiterated again in AP I article 51(3)⁴⁹³. This principle can also be said to have achieved customary international law status, as was confirmed by the ICRC's study into the customary international law status of IHL. The study concluded that no 'official contrary practice was found'⁴⁹⁴, and on the whole the principle that civilians lose their immunity from prosecution when they participate in hostilities, is seen as a valuable reaffirmation of an existing rule of customary international law⁴⁹⁵.

While the principle is often cited, neither treaty law nor customary international law, can offer a definitive 'definition of what activities amount to prohibited direct participation in hostilities'⁴⁹⁶. What is often stated, is that an 'assessment of direct participation has to be made on a case-by-case basis'⁴⁹⁷, interpreting 'the notion of direct participation in hostilities ... in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL'⁴⁹⁸.

Simply put, the notion of direct participation in hostilities is generally understood to apply to 'acts which, by their nature or purpose may cause actual harm to enemy personnel and *matériel*'⁴⁹⁹. These are distinguished from acts which merely support the war effort⁵⁰⁰, like supplying 'food and shelter to combatants or generally "sympathising" with them'⁵⁰¹. This problem, which

⁴⁹¹ Subject to the limitations imposed upon them by international law regarding methods and means of warfare. Failure to observe these limitations will expose combatants to prosecution before a military tribunal (Ipsen (1995) 'Combatants and Non-combatants' at 65-66 and 68; HR article 3; AP I article 43(2)). It must be noted that these privileges may be forfeited as a result of the actions of particular individuals, for example by engaging in spying.

⁴⁹² GC common article 3(1): 'Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons'; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

⁴⁹³ 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities'.

⁴⁹⁴ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Idem* at 22; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12 and 41.

⁴⁹⁷ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 22.

⁴⁹⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 41.

⁴⁹⁹ ICRC 'Direct Participation in Hostilities Under International Humanitarian Law' ICRC expert meetings, (2 June 2003; 25-26 October 2004; 23-25 October 2005) (the Hague and Geneva) available at <http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm> (accessed 14 July 2012) at 1.

⁵⁰⁰ Gasser (1995) 'Protection of the Civilian Population' at 211 and 233.

⁵⁰¹ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 5. 'Support and logistical activities' carried out by civilians like 'catering,

Gillard expresses so succinctly, is that 'a considerable grey zone exists between these two ends of the spectrum'⁵⁰² - which has led to the existing controversy. The ICRC in their commentary to AP I, summarises the controversy as follows 'undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly'⁵⁰³. The International Criminal Tribunal for the Former Yugoslavia, when faced with this issue in the *Tadić* case, commented that 'it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time'⁵⁰⁴.

While it might seem straight forward to instruct civilian PMSCs to desist from any actions which might amount to direct participation in hostilities, the issue is complicated by the fact that the notion of exactly what amounts to direct participation in hostilities has eluded IHL academics and international courts alike. There is widespread agreement, that when PMSCs 'engage in combat activities' (like the accounts of 'Executive Outcomes and Sandline International contracting to fight wars for the governments of Sierra Leone and Angola in the 1990's')⁵⁰⁵, that these activities amount to direct participation in hostilities. While these sorts of activities have received 'widespread condemnation', PMSCs have reinvented themselves, 'rejecting ... an explicit combat role', to the extent that 'some scholars argue that a norm against offensive missions is emerging'⁵⁰⁶. 'British industry officials argue ... that British companies are 'purely defensive', while U.S. industry representatives, in discussing offensive actions, insist that 'none of the companies do it'⁵⁰⁷, and others argue that it still happens, but that PMSCs do not advertise these services openly, and 'have simply learned to avoid public view'⁵⁰⁸.

The PMSC 'industry boom' seems to test the debate around which activities amount to direct participation in hostilities, in new ways. It poses new challenges, like: whether preparation for military operations oversteps the mark⁵⁰⁹; whether defensive⁵¹⁰ (as opposed to offensive) operations amount to

construction and maintenance of bases' do not constitute direct participation in hostilities, provided these civilians do no more than act in self defence (Cameron 'Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation' at 588-589).

⁵⁰² Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 5.

⁵⁰³ Pilloud *et al* *ICRC Commentary on the Additional Protocol of 8 June 1977 to the Geneva Convention of 12 August 1949* at 516.

⁵⁰⁴ *Prosecutor v Dusko Tadić* ICTY (7 May 1997) IT -94 -1-A available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> (accessed 17 July 2012) at para 616.

⁵⁰⁵ De Nevers 'Private Security Companies and the Laws of War' at 179.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Gasser proposes that direct participation involves not only 'direct personal involvement but also preparation for a military operation, and intention to take part therein', provided the

direct participation; whether the ‘use of force in self defence’ amounts to direct participation in hostilities; whether the close proximity of PMSCs to the theatre of combat makes their activities more likely to be interpreted as direct participation in hostilities⁵¹¹; and lastly, whether the location of PMSCs far from the actual theatre of hostilities necessarily exempts them from being found participating directly in hostilities⁵¹².

i. The ICRC’s ‘Interpretive Guide’

In an attempt to provide guidance for States interpreting the concept of ‘direct participation in hostilities’, the ICRC convened a panel of experts to debate the issue, and in 2009 the ICRC produced the Interpretive Guide on the Notion of Direct Participation in Hostilities. While the guide is not legally binding, the ICRC hoped that their recommendations would have ‘substantial persuasive effect’⁵¹³ ‘for States, non-State actors, practitioners, and academics alike’⁵¹⁴. Some argue that the guidance ‘may even be viewed as a secondary source of international law... analogous to writings of the “most highly qualified publicists”’⁵¹⁵.

It is worth stating at the outset, that the Interpretive Guide makes it explicit that the document only speaks to the notion of direct participation in hostilities, in so far as it impacts on decisions regarding ‘targeting and military attacks’. It does not propose to deal with the issue of ‘detention or combatant immunity’⁵¹⁶. Moreover, the concept of direct participation in hostilities is only

activities ‘represent a direct threat to the enemy’ (Gasser ‘Protection of the Civilian Population’ at 232; ICRC ‘Commentary to AP I’ (1977) 16 *International Legal Materials* 1391 at 1679.

⁵¹⁰ ‘IHL does not distinguish between offensive and defensive operations’, providing defence for ‘military objectives amounts to direct participation in hostilities’ (Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 208).

⁵¹¹ ‘The first principle is that the closer an activity occurs to the physical location of fighting, the more likely it will be considered combat’, since ‘activity near the battlefield can usually be more closely linked to the infliction of harm on an enemy’ (Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 179-180).

⁵¹² Technological developments which would allow individuals located far from the front-lines to direct a weapon to strike a target remotely by computer, must be taken into account. Cameron argues that these activities would amount to direct participation in hostilities (Lindsey Cameron ‘International Humanitarian Law and the Regulation of Private Military Companies’ (February 2007) Plenary Lecture given at Conference on Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide, available at <http://www.baselgovernance.org/fileadmin/docs/pdfs/Non-State/Cameron.pdf> (accessed 27 May 2012) at 9).

⁵¹³ William Fenrick ‘ICRC Guidance on Direct Participation in Hostilities’ (2009) 12 *Yearbook of International Humanitarian Law* 287 at 300.

⁵¹⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 10.

⁵¹⁵ Damien Van der Toorn ‘“Direct Participation in Hostilities”: A Legal and Practical Evaluation of the ICRC Guidance’ (2009) available at http://works.bepress.com/damien_van_der_toorn/1 (accessed 14 July 2012) at 22.

⁵¹⁶ Robert Goodman and Derek Jinks ‘The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum’ (2010) 42 *International Law and Politics* 637-640 at 638. ‘Its conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty’ (Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 670).

intended to be applicable to those who qualify as civilians, as it is the means of determining when their actions result in the loss of their otherwise protected civilian immunity⁵¹⁷. The guide approaches the issues as a series of steps:

step 1: does the 'specific hostile act'⁵¹⁸ fall within the ambit of those restricted acts which amount to direct participation in hostilities⁵¹⁹; and
step 2: what is the temporal scope of the loss of immunity on account of their direct participation in hostilities.

Despite being critical of elements of the guide, most commentators concede that 'the Interpretive Guidance is superior to the various *ad hoc* lists', because it provides 'those tasked with applying the norm on the battlefield' with 'guidelines against which to gauge an action'⁵²⁰.

ii. Specific hostile acts which amount to direct participation in hostilities

'According to the ICRC's Interpretive Guide, in order to qualify as direct participation in hostilities, a specific act must meet three cumulative criteria'⁵²¹:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack ('threshold of harm'), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part ('direct causation'), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another ('belligerent nexus')⁵²².

The threshold⁵²³ of harm

⁵¹⁷ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 704. Since the 'loss is temporary' Melzer suggests that it is 'better described as a "suspension" of protection' (Melzer *Targeted Killings in International Law* at 347); Boothby "And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' at 755-756.

⁵¹⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 45.

⁵¹⁹ 'The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 46).

⁵²⁰ Melzer N 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 831 at 877.

⁵²¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 46. Determining which activities amount to direct participation in hostilities is not dependant on ones 'status, function, or affiliation' (*Idem* at 10).

⁵²² *Idem* at 47.

⁵²³ The Interpretive Guidance stipulates that it is not the 'quantum of harm caused the enemy' which determines whether it reaches the necessary threshold of harm criteria' ... it is 'the

The first criterion, which is referred to as the ‘threshold of harm’ determination, requires that harm:

- a) ‘of a specifically military nature⁵²⁴, or⁵²⁵
- b) harm (‘by inflicting death, injury or destruction⁵²⁶) of a protected person or object⁵²⁷, must be reasonably expected to result from a civilian’s actions before the civilian can be said to be participating directly in hostilities⁵²⁸.

All that is required is the ‘objective likelihood⁵²⁹ that the act will result in such harm’, not necessarily the actual ‘materialisation of harm⁵³⁰.

a) Military harm

The term ‘military harm should be interpreted as encompassing not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict⁵³¹. This does not apply to ‘civilian objects (even if they may sometimes contribute to one belligerent’s success in the conflict)⁵³².

performance of a specified act, not that the act reaches a “particular threshold” (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 716).

⁵²⁴ The act ‘must either harm the enemy’s military operations or capacity’ (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 862).

⁵²⁵ From a cursory examination of the criterion, it is apparent that the test is framed in the alternative ‘that is, the harm contemplated may either adversely affect the enemy or harm protected persons or objects’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 713).

⁵²⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47.

⁵²⁷ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 862.

⁵²⁸ *Ibid.*

⁵²⁹ Defined as ‘harm which may reasonably be expected to result from an act in the prevailing circumstances’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47). As was discussed at the Expert discussions, ‘wherever a civilian had a subjective “intent” to cause harm that was objectively identifiable, there would also be an objective “likelihood” that he or she would cause such harm’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 724).

⁵³⁰ The ‘causal relationship between the physical conduct and the harm suffered’ is addressed under the second leg of the test (the direct causation test) (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 33). Schmitt concedes that this is a sensible requirement, as it would be ‘absurd to suggest that a civilian shooting at a combatant, but missing, would not be directly participating because no harm resulted’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 724).

⁵³¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47.

⁵³² So, for example, ‘political, economic and psychological contributions might play a role in a military victory but alone they are not considered military objects’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 717).

b) Attacks against protected persons

When no military harm results, the actions of civilians might still constitute direct participation in hostilities, when their actions amount to attacks⁵³³ specifically 'directed against civilians and civilian objects'⁵³⁴. 'In the absence of such military harm, however, a specific act must be likely to cause at least death, injury, or destruction'⁵³⁵. It is important that the harmful action is 'in some way connected to the armed conflict'⁵³⁶, or as Melzer puts it, it is an 'integral part of armed confrontations'⁵³⁷. 'Consequently, the direct infliction of harm on protected persons and objects, qualifies as direct participation in hostilities, unless: 1) it falls short of the required threshold of death, injury or destruction, or 2) it lacks belligerent nexus'⁵³⁸.

A large proportion of the tasks performed by PMSCs involve guarding or security services for objects and personnel. When assessing the actions of PMSCs who claim to be acting defensively as a security guard, two factors will have to be considered in deciding whether their 'defensive use of force amounts to direct participation in hostilities'⁵³⁹. Firstly, who or what sites are

⁵³³ The Interpretive Guidance relies on the AP I article 49 definition of 'attack', which 'does not specify the target, but the belligerent nexus of an attack, so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 723). Legal precedence for this position can be found in the jurisprudence emerging from the ICTY, where it was concluded that 'sniping attacks against civilians and bombardment of civilian villages or urban residential areas' constitutes an 'attack' in the IHL sense (*Ibid*).

⁵³⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 49. It is worth noting that these attacks would also constitute 'grave violations of IHL or even war crimes' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 861).

⁵³⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 49). 'As distinct from other forms of harm, such as deportation' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 723). 'Political, diplomatic, economic, or administrative measures, which may well be harmful to the civilian population, but which are not part of the hostilities' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 862). For example, 'building of fences or road blocks, the interruption of electricity, water, or food supplies, and the manipulation of computer networks not directly resulting in death, injury, or destruction. While all of these activities may adversely affect public security, health, and commerce, they would not, in the absence of military harm, qualify as direct participation in hostilities' (*Ibid*).

⁵³⁶ For example, a 'prison guard may kill a prisoner for purely private reasons', without his actions amounting to direct participation in hostilities, but were he to engage in 'a practice of killing prisoners of a particular ethnic group during an ethnic conflict [that] would meet the standard' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 723).

⁵³⁷ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 861.

⁵³⁸ *Ibid*.

⁵³⁹ It is worth noting that 'IHL makes no distinction between offensive and defensive uses of force: it focuses on whether the actor has the right to use force' (Cameron 'International Humanitarian Law and the Regulation of Private Military Companies').

they guarding (i.e. the status of the sites under IHL), and secondly who are they using force against⁵⁴⁰. These two factors determine whether PMSCs 'can lawfully use force, even defensively, without endangering their status and protections under IHL'⁵⁴¹. If they are guarding military personnel⁵⁴², or military objectives⁵⁴³, they are affecting military operations and can be considered to be participating directly in hostilities. While they, themselves, are not technically legitimate military targets, if they defend military objectives they become legitimate targets for attack⁵⁴⁴. If, on the other hand, they are guarding civilians⁵⁴⁵ or civilian objects, they will not be considered to be participating in hostilities⁵⁴⁶, provided they 'only use force in self-defence'⁵⁴⁷, or in defence of those civilians they are protecting⁵⁴⁸. So, for example, 'Blackwater employees protecting U.S. State Department officials in Iraq, will not be found to be participating directly in hostilities when using force to protect their clients, since these diplomats cannot lawfully be attacked'⁵⁴⁹. What then of dual use sites (i.e. 'pipelines, radio towers, and electricity stations'⁵⁵⁰), which 'could be seen to help a war effort owing to their role in supporting the State and its armed forces'?⁵⁵¹ In light of the presumption in favour of protected status for dual-use sites, these dual-use sites should be afforded civilian status until the status of the installation can be deemed to be definitely military in nature. Only once the installation is classified as a military objective, can those PMSCs guarding it be targeted for participating directly in hostilities. As regards the issue of who they are guarding the particular site or persons against, if they are using force in defence against criminal elements⁵⁵², rather than parties to the conflict, their actions do not have the necessary belligerent nexus to amount to direct participation in hostilities⁵⁵³.

⁵⁴⁰ De Nevers 'Private Security Companies and the Laws of War' at 180.

⁵⁴¹ *Ibid*; Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 17.

⁵⁴² 'Military leaders are legitimate military targets' and 'because military officers are legitimate military targets, PSC employees risk coming under attack when protecting them' (De Nevers 'Private Security Companies and the Laws of War' at 180).

⁵⁴³ When PMSCs 'use of force ... to defend these [military] sites', their actions amount to 'direct participation in hostilities' (Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 540).

⁵⁴⁴ The presence of PMSCs at military targets not only puts them at increased 'risk of harm', but 'if they use force in defense of this target they become legitimate targets of attack themselves' (De Nevers 'Private Security Companies and the Laws of War' at 180).

⁵⁴⁵ Civilians enjoy complete immunity from attack, as do diplomats, 'neither are legitimate targets' (*Ibid*).

⁵⁴⁶ *Ibid*.

⁵⁴⁷ Using 'indiscriminate force' will result in PMSCs being charged with 'war crimes, or criminal acts, or both' (*Idem* at 181).

⁵⁴⁸ Since attacks which target civilians are illegal under IHL, any such attacks are considered 'criminal acts', and as a result PMSCs 'may lawfully defend themselves and those they are protecting'... 'without being viewed as taking a direct part in hostilities' (*Idem* at 180).

⁵⁴⁹ *Idem* at 181.

⁵⁵⁰ *Idem* at 186

⁵⁵¹ *Ibid*.

⁵⁵² 'Naturally the security provided must be against thieves and marauders, rather than enemy combatants' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 58).

⁵⁵³ As de Nevers explains, 'attacks by non-State actors, insurgents, and criminals' are not a part of hostilities, 'because these are not lawful combatants' (De Nevers 'Private Security Companies and the Laws of War' at 180).

Guarding duties aside, the following activities satisfy the threshold of harm test:

- 'acts of violence against human and material enemy forces'⁵⁵⁴;
- causing 'physical or functional damage to military objects, operations or capacity'⁵⁵⁵;
- violent acts specifically directed against civilians or civilian objects (such as sniper attacks or the bombardment of [a] civilian residential area')⁵⁵⁶;
- sabotaging military capacity and operations⁵⁵⁷;
- electronic interference, exploitation, or attacks on 'military computer networks'⁵⁵⁸;
- 'wiretapping the adversary's high command or transmitting tactical targeting information for an attack'⁵⁵⁹;
- restricting or disturbing military 'deployments'⁵⁶⁰;
- exercising any form of control or denying the military use of 'military personnel, objects and territory to the detriment of the adversary'⁵⁶¹;
- providing 'logistics and communications'⁵⁶² assistance;
- clearing mines placed by the opposition;
- 'repairing a battle-damaged runway at a forward airfield, so it can be used to launch aircraft'⁵⁶³;
- 'guarding captured military personnel to prevent them being forcibly liberated'⁵⁶⁴;
- 'building defensive positions at a military base certain to be attacked'⁵⁶⁵;
- 'voluntarily and deliberately positioning themselves to create a physical obstacle to military operations of a party to the conflict'⁵⁶⁶;

⁵⁵⁴ For example, 'killing and wounding of military personnel' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 48).

⁵⁵⁵ *Idem* at 47-48.

⁵⁵⁶ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 203; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 49.

⁵⁵⁷ 'Sabotage or other unarmed activities qualify, if they restrict or disturb logistics or communications of an opposing party to the conflict' (Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 203).

⁵⁵⁸ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 715.

⁵⁵⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 48.

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*

⁵⁶² *Ibid.*

⁵⁶³ 'Because it constitutes a measure preparatory to specific combat operations likely to directly inflict harm on the enemy' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 859).

⁵⁶⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 48.

⁵⁶⁵ 'Because it is likely to directly and adversely affect the enemy's impending attack' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 859).

- disclosing any tactical targeting information; and
- training military personnel ‘for the execution of a predetermined hostile act’⁵⁶⁷.

If those activities, performed by PMSCs, satisfy the threshold of harm requirement, then the following activities performed by PMSCs, will not amount to a specific hostile act, for which they can expect to lose civilian immunity from targeting:

- ‘building fences or roadblocks’⁵⁶⁸;
- interrupting electricity, water, or food supplies⁵⁶⁹;
- appropriating ‘cars and fuel’⁵⁷⁰;
- manipulating ‘computer networks’⁵⁷¹;
- arresting or deporting ‘persons [who] may have a serious impact on public security, health, and commerce’⁵⁷²;
- refusing ‘to engage in actions that would positively affect one of the parties’ (e.g. refusing to provide information)⁵⁷³;
- rescuing ‘enemy aircrew members’⁵⁷⁴;
- ‘development and production of improvised explosive devices’ (IEDs);⁵⁷⁵ and
- providing ‘generalised training to military personnel’⁵⁷⁶.

Jensen⁵⁷⁷, Schmitt⁵⁷⁸ and Heaton⁵⁷⁹, are all critical of the threshold of harm requirement for - what they term - its ‘under-inclusiveness’, and its failure to include within its ambit ‘those who directly support those who cause actual harm’⁵⁸⁰. They would have preferred an interpretation which ‘would also

⁵⁶⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 56.

⁵⁶⁷ *Idem* at 53.

⁵⁶⁸ *Idem* at 48.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*

⁵⁷³ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 719.

⁵⁷⁴ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 860.

⁵⁷⁵ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 860.

⁵⁷⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 53.

⁵⁷⁷ Jensen ‘Direct Participation in Hostilities’ at 2221-28.

⁵⁷⁸ Melzer argues that ‘Schmitt fails not only to support his argument as a matter of law, but also to demonstrate that the Interpretive Guidance’s wide concept of military harm is “under-inclusive” as a matter of practice’ (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ 859).

⁵⁷⁹ Van der Toorn ‘“Direct Participation in Hostilities”: A Legal and Practical Evaluation of the ICRC Guidance’ at 37.

⁵⁸⁰ Jensen ‘Direct Participation in Hostilities’ at 2221-28.

include those who gather intelligence or act as observers and supply information to fighters, those who solicit others to participate in hostilities, and those who train them on military tactics⁵⁸¹. They argue that the final hostile act of the combatant is heavily reliant on the 'support personnel', which makes the combative actions possible⁵⁸². In response to these critiques, Melzer warns that any proposal to lower the required threshold of harm, in order to 'extend loss of protection to a potentially wide range of support activities', will result in 'undermining the generally recognised distinction between direct participation in hostilities and mere involvement in the general war effort'⁵⁸³.

The direct causation requirement

The second requirement of the three criteria for a finding of 'direct participation in hostilities', is termed the 'direct causation' test. The purpose of this part of the test is to ensure that 'general war effort'⁵⁸⁴ and activities aimed at sustaining war⁵⁸⁵ (although indispensable to the war effort, and which in effect do harm the adversary), would not satisfy the threshold criteria and amount to direct participation in hostilities⁵⁸⁶. Consequently, and in order to avoid depriving much of the civilian population of their protected status, there must be 'a sufficiently close causal relation between the act and the resulting harm', for it to amount to direct participation in hostilities⁵⁸⁷.

According to the ICRC's Interpretive Guide, 'direct causation should be understood as meaning that the harm in question must be brought about in one causal step'⁵⁸⁸. Where a specific act by an individual does not, 'on its own

⁵⁸¹ *Ibid.*

⁵⁸² Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 37.

⁵⁸³ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 877.

⁵⁸⁴ This includes all activities 'objectively contributing to the military defeat of the adversary', for example 'design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 53).

⁵⁸⁵ This would additionally include 'political, economic or media activities supporting the general war effort', for example 'political propaganda, financial transactions, production of agricultural or non-military industrial goods'... providing 'finances, food and shelter to the armed forces and producing weapons and ammunition' (*Idem* at 52-53).

⁵⁸⁶ As the ICRC Interpretive Guide points out: 'both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities, in fact ... some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is designed to cause the required harm, the general war effort and war sustaining activities also include activities that merely maintain or build up the capacity to cause such harm' (*Idem* at 52).

⁵⁸⁷ *Ibid.*

⁵⁸⁸ The act must not only be causally linked to the harm, but it must also cause the harm directly. For example, 'the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 54 and

directly cause the required threshold of harm, their actions might still amount to direct participation where the individuals are part of a collective operation⁵⁸⁹. As Sossai explains, ‘this means that the notion of direct participation of hostilities’, comprises also those activities which cause harm ‘only in conjunction with other acts’⁵⁹⁰. In these instances, the requirement of direct causation would still have to be fulfilled, and the civilian would lose their immunity from attack, where their individual ‘act constitutes an integral part of a concrete and coordinated tactical (or collective) operation that directly causes such harm’⁵⁹¹.

In light of this requirement of causation, the following activities have been said to satisfy the direct causation enquiry:

- ‘a coordinated tactical operation that directly causes harm’ (of the required threshold)⁵⁹²;
- ‘taking part in military or hostile acts, activities, conduct or operations’⁵⁹³;
- ‘bearing, using or taking up arms’ in combat⁵⁹⁴;
- ‘conducting attacks’⁵⁹⁵ or ‘participating in attacks against enemy personnel, property or equipment’⁵⁹⁶;
- operating ‘weapons which unlawful combatants use’ (i.e. ‘manning an anti-aircraft gun’)⁵⁹⁷, or supervising the ‘operation of weaponry’⁵⁹⁸;
- ‘sabotaging military installations’⁵⁹⁹ and lines of communication⁶⁰⁰;

55). In short, where an ‘individual’s conduct ... merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, it is excluded from the concept of direct participation in hostilities’ (*Idem* at 53); Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 866.

⁵⁸⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55; Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 865.

⁵⁹⁰ Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 206.

⁵⁹¹ Examples of such acts would include, *inter alia*: ‘the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55); Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 102.

⁵⁹² ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

⁵⁹³ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁵⁹⁴ *Ibid.*

⁵⁹⁵ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁵⁹⁶ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁵⁹⁹ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

- capturing combatants or their equipment⁶⁰¹;
- the gathering⁶⁰² (in enemy- controlled territory)⁶⁰³ of military intelligence⁶⁰⁴;
- analysis or transmission of ‘tactical intelligence’ or military information⁶⁰⁵ to attacking forces⁶⁰⁶, ‘for their immediate use’⁶⁰⁷;
- ‘acting as lookouts, or observers on behalf of military forces’⁶⁰⁸;
- identifying and ‘marking of targets’⁶⁰⁹;
- ‘instruction and assistance given to troops for the execution of a specific military operation’⁶¹⁰;
- ‘providing logistical support’⁶¹¹ like transporting weapons in proximity to combat operations⁶¹²;
- ‘transporting unlawful combatants to or from the place where the hostilities are taking place’⁶¹³, and ‘delivering ammunition to combatants’⁶¹⁴;
- ‘performing mission-essential work at a military base’⁶¹⁵; and
- serving as guards for military objects or personnel⁶¹⁶.

The following activities, often performed by PMSCs, will not satisfy the direct causation test:

⁶⁰⁰ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁶⁰¹ *Ibid.*

⁶⁰² Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 867; Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 177-8.

⁶⁰³ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁶⁰⁴ ‘The rule that participation in activities closely associated with the direct infliction of violence is more likely to be labelled combat explains why activities such as gathering intelligence for targeting purposes and servicing a weapons system may be considered direct participation in hostilities’ (Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 180).

⁶⁰⁵ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁶⁰⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

⁶⁰⁷ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

⁶¹⁰ *Ibid.*

⁶¹¹ Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 177-8.

⁶¹² Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁶¹³ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁶¹⁴ *Ibid.*

⁶¹⁵ Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 177-8.

⁶¹⁶ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

- ‘driving military transport vehicles’⁶¹⁷ and ‘transporting arms and munitions’⁶¹⁸ in a combat zone⁶¹⁹;
- ‘participating in activities in support of the war or military effort’⁶²⁰ (i.e. working in military vehicle maintenance depots⁶²¹ or munitions ‘factories’⁶²², ‘providing supplies or services’⁶²³ or working in canteens⁶²⁴);
- providing logistical and general support⁶²⁵ (for example ‘accompanying and supplying food’⁶²⁶ or selling goods⁶²⁷ and medicine⁶²⁸ to one of the parties to the conflict⁶²⁹);
- aiding combatants by providing ‘general strategic analysis’⁶³⁰;
- recruiting and general⁶³¹ training of personnel⁶³², including the ‘recruitment of suicide bombers’⁶³³;
- ‘design, production and shipment of weapons’⁶³⁴, including the purchase, assembly, storage or smuggling of materials in order to build suicide vests⁶³⁵ or improvised explosive device(s)⁶³⁶;

⁶¹⁷ *Idem* at 706.

⁶¹⁸ *Idem* at 707.

⁶¹⁹ At the ICRC’s expert meeting ‘everyone agreed that the truck itself represented a military objective, disagreement surrounded the driver’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 710).

⁶²⁰ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁶²¹ *Idem* at 706.

⁶²² *Ibid*; Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 710.

⁶²³ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707; Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 728.

⁶²⁴ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 710.

⁶²⁵ *Idem* at 708.

⁶²⁶ Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 181.

⁶²⁷ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁶²⁸ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁶²⁹ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁶³⁰ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁶³¹ ‘General training of recruits undeniably contributes to a party’s military prowess; effective recruit training will often be the difference between eventual victory and defeat on the battlefield. Nevertheless, the causal link between the training and subsequent combat action is attenuated’ (*Idem* at 728). However, ‘training for a particular type of mission’... where the training may ‘reasonably be regarded as a preparatory measure integral to a predetermined hostile act or operation’ may qualify as direct participation in hostilities (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 867).

⁶³² Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 204.

⁶³³ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 865; Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

- advising on the ‘correct maintenance of the weapons’⁶³⁷;
- ‘voluntary human shielding’⁶³⁸;
- ‘contributing funds to a cause’⁶³⁹ or partaking in ‘economic sanctions’⁶⁴⁰;
- ‘expressing sympathy for the cause of one of the parties to the conflict’⁶⁴¹;
- distributing propaganda supporting unlawful combatants⁶⁴²; and
- ‘failing to act to prevent an incursion by one of the parties to the conflict’⁶⁴³.

Schmitt is critical of the guide’s interpretation of direct causation, which excludes from the parameters of ‘direct participation’, a range of ‘capacity-building activities’⁶⁴⁴ which may not result ‘in direct and immediate harm to the enemy’⁶⁴⁵, despite the fact that they may have a marked effect on the belligerent’s capacity to win⁶⁴⁶. Melzer warns that Schmitt’s approach is ‘extremely permissive’, and if we were to adopt Schmitt’s approach ‘essentially any act connected with the resulting harm through a causal link would automatically qualify as “direct” participation in hostilities’, no matter how far removed it may be from the final harm caused⁶⁴⁷. To adopt Schmitt’s

⁶³⁴ Fenrick ‘ICRC Guidance on Direct Participation in Hostilities’ at 293.

⁶³⁵ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 865.

⁶³⁶ *Ibid.* Fenrick argues that ‘those involved in the production and storage of IEDs might better be regarded as belonging in the same category as those providing tactical intelligence instead of equating them with workers in munitions factories’ (Fenrick ‘ICRC Guidance on Direct Participation in Hostilities’ at 293).

⁶³⁷ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁶³⁸ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 865.

⁶³⁹ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708 and 727.

⁶⁴⁰ *Idem* at 728.

⁶⁴¹ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁶⁴² Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁶⁴³ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁶⁴⁴ Melzer notes that ‘while most of these examples are typical for non-State actors ... it should be noted that States frequently use civilian contractors or employees to carry out roughly equivalent activities’ (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 865; Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 727).

⁶⁴⁵ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 736.

⁶⁴⁶ *Idem* at 725.

⁶⁴⁷ According to the Melzer, if we were to apply Schmitt’s proposal, then ‘not only the planting or detonation of an improvised explosive device, but also its assembly and storage, as well as the purchase or smuggling of its components, would make legitimate military targets of all those involved, no matter how far their action is removed from the actual causation of harm’ (Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four

‘extreme relaxation of the requirement of direct causation would invite excessively broad targeting policies, prone to error, arbitrariness, and abuse’⁶⁴⁸. Melzer maintains that there is no indication that ‘general *opinio juris* of States would condone the targeting of all persons who, at some point, have causally contributed to a hostile act, no matter how far removed from the potential materialisation of harm’⁶⁴⁹.

The belligerent nexus requirement

The third and final leg of the test for direct participation in hostilities, is the belligerent nexus requirement. In short, this leg of the test requires that ‘an 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’⁶⁵⁰. So, for example, the following activities will satisfy the belligerent nexus requirement:

- preparatory collection of tactical intelligence⁶⁵¹;
- transporting of personnel⁶⁵²;
- transporting and positioning of weapons and equipment⁶⁵³; and
- loading explosives in a suicide vehicle⁶⁵⁴.

On the other hand, ‘armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party’⁶⁵⁵, cannot amount to any form of “participation” in hostilities taking place between these parties’⁶⁵⁶.

So, for example, if civilians are found causing harm in:

- ‘(a) individual self-defence or defence of others,
- (b) in exercising power or authority over persons or territory,
- (c) as part of civil unrest against such authority, or
- (d) during inter-civilian violence.

These acts lack the belligerent nexus required for a qualification as

Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 867).

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Idem* at 868.

⁶⁵⁰ *Idem* at 872; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 64; and Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 102.

⁶⁵¹ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 204-5.

⁶⁵² *Ibid.*

⁶⁵³ *Ibid.*

⁶⁵⁴ *Ibid.*

⁶⁵⁵ For example, ‘looting or civil unrest that merely takes advantage of the instability incident to conflict’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 735).

⁶⁵⁶ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 873.

direct participation in hostilities⁶⁵⁷.

On this basis, ‘the hiding or smuggling of weapons⁶⁵⁸ and the financial or political support of armed individuals⁶⁵⁹, will not satisfy the belligerent nexus requirement.

Schmitt is in favour of formulating the belligerent nexus test in the alternative, to read ‘in support of a party to the conflict or to the detriment of another’⁶⁶⁰. Melzer cautions against a ‘disjunctive reading of the two elements’, for the reasons that it can give rise to situations where it would be permissible to respond with military force against criminal elements who had no connection to the armed conflict⁶⁶¹. Melzer argues that, if ‘either element is missing’ (support of a party to the conflict and the intention to act to the detriment of another party), the ‘violence in question becomes independent of the armed struggle taking place between the parties to a conflict’⁶⁶².

Conclusions regarding PMSCs and the specific hostile acts

If we examine the activities that PMSCs have reportedly been carrying out, we can conclude that some of these activities amount to hostile acts which fulfill the threshold of harm, direct causation and belligerent nexus test. Where PMSCs - at the so-called tip of Singer’s spear⁶⁶³ - have been ‘hired for the explicit purpose of engaging in combat operations’⁶⁶⁴ (a practice which the ICRC has documented⁶⁶⁵), or providing ‘operational support in combat’⁶⁶⁶ (sometimes even operating weapons’ systems⁶⁶⁷), their actions, which target

⁶⁵⁷ Van der Toorn ‘Direct Participation in Hostilities’: A Legal and Practical Evaluation of the ICRC Guidance’ at 19; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 64; Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 873.

⁶⁵⁸ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 204-5.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 736.

⁶⁶¹ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 873.

⁶⁶² *Ibid.*

⁶⁶³ Singer ‘likens military provider firms, which may engage in direct combat or command and control functions as the “tip of the spear” while those support firms providing logistics and other non-lethal services are at the base of the spear, and private security companies or “military consultant firms” fall somewhere in between’ (Singer *Corporate Warriors: The Rise of the Privatised Military Industry* at 91-92; Gaston ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement’ at 225).

⁶⁶⁴ Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 188; De Nevers ‘Private Security Companies and the Laws of War’ at 179; McDonald ‘Private Military Contractors’ at 1.

⁶⁶⁵ ICRC ‘International Humanitarian Law and Private Military/Security Companies’ (2012) available at <http://www.icrc.org/eng/resources/documents/faq/pmsc-faq-150908.ht> (accessed 16 October 2012).

⁶⁶⁶ McDonald ‘Private Military Contractors’ at 1.

⁶⁶⁷ Montreux Document at 36.

enemy personnel, 'military objects, operations or capacity'⁶⁶⁸, clearly satisfy the initial threshold of harm requirement. So, for example, when Russian, Latvian and Ukrainian PMSCs were hired during the Eritrea and Ethiopia War (1998-2000) to fly the Sukhoi-27 fighters and the MiG-29 interceptors, which Ethiopia and Eritrea had purchased, these individuals were clearly participating directly in hostilities⁶⁶⁹. These sorts of incidence of hiring PMSC is not limited only to advanced fighter jet pilots, actually it is remarkably commonplace for PMSC to be hired to fly helicopters⁶⁷⁰, purely because the skills required are so rare. While most PMSCs are reticent to advertise their combat services, some like Lockheed Martin and MPRI list their 'products to include the provision of 'combat capability'⁶⁷¹. Blackwater, which boasts having the 'largest private training center in the United States', maintains that at its centre PMSC are trained in 'urban combat' ... and 'boarding hostile' vessels,⁶⁷² all activities which reach the initial threshold of harm requirement.

When PMSCs engage in these sorts of 'coordinated, tactical, hostile operations'⁶⁷³; which involve attacking 'enemy personnel, property or equipment'⁶⁷⁴, these acts clearly also satisfy the direct causation leg of the test for direct participation in hostilities. For this reason, the 'policy directives issued by the U.S. Embassy in Baghdad, prohibited PMSCs working for the Department of State and the Agency for International Development from engaging in "offensive combat operations"⁶⁷⁵. Similarly, when PMSCs are hired to operate⁶⁷⁶ weapons, 'supervise the operation of weaponry'⁶⁷⁷ and maintain weapons, as has been the case in recent international armed conflicts, this satisfies the direct causation leg of the test for direct participation in hostilities - particularly when these activities are carried out in close proximity to the theatre of hostilities⁶⁷⁸. So, for example, when PMSCs 'flew on targeting and surveillance aircraft, and operated Global Hawk and Predator UAVs in Afghanistan and Iraq'⁶⁷⁹, not only did their actions rise to the required threshold of harm, but they also satisfied the direct causation leg of

⁶⁶⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47-48.

⁶⁶⁹ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 400-401.

⁶⁷⁰ Frye 'Private Military Firms in the New World Order: How Redefining "Mercenary" can Tame the "Dogs of War"' at 2610.

⁶⁷¹ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 393.

⁶⁷² Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 8.

⁶⁷³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

⁶⁷⁴ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707.

⁶⁷⁵ Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 334.

⁶⁷⁶ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 211; McDonald 'Private Military Contractors' at 1.

⁶⁷⁷ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 708.

⁶⁷⁸ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 396.

⁶⁷⁹ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 191.

the test. Similarly, when PMSCs ‘maintained and loaded weapons on many of the most sophisticated U.S. weapons systems’ during the Iraqi war, including the loading of hellfire missiles and laser-guided smart bombs on unmanned aerial vehicles or drones⁶⁸⁰, their actions met both the threshold of harm and the direct causation test for direct participation in hostilities.

With most PMSCs being ex-military (often with ‘special op’s’ credentials), it is not surprising that they are ‘involved in covert operations’⁶⁸¹ aimed at sabotaging the military installations⁶⁸², capacity, operations, logistics and lines of communication⁶⁸³ of the opposition. These activities not only reach the required threshold of harm, but they also satisfy the direct causation requirement needed to amount to direct participation in hostilities.

PMSCs have also rather infamously been employed to capture⁶⁸⁴ and guard the opposition’s ‘military personnel, to prevent them being forcibly liberated’⁶⁸⁵. The scandal which ensued when it was discovered how PMSCs were carrying out their duties at Abu Ghraib detention centre, cast them in a bad light and prompted academics to question whether these duties should ever have been abdicated by the State to private entities. It is generally agreed that certain inherently State functions⁶⁸⁶ simply cannot be outsourced to PMSCs, including ‘the role of commander over a POW camp’⁶⁸⁷ or responsible officer over ‘a place of internment’⁶⁸⁸, as was the case in Abu Ghraib⁶⁸⁹. To this end, article 9 of the proposed treaty on PMSCs, states that ‘each State Party shall define and limit the scope of activities of PMSCs, and specifically prohibit the outsourcing to PMSCs of functions which are defined

⁶⁸⁰ Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 211; McDonald ‘Private Military Contractors’ at 1.

⁶⁸¹ Gaston ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement’ at 227.

⁶⁸² Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁶⁸³ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁶⁸⁴ *Ibid.*

⁶⁸⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 48.

⁶⁸⁶ These ‘are functions which are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to PMSCs under any circumstances’. The Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, includes ‘among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a State Party considers to be inherently State functions’. Human Rights Council ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development’ A/HRC/15/25 (Report of the Chairperson/Rapporteur: José Luis Gómez del Prado) available at http://www.ohchr.org/Documents/Issues/Development/A.HRC.RES.15.25_en.pdf (accessed 14 July 2012).

⁶⁸⁷ GC III article 39; Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 198.

⁶⁸⁸ GC IV article 99; Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 198.

⁶⁸⁹ Ishøj *Handbook on the Practical Use of International Humanitarian Law* at 106.

as inherently State functions⁶⁹⁰. Probably, and most notably, this will put an end to PMSCs interrogating detainees⁶⁹¹. In fact, in the aftermath of the 'Abu Ghraib prison torture scandal the U.S., in its National Defense Authorisation Act for Fiscal Year 2009, concluded that interrogation ... is an inherently governmental function and it cannot be transferred to private sector contractors⁶⁹². Those issues aside, it is clear from the ICRC's Interpretive Guide, that these activities satisfy the threshold of harm requirement, and the direct causations test, and might implicate PMSCs in activities which amount to direct participation in hostilities.

Another activity which PMSCs are often involved in, which satisfies the threshold of harm requirement and the direct causation test, is their assisting a party to the conflict with 'tactical targeting information for an attack'⁶⁹³. Their ex-military backgrounds along with their presence in 'enemy-controlled territory'⁶⁹⁴, place PMSCs in an advantageous position to gather⁶⁹⁵ military intelligence⁶⁹⁶. Sometimes PMSCs gather their intelligence through interrogating detainees⁶⁹⁷, 'performing analysis'⁶⁹⁸, maintaining and supporting intelligence computer and electronic systems, or providing intelligence in the form of aerial reconnaissance and satellite imagery⁶⁹⁹. So, for example, PMSCs were often contracted by the U.S. government to gather 'intelligence

⁶⁹⁰ Human Rights Council 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development'

⁶⁹¹ Caroline Holmqvist 'Engaging Armed Non-State Actors in Post-Conflict Settings' at 57; Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 227; McDonald 'Private Military Contractors' at 1; ICRC 'International Humanitarian Law and Private Military/Security Companies'.

⁶⁹² Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 211.

⁶⁹³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 48.

⁶⁹⁴ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 708. 'However, a distinction can be drawn between a person who gathers military intelligence in enemy controlled territory' (which amounts to direct participation in hostilities and classifies the individual as a spy, as per HR article 29(1)), 'and a civilian who retrieves data from satellites or listening posts, working in terminals located in his home country' (Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 210).

⁶⁹⁵ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 867; Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 177-8; Frye 'Private Military Firms in the New World Order: How Redefining "Mercenary" can Tame the "Dogs of War"' at 2610.

⁶⁹⁶ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 180; Singer *Corporate Warriors: The Rise of the Privatised Military Industry* at 16; Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 227; Caroline Holmqvist 'Engaging Armed Non-State Actors in Post-Conflict Settings' at 57; ICRC 'International Humanitarian Law and Private Military/Security Companies'; Frye 'Private Military Firms in the New World Order: How Redefining "Mercenary" can Tame the "Dogs of War"' at 2610.

⁶⁹⁷ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 211.

⁶⁹⁸ Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 3.

⁶⁹⁹ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 191-192.

useful for U.S. operations in Iraq'... to 'analyse intelligence data' and most importantly to transmit 'targeting co-ordinates to unmanned aerial vehicles or other manned or unmanned platforms that fire weapons'⁷⁰⁰. Similarly, 'Air Scan, a Florida-based company, has provided aerial intelligence-gathering services in Angola, the Balkans, Colombia, and Sudan'⁷⁰¹. Provided one can 'demonstrate a direct causal link between the intelligence information, and the harm affecting the adversary'⁷⁰², the intelligence gathering activities are deemed to satisfy the belligerent nexus test⁷⁰³ and will amount to direct participation in hostilities⁷⁰⁴. Probably the easiest way to illustrate the causal link, is to show that the intelligence was passed on to attacking forces⁷⁰⁵ 'for their immediate use', to assist parties in identifying and marking⁷⁰⁶ military targets. Under these circumstances, when PMSCs gather intelligence, their actions qualify as 'direct participation'⁷⁰⁷.

PMSCs are also often hired to provide military training because of their ex-military backgrounds. While generalised 'advise and military training aimed at improving the capacities of the regular armed forces', does not rise to the required threshold of harm, since it does 'not necessarily produce the immediate direct impact on military operations'⁷⁰⁸, the Interpretive Guide does prohibit training⁷⁰⁹ of military personnel⁷¹⁰ where their training is intended 'for the execution of a predetermined hostile act'⁷¹¹. So, for example, when MPRI 'reportedly helped prepare Croatia's armed forces to plan a successful offensive in 1995 against the Serbs in Krajina'⁷¹², this would rise to the threshold of harm and fulfil the direct causation test. Likewise, when 'contractors from Vinnell Corporation, were teaching the Saudi National Guard how to use heavy weapons systems, and accompanied the Guard into battle against Iraqi forces in the battle of Khafji'⁷¹³, during the first Gulf War, these activities rose to the required threshold of harm needed to amount to direct

⁷⁰⁰ Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 335.

⁷⁰¹ Singer *Corporate Warriors: The Rise of the Privatised Military Industry* at 16.

⁷⁰² Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 211.

⁷⁰³ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 204-5.

⁷⁰⁴ Montreux Document at 36.

⁷⁰⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

⁷⁰⁶ *Ibid.*

⁷⁰⁷ Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' at 532-544.

⁷⁰⁸ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 212.

⁷⁰⁹ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 179.

⁷¹⁰ *Ibid.*

⁷¹¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 53; Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 212; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

⁷¹² Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 179; Holmqvist 'The Private Security Industry, States and Lack of an International Response' at 6.

⁷¹³ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 179.

participation in hostilities.

While these instances of PMSC involvement in hostilities often make news headlines, the reality remains that 'only very few PMSCs engage in active combat'⁷¹⁴. PMSCs are also hired to build and man roadblocks⁷¹⁵, to arrest persons who threaten public security⁷¹⁶, to undertake rescue operations⁷¹⁷ in respect of 'enemy aircrew members'⁷¹⁸ or civilians⁷¹⁹ - all being activities which are not considered to be direct participation in hostilities. Likewise, when PMSCs provide unarmed security services like military advice and training⁷²⁰ to military personnel in situations of armed conflict, these activities do not rise to the required threshold of harm. So, for example, the security training⁷²¹ provided to the Iraqi security forces⁷²² by MPRI⁷²³ and DynCorp International⁷²⁴, was not considered to be direct participation in hostilities. Provided PMSCs ensure that the training⁷²⁵ of military personnel⁷²⁶ is 'generalised'⁷²⁷ (i.e. not for a specific military operation), or that they are only providing 'general strategic analysis'⁷²⁸ and 'strategic advisory services'⁷²⁹, they do not run the risk of being found in violation of the notion of direct participation in hostilities.

Another area which the ICRC⁷³⁰ note is often contracted out to PMSCs, is the provision of 'logistical support'⁷³¹. In Iraq alone, it is estimated that

⁷¹⁴ Bruce Blain 'The Role of Private and Mercenary Armies in International Conflict' (2007) available at http://www.informationclearinghouse.info/article_3396.htm (accessed 15 August 2007).

⁷¹⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 48.

⁷¹⁶ *Ibid.*

⁷¹⁷ McDonald 'Private Military Contractors' at 1.

⁷¹⁸ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 860).

⁷¹⁹ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 212.

⁷²⁰ Caroline Holmqvist 'Engaging Armed Non-State Actors in Post-Conflict Settings' at 57.

⁷²¹ Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 3.

⁷²² *Ibid.*

⁷²³ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 393.

⁷²⁴ DynaCorp international also 'provided civil police training in Bosnia, Kosovo, East Timor, Afghanistan and Iraq and demobilised the Liberian army of 2005 and trained a new force' (Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 31).

⁷²⁵ ICRC 'International Humanitarian Law and Private Military/Security Companies'.

⁷²⁶ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 204; Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 179.

⁷²⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 53; Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 728; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 867.

⁷²⁸ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 708.

⁷²⁹ Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 227.

⁷³⁰ ICRC 'International Humanitarian Law and Private Military/Security Companies'.

'twenty to thirty percent of the essential military support services in Iraq are provided by contractors'⁷³². Since logistical support is imperative to the military capacity to defeat the opposition, it does, according to the Interpretive Guide, satisfy the direct causation element of the test for direct participation in hostilities. That said, the Interpretive Guide exempts the 'driving of military transport vehicles'⁷³³ and the 'transporting of arms and munitions'⁷³⁴ in a combat zone⁷³⁵ from activities which amount to direct participation in hostilities - because these activities fail to meet the direct causation leg of the test (although they clearly satisfy the belligerent nexus test⁷³⁶). So, for example, when MPRI⁷³⁷, Halliburton or Kellogg, Brown & Root were reported to have provided transport for troops⁷³⁸, while other PMSCs are reported to have transported weapons and ammunition, these activities would not amount to direct participation in hostilities.

By far the predominant service provided by PMSCs⁷³⁹ in conflict situations, is that of private armed guards. So, for example, in Iraq it was not uncommon for PMSCs to be hired to guard 'U.S., British, or NATO military bases'⁷⁴⁰, embassies⁷⁴¹, checkpoints⁷⁴², convoys moving equipment and supplies⁷⁴³ and even the armed forces⁷⁴⁴. PMSCs have provided security for a variety of premises⁷⁴⁵, and 'close protection of persons'⁷⁴⁶. The 'British firm Aegis had three contracts to perform these functions in Iraq, while 23000 PMSCs were performing these functions for the U.S. Department of Defence

⁷³¹ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 177-8; McDonald 'Private Military Contractors' at 1; Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 106; Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 393.

⁷³² Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 189.

⁷³³ Watkin "Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 706.

⁷³⁴ *Idem* at 707.

⁷³⁵ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 710.

⁷³⁶ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 204-5.

⁷³⁷ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 393.

⁷³⁸ Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 225; Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 708; McDonald 'Private Military Contractors' at 1.

⁷³⁹ Caroline Holmqvist 'Engaging Armed Non-State Actors in Post-Conflict Settings' at 57; McDonald 'Private Military Contractors' at 1; Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 106.

⁷⁴⁰ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 207.

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.*

⁷⁴³ Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 3; Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 226; Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 207.

⁷⁴⁴ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 393.

⁷⁴⁵ ICRC 'International Humanitarian Law and Private Military/Security Companies'.

⁷⁴⁶ *Ibid.*

in Iraq and Afghanistan⁷⁴⁷. PMSCs have also been hired to provide guarding capacity in respect of civilian buildings, government buildings⁷⁴⁸, 'construction, consulting and engineering' corporations (particularly those undertaking reconstruction work in conflict zones⁷⁴⁹), large mining corporations⁷⁵⁰, high-ranking⁷⁵¹ personnel, 'U.S. defence lawyers gathering evidence for detainee cases'⁷⁵², diplomats, and relief workers. PMSCs are often at pains to explain that they are not using force in an offensive manner when they act as guards, and consequently they argue that their actions cannot constitute direct participation in hostilities. However, the legal reality remains that IHL 'does not draw a distinction between offensive or defensive operations'⁷⁵³, and 'engaging in defensive combat [might] also constitutes direct participation in hostilities'⁷⁵⁴.

As already discussed above, the nature of the site which is being guarded, impacts upon decisions about whether civilian PMSCs, stationed at these sites, can be legally targeted, and whether collateral damage calculations are applicable. While the Interpretive Guide supports the conclusion that some guarding activities do satisfy the direct causation requirement of the test for direct participation in hostilities⁷⁵⁵, some academics maintain that guarding does not amount to direct participation in hostilities⁷⁵⁶. In short, I would argue that when PMSCs are guarding purely civilian sites, and even when they are guarding military sites against criminal elements, their actions do not amount to direct participation in hostilities⁷⁵⁷. On the other hand, as was the case in Iraq, when PMSCs are 'retained to protect military installations, such as barracks and military hardware ... these are military

⁷⁴⁷ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 207.

⁷⁴⁸ Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 3.

⁷⁴⁹ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 187; Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 227.

⁷⁵⁰ Erinys 'won a \$80 million contract ... to provide security for Iraqi oil refineries and pipelines', although it was claimed that this was to prevent looting by criminals, it was just as effective as 'diminishing the enemy's access to oil' (Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 208); Blain 'The Role of Private and Mercenary Armies in International Conflict'.

⁷⁵¹ Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 227; Elsea *et al* 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' at 3; Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 207.

⁷⁵² Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 227.

⁷⁵³ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 5.

⁷⁵⁴ Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 334.

⁷⁵⁵ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 107.

⁷⁵⁶ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 58.

⁷⁵⁷ *Ibid.*

objectives and defending them amounts to taking direct part in hostilities⁷⁵⁸. However, as the Iraqi conflict can attest, it was not uncommon for PMSCs acting as armed guards to 'become involved in exchanges of fire' where it was almost impossible to differentiate engaging with combatants (which amounts to direct participation), from deterring 'criminal attacks'⁷⁵⁹ (which does not technically amount to direct participation). So, for example, in Najaf (Iraq) on 4 April 2004, 'Blackwater's contractors tasked with the protection of the Coalition Provisional Authority Headquarters'⁷⁶⁰ 'took up positions on a rooftop alongside U.S. Army and Spanish forces'⁷⁶¹, and 'repulsed an attack by hundreds of Shiite militia members' during a battle which lasted for more than three hours⁷⁶².

It is worth restating that 'armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party'⁷⁶³, cannot amount to any form of "participation" in hostilities⁷⁶⁴. On this basis, PMSCs who cause harm in 'individual self-defence or defence of others', or 'in exercising power or authority over persons or territory', lack the belligerent nexus required for a qualification as direct participation in hostilities⁷⁶⁵. To this end, the U.K. government stated in its Green Paper, that 'private military companies be expressly prohibited from direct participation in armed conflict operations, and that firearms should only be carried - and if necessary, used - by company employees for purposes of training or self defence'⁷⁶⁶. Likewise, the U.S. Department of Defence's instruction of 3 October 2005, stated that 'contractor personnel may be authorised to be armed for individual self-defence'⁷⁶⁷.

Another category of activities traditionally carried out by PMSCs⁷⁶⁸, which does not satisfy the direct causation requirement of the test, are those

⁷⁵⁸ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 5; Montreux Document at 36.

⁷⁵⁹ Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 334.

⁷⁶⁰ *Ibid.*

⁷⁶¹ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 207.

⁷⁶² Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 334.

⁷⁶³ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 735.

⁷⁶⁴ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 873.

⁷⁶⁵ Van der Toorn "Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 19; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 64; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 873.

⁷⁶⁶ Foreign Commonwealth Office 'Private Military Companies: Options for Regulation'; Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 209.

⁷⁶⁷ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 209.

⁷⁶⁸ Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 225.

activities which ‘support of the war or military effort’⁷⁶⁹. This category includes: building military bases⁷⁷⁰, ‘working in military vehicle maintenance depots or munitions factories’⁷⁷¹, and ‘providing supplies or services’⁷⁷² (like catering⁷⁷³, selling goods⁷⁷⁴ and medicine⁷⁷⁵ to one of the parties to the conflict⁷⁷⁶). While PMSCs providing these services will not be deemed to be participating directly in hostilities, they are nevertheless in ‘dangerously close proximity to combat’⁷⁷⁷.

Another major source of support, often provided by PMSCs, includes advising on the ‘correct maintenance of the weapons’ systems⁷⁷⁸, as was the practice of firms like Halliburton and Kellogg, Brown & Root⁷⁷⁹. Often the maintenance of sophisticated military systems requires skills that military members simply do not possess⁷⁸⁰. Moreover, this maintenance often takes place ‘in close proximity to the battlefield’⁷⁸¹. According to the Interpretive Guide, this type of maintenance activity does not satisfy the direct causation requirement of the test for direct participation in hostilities.

⁷⁶⁹ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁷⁷⁰ Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 189.

⁷⁷¹ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 706; Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 710.

⁷⁷² ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707; Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 728.

⁷⁷³ As was the practice of MPRI Halliburton or Kellogg, Brown & Root. Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708 and 710; Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 181; McDonald ‘Private Military Contractors’ at 1; Gaston ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement’ at 225; Kidane ‘The Status of Private Military Contractors Under International Humanitarian Law’ at 393.

⁷⁷⁴ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁷⁷⁵ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 708.

⁷⁷⁶ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

⁷⁷⁷ Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 189.

⁷⁷⁸ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707. Conversely, ‘performing routine maintenance which does not have an immediate causal link with an operation affecting the adversary, does not qualify as direct participation in hostilities’ (Sossai ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’ at 211); Singer *Corporate Warriors: The Rise of the Privatised Military Industry* at 16.

⁷⁷⁹ Gaston ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement’ at 225.

⁷⁸⁰ ‘Examples of weapons in the United States inventory dependent on contractor maintenance include the F-117 Stealth fighter, the M1-A1 tank, the Patriot missile, the B-2 stealth bomber, the Apache helicopter, and many naval surface warfare ships’ (Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 190.

⁷⁸¹ *Ibid*; Caroline Holmqvist ‘Engaging Armed Non-State Actors in Post-Conflict Settings’ chapter 3 at 57; ICRC ‘International humanitarian law and private military/security companies’.

In conclusion then, ‘many activities undertaken by PMSC can, depending on the circumstances’⁷⁸², be ‘covered by the notion of direct participation in hostilities as specified in the ICRC’s Interpretive Guidance’⁷⁸³. For most PMSCs who are not incorporated into the armed forces, engaging in these specific hostile acts would amount to unauthorised direct participation in hostilities under IHL. As civilians, their direct participation in hostilities exposes them to direct targeting, and potential criminal prosecution upon capture. Moreover, where these PMSCs are fortunate enough to be able to show identification as a ‘person accompanying the armed forces’, they would ‘lose their POW status’, were they to be found to be participating directly in hostilities⁷⁸⁴. Sadly, despite this legal position, PMSCs ‘are increasingly performing duties once reserved for military personnel and becoming increasingly intertwined with, and essential for, combat operations’⁷⁸⁵. In the words of the Coalition Provisional Authority official in Iraq, ‘the military role and the civilian-contractor role are exactly the same’⁷⁸⁶.

- iii. The temporal scope of the loss of protection ‘for such time as’ civilians take a direct part in hostilities

Once an individual is classified as a civilian, their direct participation in hostilities does not result in the loss of their primary civilian status⁷⁸⁷, but it does temporarily suspend their civilian ‘protection against direct attack’⁷⁸⁸ and exposes them to prosecution⁷⁸⁹, for so long as the civilian engages in direct participation in hostilities⁷⁹⁰. When such a civilian is no longer engaged in these specific hostile acts, (and consequently no longer poses a threat to the opposition), ‘they regain their full civilian immunity’⁷⁹¹ from direct attack’ - giving rise to what is called the ‘revolving door’ of civilian protection⁷⁹².

Uncontroversially, the ‘execution phase of a specific act’ which satisfies the three-pronged test for direct participation in hostilities, will fall within the ‘for such time’ window, and result in a temporary loss of civilian immunity from attack⁷⁹³. According to the ICRC’s Interpretive Guide, the scope of the ‘for such time’ window will ‘also include measures preparatory to the execution of a specific act’... ‘as well as the deployment to and the return from the location

⁷⁸² Tougas ‘Some Comments and Observations on the Montreux Document’ at 338.

⁷⁸³ Mancini *et al* ‘Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?’ at 334.

⁷⁸⁴ McDonald ‘Private Military Contractors’ at 3.

⁷⁸⁵ Ricou Heaton ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ at 179.

⁷⁸⁶ *Ibid.*

⁷⁸⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 70.

⁷⁸⁸ *Ibid.*

⁷⁸⁹ *Idem* at 83.

⁷⁹⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 70; Melzer *Targeted Killings in International Law* at 329.

⁷⁹¹ ‘Even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71).

⁷⁹² *Idem* at 70.

⁷⁹³ *Idem* at 65.

of its execution', as they 'constitute an integral part of that act'⁷⁹⁴. What the Interpretive Guide does stipulate, however, is that these preparatory measures must be linked to 'specific hostile acts'⁷⁹⁵ of direct participation, before they amount to direct participation in hostilities⁷⁹⁶.

Where the specific hostile act requires 'prior geographic deployment' by the belligerent party, that preparatory deployment 'already constitutes an integral part of the act in question', and results in the loss of civilian immunity⁷⁹⁷. For an activity to amount to a deployment which will compromise civilian immunity, 'the deploying individual'...must 'undertake a physical displacement' with the aim of carrying out the specific act⁷⁹⁸. Similarly, if the military withdrawal 'from the execution of a hostile act remains an integral'⁷⁹⁹ part of the preceding operation', it constitutes a part of the 'for such time' window⁸⁰⁰, and civilian immunity is only restored 'once the individual in question has physically separated from the operation. Such physical separation might be evidenced by laying down, storing or hiding the weapons or other equipment used, and resuming activities distinct from that operation'⁸⁰¹.

The ICRC's Interpretive Guide cites the following as examples of acts, which, if carried out as preparation for the undertaking of a specific hostile act⁸⁰², amount to direct participation in hostilities: 'equipping, instructing, and transporting personnel; gathering intelligence; preparing, transporting and positioning weapons and equipment'⁸⁰³.

PMSCs have on occasion provided training, and transported personnel 'for the execution of a predetermined hostile act'⁸⁰⁴, although this is not the norm⁸⁰⁵. More common, is the practice of PMSCs being hired to gather⁸⁰⁶

⁷⁹⁴ *Ibid.*

⁷⁹⁵ Boothby "'And For Such Time As': The Time Dimensions to Direct Participation in Hostilities' at 750; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 880).

⁷⁹⁶ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 881.

⁷⁹⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 67.

⁷⁹⁸ *Ibid.*

⁷⁹⁹ *Idem* at 68.

⁸⁰⁰ *Idem* at 67.

⁸⁰¹ *Ibid.*

⁸⁰² Boothby "'And For Such Time As': The Time Dimensions to Direct Participation in Hostilities' at 747.

⁸⁰³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 66.

⁸⁰⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 53; Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 212; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

⁸⁰⁵ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 179.

⁸⁰⁶ Melzer "'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 867, Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 177-8; Frye 'Private Military Firms in the New World

military intelligence⁸⁰⁷, sometimes through interrogating detainees⁸⁰⁸, which is then used to assist parties in identifying and marking⁸⁰⁹ military targets. Either of these preparatory acts will form an 'integral part of the hostile act'⁸¹⁰ which amounts to direct participation in hostilities.

These preparations for a specific hostile act, are to be distinguished from preparatory activities which merely establish 'the general capacity to carry out hostile acts', or exhibit a generalised 'campaign of unspecified operations'⁸¹¹. Examples of such general preparations (which do not amount to direct participation in hostilities)⁸¹² include 'the purchase, smuggling, production, hiding of weapons⁸¹³; recruitment and training of personnel; and financial, political, and administrative support to armed actors'⁸¹⁴.

As mentioned above, it is not the norm for PMSCs to train personnel with a specific hostile act in mind; it is more common for PMSCs to provide 'generalised'⁸¹⁵ (i.e. not for a specific military operation) training⁸¹⁶, which does not rise to the required threshold of harm, and is not considered integral to the hostile act which might result after training. Likewise, the activities frequently carried out by PMSCs which 'support the war or military effort'⁸¹⁷, are not considered an integral part of the preparations, so as to amount to direct participation in hostilities.

Probably the most common academic⁸¹⁸ critique levelled at the

Order: How Redefining "Mercenary" can Tame the "Dogs of War" at 2610.

⁸⁰⁷ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 180; Singer *Corporate Warriors: The Rise of the Privatised Military Industry* at 16; Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 227; McDonald 'Private Military Contractors' at 1; Caroline Holmqvist 'Engaging Armed Non-State Actors in Post-Conflict Settings' at 57; ICRC International humanitarian law and private military/security companies; Frye 'Private Military Firms in the New World Order: How Redefining "Mercenary" can Tame the "Dogs of War"' at 2610.

⁸⁰⁸ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 211.

⁸⁰⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

⁸¹⁰ *Idem* at 65

⁸¹¹ *Idem* at 66.

⁸¹² Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 881.

⁸¹³ Boothby "'And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' at 747.

⁸¹⁴ *Ibid.*

⁸¹⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 53; Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 728; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 867.

⁸¹⁶ Caroline Holmqvist 'Engaging Armed Non-State Actors in Post-Conflict Settings' at 57; Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 393; Stephens and Lewis 'The Targeting of Civilian Contractors in Armed Conflict' at 31.

⁸¹⁷ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707; Gaston 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement' at 225.

⁸¹⁸ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 687.

'revolving door' phenomenon⁸¹⁹, is that it gives rise to an 'uneven legal playing field on the battleground'⁸²⁰. In effect, it is argued that the 'revolving door' permits attacks to be levelled at regular combatants (be they cooks or infantry men) at all times, whilst affording civilians who are participating in hostilities the advantage of a 'shield', behind which to 'repeatedly claim the protection associated with that status'⁸²¹, and yet launch 'spontaneous, unorganised or sporadic'⁸²² attacks from these protected positions⁸²³. However, the Interpretive Guide justifies the revolving door position as being necessary (rather than a 'malfunction'), in order to protect the 'civilian population from erroneous or arbitrary attacks'⁸²⁴ at times when they do not constitute a military target.

This temporary suspension of a civilian's immunity from attack is only afforded 'civilians who participate in hostilities in a spontaneous, unorganised or sporadic basis'⁸²⁵. The revolving door of protection is not extended to 'members of organised armed groups belonging to a non-State party to an armed conflict'. While this category of participant also lose immunity from direct attack, as is the case with any civilian, they however 'cease to enjoy their civilian protections 'for as long as they assume their continuous combat function'⁸²⁶, and for the duration of their membership of the group⁸²⁷. On those occasions when PMSCs are found participating in hostilities, either directly or in the preparation for such activities, it is possible that they may be seen as adopting a continuous combat function.

iv. Continuous combat function

The need for a special legal regime applicable to 'organised armed groups', arose because it was felt that the revolving door concept (applicable to civilians who participate intermittently in hostilities), could not legitimately be applied to 'members of organised armed groups belonging to a non-State party'⁸²⁸. It was felt that the 'for such time' formulation applicable to civilians, was only intended to apply to those spontaneous and unorganised acts of participation by civilians, and if it were to be applied to 'organised armed

⁸¹⁹ 'By which an individual becomes immune from attack once he or she returns safely home and until he or she commences another operation' (Adam Roberts 'The Civilian in Modern War' (2009) 12 *Yearbook of International Humanitarian Law* 13 at 41).

⁸²⁰ Van der Toorn "Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 1.

⁸²¹ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 682.

⁸²² Boothby "And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' at 757.

⁸²³ Roberts 'The Civilian in Modern War' at 41.

⁸²⁴ Boothby "And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' at 757.

⁸²⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71.

⁸²⁶ *Idem* at 70. This concept will be explored further in the next section.

⁸²⁷ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 883.

⁸²⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71.

groups' it would give these 'farmers by day and fighters by night' ... 'a significant operational advantage'⁸²⁹ over the regular armed forces, who as a result of their combatant status 'can be attacked on a continuous basis'⁸³⁰. Rogers agrees that 'there is certainly a case for arguing that a person who becomes a member of a guerrilla group or armed faction, that is involved in attacks against enemy armed forces, forfeits his protected status for so long as he participates in the activities of the group'⁸³¹. At the ICRC's expert meeting, it was generally agreed that 'the distinction between civilians and members of organised armed groups was defensible'⁸³².

Rather than restrict their protection from attack 'for such time as they participate directly in hostilities', as is the case with civilians, this group of participants lose their civilian protection 'for as long as they remain members' of the organised group, 'by virtue of their continuous combat function'⁸³³. In other words, 'the "revolving door" of protection starts to operate based on membership'⁸³⁴ and the door revolves again, rendering the individual once again a protected civilian, only once their membership in the group has ceased. In the words of Melzer, their 'functional membership' is 'based on a *de facto* exercise of a continuous combat function'⁸³⁵, and their loss of civilian 'protection against direct attack', lasts for 'as long as their membership lasts'⁸³⁶, and 'until he or she ceases to assume such function'⁸³⁷.

According to the Interpretive Guide, 'once a member has affirmatively disengaged from a particular group, or has permanently changed from its military to its political wing'⁸³⁸, he can no longer be regarded as assuming a continuous combat function, and must be considered a civilian protected against attack unless and for such time as he directly participates in hostilities'⁸³⁹. As to how this disassociation from the group needs to be manifested, the Interpretive Guide states that 'disengagement from an organised armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an

⁸²⁹ Van der Toorn "Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 19.

⁸³⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 72.

⁸³¹ Rogers 'Unequal Combat and the Law of War' at 19.

⁸³² Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 209.

⁸³³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 883.

⁸³⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 72.

⁸³⁵ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 843.

⁸³⁶ *Idem* at 837.

⁸³⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 72.

⁸³⁸ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 891.

⁸³⁹ *Ibid.*

exclusively non-combat function⁸⁴⁰. Accordingly, an assessment as to whether an individual has disengaged from an organised armed group, 'must therefore be made in good faith and based on a reasonable assessment of the prevailing circumstances, presuming entitlement to civilian protection in cases of doubt'⁸⁴¹.

Since the loss of civilian protection which results for those who assume a continuous combat function is more serious, in that it lasts for the duration of their integration⁸⁴² into, or membership of, the group, it is necessary that only those group members who actually engage in the continuous combat function lose civilian immunity from attack⁸⁴³. The 'functional membership' focus of the provision allows for the fact that not all of the members of such organised armed groups can be targeted; it is limited to 'only those serving in a continuous combat function'⁸⁴⁴. Those, who while affiliated with an organised armed group, fail to undertake a continuous combat function, are excluded⁸⁴⁵ from the loss of protection, on account of their failure to 'directly participate in hostilities'. These 'members of an organised armed group who do not regularly perform combat duties continue to enjoy full civilian protection from attack unless they directly participate in hostilities'⁸⁴⁶. Similarly, 'private contractors and civilian employees', contracted to such organised armed groups, 'were entitled to protection from direct attack unless and for such time as they engaged in direct participation in hostilities'⁸⁴⁷. Melzer warns that to

⁸⁴⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 72.

⁸⁴¹ *Idem* at 73.

⁸⁴² Van der Toorn "Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 7.

⁸⁴³ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 846.

⁸⁴⁴ Jensen 'Direct Participation in Hostilities' at 2141-49. Van der Toorn proposed the following 'objectively verifiable indicia' of the necessary integration: 'regular physical association with other individuals affiliated with the group, acting under orders or the command of senior figures, and any other conduct that demonstrates they are seeking to advance the common purpose of the group' (Van der Toorn "Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 28-29).

⁸⁴⁵ Included in this exempted group are 'political and administrative personnel, as well as other persons not exercising a combat function' (Van der Toorn "Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 7).

⁸⁴⁶ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 704.

⁸⁴⁷ Watkin is sceptical that at a split second's notice, a soldier can 'realistically be expected to distinguish between a civilian who participates on a "persistent recurring basis" and a member of an organised armed group who performs a "continuous combat function"' (Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 662; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 855). Watkin prefers to apply the continuous loss of civilian immunity from attack 'not only to fighting personnel of organised armed groups, but essentially to any person who could be regarded as performing a "combat," "combat support", or even "combat service support" function for such a group, including unarmed cooks and administrative personnel' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 913). Van der Toorn shares a similar concern that the 'continuous participation requirement'... 'imposes a very high threshold and would likely exclude a large number of individuals', who for all intents and purposes are 'carrying out

adopt an ‘overextended’ notion of who could be targeted in an organised armed group, so as ‘to include all persons accompanying or supporting that group (i.e. regardless of their function)’, would ‘completely discard the distinction between “direct” and “indirect” participation in hostilities inherent in treaty and customary law’⁸⁴⁸. Consequently, the loss of civilian protection against attack would not apply to ‘recruiters, trainers, financiers, propagandists, or those who purchase, smuggle, store, manufacture, or maintain weapons and other military equipment’⁸⁴⁹.

The net effect of the continuous combat function for non-State actors, is that those who are affiliated⁸⁵⁰ with organised armed groups (like child soldiers and some PMSCs), and who engage in combative functions in a continuous manner, will ‘lose their entitlement to protection against direct attack’⁸⁵¹ which would normally apply to civilians. Moreover, as Melzer points out, the ‘continuous combat function does not, of course, imply *de jure* entitlement to combatant privilege’, with its attendant immunity from prosecution⁸⁵². Even once PMSCs leave the organised armed group, and are once again classified as civilians, they can nevertheless still face ‘prosecution for violations of domestic and international law’ which they may have committed⁸⁵³.

What is particularly problematic for civilians taking a direct part in hostilities, or acting with a continuous combat function, is that they very often act so as to ‘capture, injure, or kill an adversary and in doing so they fail to distinguish themselves from the civilian population in order to lead the adversary to believe that they are entitled to civilian protection against direct attack’. This alone is considered a serious violation of the IHL prohibition against perfidy⁸⁵⁴. Moreover, even if they had, at all times, respected the laws of war⁸⁵⁵, their direct participation in hostilities is what exposes them to prosecution.

PMSCs who do engage in specific hostile acts which satisfy the direct causation and belligerent nexus test, are likely to be viewed as assuming a

substantial and continuing integrated support functions for such groups’, but ‘who fight for the group on a regular but not continuous basis’ (Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 664; Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 837).

⁸⁴⁸ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 850.

⁸⁴⁹ Jensen ‘Direct Participation in hostilities’ at 2137-46.

⁸⁵⁰ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 845.

⁸⁵¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 73.

⁸⁵² Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 847.

⁸⁵³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 83; Roberts ‘The Civilian in Modern War’ at 41.

⁸⁵⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 85.

⁸⁵⁵ *Idem* at 84.

continuous combat function. However, that said, only those members of a private military group who actually assume these combat functions, will be labelled as such, based on their function. PMSCs are unlikely to fall into this category unless they train armed forces for specific hostile acts, accompany their trainees into battle and engage enemy combatants, or gather military intelligence for targeting purposes, on a continuous basis. As Sossai explains, 'this approach seems to strike the right balance: if contractors are employed fulfil a function which implies taking a direct part in hostilities on a regular and continuous basis, then that individual would lose protection against direct attack for so long as that function was being fulfilled'⁸⁵⁶.

6.8 Conclusion

In short then, most legal scholars agree that there is no legal obstacle to PMSCs being afforded primary combatant status and secondary POW status upon capture⁸⁵⁷, when they are either 'formally incorporated into the States armed forces'⁸⁵⁸, or 'they fulfil the customary IHL criteria for combatant status'⁸⁵⁹. However, most commentators agree that the attainment of either of these conditions is likely to be rare⁸⁶⁰. It is more common that they will remain protected as civilians⁸⁶¹. There might then be room to argue that where States have contracted PMSCs to assist the armed forces, that they are effectively 'civilians accompanying the armed forces'. If they are in possession of an identity card, they are then entitled to be afforded POW status upon capture⁸⁶². Either way, as ordinary civilians or 'persons accompanying the armed forces', PMSCs must take care not to 'dress like members of the armed forces' or 'participate directly in hostilities'⁸⁶³. As civilians, they would by law still be permitted to carry 'light, personal weapons for their own self-defence or the defence of those they are protecting'⁸⁶⁴. As for the allegation that PMSCs might be classified as mercenaries, in theory it is possible for a PMSC (in the context of an international armed conflict) to fulfill all the requirements of the legal definition of a mercenary in terms of IHL⁸⁶⁵, although it would be a rare occurrence⁸⁶⁶. In the end, it is misleading to say that PMSCs are without status under IHL⁸⁶⁷. What is true, however, is that 'there is

⁸⁵⁶ Sossai 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict' at 214.

⁸⁵⁷ De Nevers 'Private Security Companies and the Laws of War' at 176.

⁸⁵⁸ Montreux Document, principle 26(b) at 39; Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 107.

⁸⁵⁹ Montreux Document at principle 26(b).

⁸⁶⁰ *Idem* at 36; Banks 'Introduction' at 228-35.

⁸⁶¹ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 107.

⁸⁶² McDonald 'Private Military Contractors' at 3.

⁸⁶³ Rogers 'Unequal Combat and the Law of War' at 22.

⁸⁶⁴ *Ibid.*

⁸⁶⁵ Salzman 'Private Military Contractors and the Taint of a Mercenary Reputation'.

⁸⁶⁶ O'Brien *Private Military Companies: Options for Regulation* at 3.

⁸⁶⁷ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 2; Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 24.

no single simple answer applicable to all⁸⁶⁸.

If PMSCs are for the most part considered civilians, they will face prosecution upon capture if they participate directly in hostilities. Usually the activities that PMSCs carry out are not considered hostile acts, which fulfill the threshold of harm, direct causation and belligerent nexus tests. That said, where PMSCs have been 'hired for the explicit purpose of engaging in combat operations'⁸⁶⁹, sabotaging military capacity, operating weapons systems in the theatre of hostilities, guarding captured military personnel, gathering military intelligence for identifying military targets, and conducting training for predetermined hostile acts - their actions clearly satisfy the threshold of harm requirement. Since a large part of the role performed by PMSCs is the provision of guarding services, it must be noted that sometimes even defensive guarding can violate the notion of direct participation in hostilities. Much turns on the nature of the site being guarded, the IHL status of individuals being protected, and the nature of the attack (i.e. whether it is linked to the belligerencies or merely a criminal act). In short, when PMSCs are guarding purely civilian sites or personnel, they are not participating directly in hostilities. So, PMSCs located at purely civilian sites or otherwise protected sites like schools, churches and hospitals, could never constitute a direct and immediate military threat to the belligerent party. Likewise, PMSCs employed as guards for reconstruction companies would be entitled to use force in self defence, and to 'protect the facilities they are guarding, as long as they did so in a defensive manner and employed no more force than was strictly necessary'⁸⁷⁰. Moreover, PMSCs are still permitted under IHL to cause harm in 'individual self-defence or defence of others', or 'in exercising power or authority over persons or territory', without their actions amounting to direct participation in hostilities⁸⁷¹. However, when they are guarding military sites, their actions may amount to direct participation in hostilities, unless they are only guarding the military sites against criminal elements. Some authors adopt the uncompromising position that 'PSCs who, through their presence at a legitimate military target, aid the war effort and can be said to be participating directly in hostilities ... effectively revoke their civilian protected status and exempt military commanders from considering his welfare further when calculating the collateral damage likely to result from an attack'⁸⁷². On the other hand, others maintain that even when PMSCs are located at purely military objectives, commanding officers still bear an obligation to factor their

⁸⁶⁸ Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' at 2; Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 412.

⁸⁶⁹ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 188.

⁸⁷⁰ Anthony Dworkin 'Security Contractors in Iraq: Armed Guards or Private Soldiers' (2004) available at <http://www.crimesofwar.org/onnews/news-security.html> (accessed 27 October 2010).

⁸⁷¹ Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 19; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 64; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 873.

⁸⁷² Parrish 'The International Legal Status of Voluntary Human Shields' at 13.

presence into their calculations of collateral damage⁸⁷³. The latter view is reminiscent of the approach taken towards workers in munitions factories. While the workers may not personally be targeted (because they retain their civilian immunity from attack), the military objectives in which they work remain open to attack, 'subject to the attacking party's obligations under IHL to assess the potential harm to civilians against the direct and concrete military advantage of any given attack, and to refrain from an attack if civilian harm would appear excessive'⁸⁷⁴.

Perhaps it is more useful to ask what a tribunal might have to say about PMSCs. It is intuitively right that a tribunal investigating an alleged war crime for an attack on a military objective guarded by PMSCs, should demand less by way of justification of commanding officers than would ordinarily be expected when other civilians are involved. PMSCs are inherently a different category of civilian than those envisaged in the conventions. They are clearly not wholly innocent civilians going about their daily routine, and caught in the crossfire. They have, after all, deliberately chosen to place themselves in the line of fire in an attempt to have an impact on the outcome of hostilities. As was the case with workers in munitions factories, they do not become quasi-combatants (personally subject to attack) by their presence in a military objective, but the installation remains a permissible military objective⁸⁷⁵. Even a large group⁸⁷⁶ of PMSCs would not change the status of single-use military objective. However, the point is worth stressing: a commander is always expected to be aware of the principle of proportionality in his justification for an attack, and should thus exercise greater caution if a site is inhabited predominantly by PMSCs.

I suspect the greatest area for concern lies at neither end of the spectrum (that being civilian sites and purely military objectives) - but rather concerns the instances when PMSCs carry out guarding duties at dual-use installations like communications networks, power sources, oil refineries, transportation infrastructure (ports and airports) and the like, which serve both the civilian population and the armed forces. It seems intuitively right that PMSCs located at dual-use sites be afforded greater protection than those located at single-use military installations. Article 52 of AP I states, 'in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house, or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.' There is a clear presumption in favour of protected status for sites that may eventually be used for military gain. However, there is also no distinction in IHL drawn between defensive and offensive guarding. AP I is clear that an 'attack means any act of violence ... whether in offense or defence'⁸⁷⁷. Where does that leave the PMSC guarding (defensively) a dual-

⁸⁷³ Human Rights Watch 'Backgrounder: International Humanitarian Law Issues in a Potential War in Iraq' *Human Rights Watch Briefing Paper 20* (20 February 2003) available at <http://www.hrw.org/backgrounder/arms/iraq0202003.htm> (accessed 27 May 2012).

⁸⁷⁴ *Ibid.*

⁸⁷⁵ Stefan Oeter (1995) 'Methods and Means of Combat' in Fleck D (ed) *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press: Oxford) at 163.

⁸⁷⁶ Oeter argues that the presence of civilian workers in a munitions factory, does not change the status of the factory as a legitimate military target, 'even if there are hundreds or thousands of them' (*Ibid.*).

⁸⁷⁷ Article 49(1).

use site? I would argue that the presumption of protected status (in respect of the site) would transfer to the PMSCs guarding the site, ensuring their civilian status is respected until the status of the installation can be deemed to be definitely military in nature. Once a site is determined to be a military objective, even the act of defending these sites will constitute direct participation in hostilities⁸⁷⁸. However, it remains the case that once a site has become military in nature, PMSCs would be able to guard these sites against individuals acting for 'general criminal reasons'⁸⁷⁹.

To conclude then, some 'activities undertaken by PMSC can, depending on the circumstances'⁸⁸⁰ amount to 'direct participation in hostilities as specified in the ICRC's Interpretive Guidance'⁸⁸¹. While it is rare that PMSCs will be found participating in hostilities - either directly or in preparation for such activities - it is likely that when they do so on a sporadic basis, they will temporarily lose their civilian immunity 'for such time as' their behaviour continues. When PMSCs engage in specific hostile acts which satisfy the direct causation and belligerent nexus tests, and they do so on a continuous basis, they will forfeit their civilian immunity until they abandon their membership of the group, or adopt a non-combative function. If PMSCs do participate directly, they may become legitimate targets for the opposition⁸⁸², as do any civilians who participate in hostilities without State authorisation. Once they are rendered '*hors de combat*', they are once again clothed with their civilian immunity from attack (unless they are found to satisfy the definitional criteria of 'mercenary')⁸⁸³. Should they fall into enemy hands after such participation, they will still be treated humanely as civilians, held to account for their unauthorised actions⁸⁸⁴, and afforded the 'regular and fair judicial guarantees' extended to civilians⁸⁸⁵. They will not enjoy POW status, unless they possess an identity card as a 'civilian accompanying the armed forces'.

In the end, it is imperative for the international community to understand just how PMSCs fit into the existing IHL structure. We need to understand how PMSCs are classified, and what implications flow from that classification. Without this understanding, we are left wondering whether PMSCs should be labelled as 'soldiers [or] murderers', are they found 'doing one's duty [or] committing a war crime'; ... 'coming home in honor or coming home in shame'⁸⁸⁶.

⁸⁷⁸ Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' at 540.

⁸⁷⁹ Cameron 'Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation' at 589.

⁸⁸⁰ Tougas 'Some Comments and Observations on the Montreux Document' at 338.

⁸⁸¹ Mancini *et al* 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-first Century?' at 334.

⁸⁸² Dworkin 'Security Contractors in Iraq: Armed Guards or Private Soldiers' at 2.

⁸⁸³ Gasser 'Protection of the Civilian Population' at 233.

⁸⁸⁴ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 400-401.

⁸⁸⁵ GC IV article 5(3); AP I article 75; Gasser 'Protection of the Civilian Population' at 211; ICRC 'International Humanitarian Law and Private Military/Security Companies'.

⁸⁸⁶ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 375.

CHAPTER 7

ASSESSING THE COMBATANT STATUS OF VOLUNTARY HUMAN SHIELDS IN INTERNATIONAL ARMED CONFLICTS, IN LIGHT OF THE INTERNATIONAL HUMANITARIAN LAW NOTION OF DIRECT PARTICIPATION IN HOSTILITIES¹

7.1 Introduction

In 1999 the world witnessed 'Serbian civilians taking up positions on the bridges of Belgrade to prevent them from being bombed during the NATO campaign to protect Kosovo'². In January of 2003, at the inception of the military intervention in Iraq³, a group of voluntary human shields (VHSs) in a visit to Tony Blair, at number ten Downing Street, indicated to the British government precisely which civilian Iraqi sites they intended to shield, so that attacks on these sites would 'be made in the full knowledge that U.K. and U.S. citizens could be killed'⁴. On the other side of the Atlantic Ocean, General Richard B. Myers, Chairman of the Joint Chiefs of Staff, warned Iraq that using 'civilians and foreign pacifists'⁵ as 'human shields for strategic sites'⁶ would 'be considered a war crime'⁷. When an estimated '100-250

¹ This chapter is based upon two articles, one entitled 'Voluntary Human Shields: Status-less in the Crosshairs?' (2007) *Comparative and International Law Quarterly of South Africa* 322 and the second entitled 'Targeting Decisions Involving Voluntary Human Shields in International Armed Conflicts, in Light of the Notion of Direct Participation in Hostilities, which is awaiting peer review with *Comparative and International Law Quarterly of South Africa*. These articles are updated and revised with permission of the publishers.

² Stéphanie Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' (2008) 90:872 *International Review of the Red Cross* 883 at 884.

³ Jefferson D Reynolds 'Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground' (2005) 56 *Air Force Law Review* 1 at 1; Richard Cleroux and Roland Watson 'Canadian Women Enlist in "Army" of Volunteer Human Shields' (9 December 2002) *The Times* (London U.K.) at 4; Rewi Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' (2008) 9 *Melbourne Journal of International Law* 313 at 314.

⁴ *The Guardian* 'Human Shield Protestors Visit No 10' (22 January 2003) available at <http://www.guardian.co.uk/politics/2003/jan/22/foreignpolicy.uk2> (accessed 31 October 2012).

⁵ Paolo Fusco 'Legal Status of Human Shields' *Corso in Diritto Umanitario Internazionale Comitato Internazionale della Croce Rossa e dalla Croce Rossa Polacca Varsavia, Pubblicazioni Centro Studi per la Pace* (2003) available at www.studiperlapace.it (accessed 15 May 2012) at 7. The first Gulf War witnessed 'for the first time in history, a party in a conflict explicitly adopting a policy of using unlawful means for preventing attacks from parties which are sensitive to humanitarian issues, communicating this policy to the mass media and using it as a form of propaganda' (Fusco 'Legal Status of Human Shields' at 7). During Operation Dessert Storm, foreigners who were captured to serve as human shields were labelled 'special guests' by Saddam Hussein (Michael N Schmitt 'Human Shields in International Humanitarian Law' (2008-2009) 47 *Columbia Journal of Transnational Law* 292 at 295).

⁶ Fusco 'Legal Status of Human Shields' at 7. These strategic sites included 'military targets

peace activists from some thirty-two countries⁸ realised that they would be used, not to protect civilian property, but to shield military objectives, they chose to leave Iraq⁹. In the same year, Palestinian civilians positioned themselves around Yasser Arafat's headquarters in Ramallah, with the intended goal of forestalling 'a threatened attack by Israeli forces'¹⁰. In November 2006, after an appeal broadcast on Hamas radio, Palestinian women entered a mosque in Beit Hanoun, where 'Israeli security forces had trapped militants', 'clothed some of the militants in female attire, and acted as shields for them as they escaped'¹¹. These are just some of the anecdotes describing the actions of VHSs in international armed conflicts¹².

General Myers is absolutely correct in asserting that the taking of hostages, or forcible use of protected persons to shield objects from attack, is prohibited under treaty-based international humanitarian law (IHL) and customary IHL. However, the dilemma confronting military commanders in recent international armed conflicts, revolves around assessing the status of human shields that, without any duress from parties to the conflict, chose voluntarily to position themselves, in order to shield particular objects from attack. Unfortunately, individuals who voluntarily position themselves as human shields, do not fit neatly within any of the existing categories of 'protected persons'¹³ recognised by contemporary IHL¹⁴. As a consequence, the 'issue of an attacker's obligations when facing human shields is highly complex and controversial', and to date is a 'subject unaddressed in *lex scripta*'¹⁵. The lacunae in IHL regarding the status of VHSs, is to some extent

such as oil refineries and power stations' (Bouchié de Belle 'Chained to cannons or wearing targets on their T-shirts: Human shields in international humanitarian law' at 885).

⁷ BBC 'U.S. Cautions Iraq on Westerners as Human Shields' (16 January 2003) available at http://news.bbc.co.uk/2/hi/middle_east/2663625.stm (accessed 31 October 2012).

⁸ Scott Peterson 'Human Shields in Tug-of War' (17 March 2003) *Christian Science Monitor* at 1.

⁹ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 885.

¹⁰ *Idem* at 884.

¹¹ BBC News 'Gaza Women Killed in Mosque Siege' (3 November 2006) available at <http://news.bbc> (accessed ?); Schmitt 'Human Shields in International Humanitarian Law' at 315.

¹² There are competing views as to how to classify the conflict between Israel and the Palestinians. One view, endorsed by Antonio Cassese and the Israeli Supreme Court in the *Targeted Killings case* HCJ 769/02 (11 December 2005) is that 'the entire conflict, including during December 2008 - January 2009 in the Gaza Strip, is an international armed conflict' (Rule of Law in Armed Conflicts Projects available at http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=113 (accessed 21 May 2013)).

¹³ These categories include amongst others: combatants (including the traditional armed forces; *levée en masse*; special forces and the exceptions: spies and mercenaries); non-combatants (including the wounded; sick or shipwrecked; medical and religious personnel); persons accompanying the armed forces (including civilian contractors); and unlawful belligerents and civilians.

¹⁴ Save to say that where there is doubt as to whether an individual qualifies for protected status under IHL, they shall be 'presumed to have protected status until such time as their status is determined by a competent tribunal.' (GC III article 5 and AP I article 45(1)).

¹⁵ Schmitt 'Human Shields in International Humanitarian Law' at 295; Josiane Haas (2005) 'Voluntary Human Shields: Status and Protection Under International Humanitarian Law' in Roberta Arnold and Pierre-Antoine Hildbrand (eds) *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges* (Editions interuniversitaires suisses:

dependent on the controversy surrounding how we are to interpret the customary international notion of direct participation of civilians in hostilities. To date, the question of whether VHSs can be said to be participating directly in hostilities is highly contested, and has sparked much debate at the series of expert meetings¹⁶ called by the International Committee for the Red Cross (ICRC), to draft a guide on how to interpret the IHL notion direct participation of civilians in hostilities¹⁷.

In this chapter I seek to explore the question of the combatant status of VHSs in international armed conflicts. I begin by outlining the distinction between VHSs and those coerced to act as human shields, and then examine how IHL currently treats each type of human shield. I then explain the notion that every person in the theatre of conflict has a designated status under IHL, and explore the existing categories of protected persons under IHL. In doing so, I hope to argue for a particular status, or permutation thereof, which might assist military advisors and tribunals in assessing the cases involving VHSs, and then attempt to answer the questions as to what status VHSs should enjoy under IHL.

I then turn my attention to the issue of whether the act of shielding sites from attack amounts to direct participation in hostilities. I begin by explaining the concept of direct participation in hostilities and apply this analysis to the factual scenario of VHSs, looking briefly at the question of whether the nature of the shielded site affects a conclusion regarding the VHSs level of participation in hostilities. I explore the legal consequences which result from a conclusion that VHSs are participating in hostilities, and the consequences which result from a conclusion that they are not direct participants. Lastly, using the conclusions reached regarding the status of VHSs, I will outline the duties and legal obligations which rest upon those who capture or detain VHSs.

7.2 Distinguishing voluntary human shields from the IHL concept of 'human shields'

The earliest codifications of IHL always maintained the position that it was strictly prohibited for belligerent parties to intentionally co-locate 'military objectives and civilians or persons *hors de combat*, with the specific intent of trying to prevent the targeting of those military objectives'¹⁸. Moreover, as AP I article 50(3) confirms, even when civilians are found 'comingled with combatants', this fact 'does not deprive the population of its civilian

Lausanne) 191 at 192.

¹⁶ Co-organised by the International Committee for the Red Cross (ICRC) and the TMC Asser Institute.

¹⁷ 'Direct Participation in Hostilities Under International Humanitarian Law' *ICRC Expert Meetings* 2 June 2003 (the Hague); 25-26 October 2004 (the Hague); 23-25 October 2005 (Geneva) available at <http://www.icrc.org/eng/resources/documents/feature/2009/direct-participation-ihl-feature-020609.htm> (accessed 18 May 2012) - culminating in the ICRC (2009) *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* ICRC: Geneva.

¹⁸ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 315; Jean-Marie Henckaerts and Louise Doswald-Beck (2005) *Customary International Humanitarian Law* Volume 1: Rules Cambridge University Press: Cambridge at 340.

character'¹⁹. When civilians are used against their will to shield a military object, they 'remain protected civilians, and any likely harm to them must be factored into the requisite proportionality analysis when determining whether the attack may be executed', in accordance with AP I article 51(8)²⁰. Moreover, their involuntary acts do 'not render them direct participants in hostilities'²¹, 'despite the belligerent nexus of the military operation in which they are being instrumentalised'²². Today this prohibition against the use of human shields has achieved customary international law status.

This intentional use or coercion of civilians to provide a deterrent shield for a particular military objective, must be distinguished from the recent emergence of the VHS, which has characterised some international armed conflicts. As Fusco explains, the contemporary term VHS refers to 'the practice, which usually involves several peace activists, travelling to conflict areas with the aim to shield facilities (mostly civilian) of States under attack'²³. It is the exercise of free will which distinguishes VHSs from 'hostages used as human shields'²⁴. However, the definition of what actions amount to shielding, what objects can be shielded, and when it can be said to be consensual²⁵ or the 'behest of a State'²⁶, is highly contested²⁷. Some academics maintain that only those shielding 'civilians and civil properties can enjoy VHS status'²⁸. Several other IHL experts however, including the ICRC, Fenrick and Bouchié de Belle, understand the term VHS to refer to 'civilians attempting to shield a

¹⁹ Schmitt 'Human Shields in International Humanitarian Law' at 334.

²⁰ Michael N. Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' *Second Expert Meeting on the Notion of Direct Participation in Hostilities* (25-26 October 2004) The Hague at 22.

²¹ Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' at 22.

²² ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 60.

²³ Fusco 'Legal Status of Human Shields' at 25.

²⁴ She cites the following as examples of the hostage use of human shields: 'U.N. observers used ... in Sarajevo to stop Western air strikes, civilian hostages used by Saddam Hussein during the Gulf war ..., and those used later by Slobodan Milosevic in Kosovo in 1999' (Haas 'Voluntary Human Shields: Status and Protection Under International Humanitarian Law' at 196).

²⁵ Sometimes VHSs act 'without the active acquiescence, of the party on whose behalf they act', as was the case for the civilians on bridges in Belgrade, Grdelica and Novi Sad during Operation Allied Force (*BBC Online* 'Serb Media: NATO Lies Over Rapes' (10 April 1999) available at <http://news.bbc.co.uk/1/hi/world/monitoring/316147.stm> (accessed 12 May 2012)); Schmitt 'Human Shields in International Humanitarian Law' at 322; William J Fenrick 'ICRC Guidance on Direct Participation in Hostilities' (2009) *Yearbook of International Humanitarian Law* 287 at 293. However, as Melzer correctly points out, aside from the 'obvious cases on both ends of the scale, such as civilian activists publicly declaring their desire and intent to serve as human shields, or civilian hostages forcibly being chained to military objectives', for the most part there is a large grey area which human shields occupy (Nils Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 831 at 871).

²⁶ As was the experience of VHSs in Iraq (Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 325).

²⁷ Schmitt 'Human Shields in International Humanitarian Law' at 334.

²⁸ Nada Al-Duaij 'The Volunteer Human Shields in International Humanitarian Law' (2010) 12 *Oregon Review of International Law* 117 at 126.

military objective²⁹, by deterring the enemy from attacking that objective³⁰, 'by their presence as persons entitled to protection against direct attack'³¹.

Sometimes the line between voluntary human shielding and prohibited human shielding is blurred. Bouchie de Belle cites as an example of an act of voluntary shielding 'where civilians gather on a bridge of military value in order to protest against the enemy's earlier destruction of other similar bridges'³². However, if the same civilians 'set up camp (on the bridge) for a long period of time and the authorities take no action to remove them, then this inaction will lead to a clear presumption³³ that the authorities intend to use the civilians' presence to shield the bridge from an enemy attack'. While the effect of this inaction on the part of the belligerent party would constitute a violation of the obligation to remove civilians from the vicinity of military objectives³⁴, it does not render the act of shielding involuntary on the part of the civilians³⁵.

In the final analysis, it is the voluntariness of their actions which distinguish VHSs from the hostage type of human shields. Lyall expresses it well when he says that VHS operate 'as civilian actors in, rather than as passive subjects of, armed conflict'³⁶. Furthermore, Schmitt gets to the crux of the issue when he writes "'voluntary shielding" only occurs, as a matter of law, consequent to the shield's intent to frustrate enemy operations'³⁷. There may be many reasons for civilians to stay in close proximity to a military objective³⁸ 'whatever the rationale for their presence, it is only when they refuse to depart because they wish to complicate the enemy's actions that they qualify as voluntary shields'³⁹. It is this subjective intent element implicit in the act of being a VHS, which in the end complicates the application of IHL to VHSs⁴⁰.

In this chapter I will write from the premise that the actions of VHSs are by definition un-coerced, and that VHSs may choose to shield military, civilian

²⁹ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 56; Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 293.

³⁰ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 885.

³¹ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 56; Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 293.

³² 'Since these civilians have not been placed here by a belligerent party there is insufficient evidence of the required intention to engage in prohibited use of civilians as human shields' (Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 889).

³³ 'An even clearer presumption of intention will arise where the civilian volunteers are briefed by the armed forces on which military sites are to be "protected"' (*Ibid*).

³⁴ 'In addition to the absolute negative obligation never to do so, the authorities also have positive obligations ... to take various precautionary measures, including keeping civilians away from military targets' (*Ibid*).

³⁵ *Ibid*.

³⁶ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 316.

³⁷ Schmitt 'Human Shields in International Humanitarian Law' at 316.

³⁸ They may be too elderly, unwell, too scared or wanting to 'safeguard their property and possessions' (*Ibid*).

³⁹ *Ibid*.

⁴⁰ *Idem* at 334.

and dual-use sites. I will address the issues of whether the specific classification of the shielded site (e.g. as military or civilian) impacts on the IHL status of VHSs, and whether their voluntariness and the specific site which they shield renders their shielding to be direct participation in hostilities.

7.3 IHL on the subject of human shields

The prohibition against the use of human shields in international armed conflicts has a long history in IHL. It is mentioned in the Hague Regulations⁴¹ of 1907 and has been re-stated in IHL treaties ever since. In the 1949 Geneva Conventions pertaining to the protections afforded prisoners of war (POWs) (GC III)⁴² and civilians (GC IV)⁴³ IHL dictates that: 'no POW may ... be used to render certain points or areas immune from military operations'⁴⁴, and 'the presence of a protected person may not be used to render certain points or areas immune from military operations'⁴⁵. Consequently, in 1949 the ban on using human shields 'was limited to the scope of the Third and Fourth Geneva Conventions, and therefore concerned only POW's and protected persons'⁴⁶.

In 1977, when the ICRC convened a conference to draft the first Additional Protocols⁴⁷ to the earlier Geneva conventions, the provisions which dealt with human shields were not only more numerous, but also extended the scope of protection. Under both Additional Protocols the protection expanded from an approach '*ratione personae*' (which had prevailed in the Geneva law), to include protection '*ratione materiae*'⁴⁸, which in effect 'protects the civilian population as a whole'⁴⁹, thereby extending the prior protection offered under Geneva law.

⁴¹ 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land 1910 *U.K. Treaty Series* 9 ('Hague Regulations'/HR), opened for signature 18 October 1907 and entered into force 26 January 1910.

⁴² 1949 Geneva Convention Relative to the Treatment of Prisoners of War of August 12 1949 (GC III) 75 *U.N. Treaty Series* 135, opened for signature 12 August 1949 and entered into force 21 October 1950, at article 23.

⁴³ 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12 1949 (GC IV) 75 *U.N. Treaty Series* 287, opened for signature 12 August 1949 and entered into force 21 October 1950, at article 28.

⁴⁴ GC III article 23.

⁴⁵ GC IV article 28.

⁴⁶ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 885.

⁴⁷ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) 1977 1125 *U.N. Treaty Series* 3 (opened for signature 8 June 1977 and entered into force 7 December 1978) and 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (AP II) 1977 1125 *U.N. Treaty Series* (1979) 609 (opened for signature 8 June 1977 and entered into force 7 December 1978). The two APs added in 1977, have not achieved universal acceptance, but many provisions are accepted as having achieved customary status. The aim of the APs was to reaffirm the principles set out in the four GCs and to incorporate the 1907 Hague laws that preceded the GC.

⁴⁸ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 885.

⁴⁹ *Idem* at 886.

So, for example, AP I article 12(4) 'prohibits⁵⁰ the use of medical units in an attempt to shield military objectives from attack', while AP I article 28(1) prohibits the use of 'medical aircraft in an attempt to shield military objectives from attack'⁵¹, while AP I article 75(2)(c) lists the taking of hostages as a prohibited act. Probably, the article which is most often cited as authority for the prohibition against the use of human shields is AP I article 51(7), which states:

'The presence or movements of the civilian population or individual civilians shall not be used⁵² to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.'

From this provision, it is clear that not only is the 'forcible movement of civilians' prohibited, where such actions are motivated by the intent to use civilians as human shields, but moreover 'the placement of military objectives within close proximity of civilians or civilian objects', is now also listed as a violation of the prohibition against the use of human shields⁵³.

The prohibition against human shielding is so fundamental to the foundational tenets of IHL, that AP I article 51(8) states that '[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians ...'⁵⁴. This provision reflects the *tu quoque* principle (principle of reciprocity), which maintains that when it comes to IHL, an attacker's obligations are not 'depend on the adversary's compliance' with IHL⁵⁵. In short, the prohibition is absolute and non-derogable.

Any discussion on the prohibition against the use of human shields would be incomplete without reference to the provisions contained in AP I which establish the obligations on belligerent parties when responding to

⁵⁰ The words 'under no circumstances' used in article 12(1), indicate that the prohibition is absolute (*Ibid*).

⁵¹ *Ibid*.

⁵² This provision is 'intended to cover cases where the civilian population moves of its own accord', but 'implies that the civilian population or persons concerned have acted under duress or, at minimum, without knowledge of the way in which they are being manipulated to shield a military objective' (Lyll 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 315).

⁵³ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 885.

⁵⁴ Michael Schmitt (2010) 'Fault Lines in the Law of Attack' (Chapter 9) in Susan Breau and Agnieszka Jachec-Neale (eds) *Testing the Boundaries of International Humanitarian Law* 277 British Institute of International and Comparative Law, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1610016 (accessed 12 May 2012) at 299.

⁵⁵ This is reflected in article 60(5) of the 1969 Vienna Convention on the Law of Treaties, which rules out the suspension of a treaty for wrongful conduct of a party in the case of 'provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.

attacks. AP I article 58, entitled 'Precautions against the effects of attacks', states that:

- 'The Parties to the conflict shall, to the maximum extent feasible:
- a) without prejudice to article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
 - b) avoid locating military objectives within or near densely populated areas;
 - c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control⁵⁶ against the dangers resulting from military operations'.

The absolute nature of the prohibition against the use of 'civilians or other protected persons to shield'⁵⁷ objects or personnel from attack, has not only expanded in its IHL application since its expression in the HRs⁵⁸, but it is now firmly recognised as having achieved the status of customary IHL⁵⁹, and consequently is binding on all belligerent parties in times of armed conflict. Moreover, international jurisprudence resulting from the prosecution of those found in violation of the prohibition, endorse the seriousness with which the prohibition is viewed⁶⁰. In the words of the International Criminal Tribunal for the Former Yugoslavia, AP I article 58 'do[es] not appear to be contested by any State, including those which have not ratified the Protocol'⁶¹. Not surprisingly, the Rome Statute of the International Criminal Court lists 'the use of human shields during an international armed conflict' as a war crime⁶².

Whether the 'protected persons' are 'placed on or close to military objectives', encouraged to move into the vicinity of 'military operations'⁶³, or

⁵⁶ 'These obligations bind any party having control over the civilian population concerned, be they members of its own population or foreigners, refugees or any other persons' (Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 890).

⁵⁷ *Idem* at 886.

⁵⁸ 'The absolute nature of this prohibition is not limited to the use of patients or staff of medical units as human shields, but applies to the general prohibition on use of human shields, be they civilians or POW, which brooks no exception' (*Ibid*).

⁵⁹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 337.

⁶⁰ *Student Case* (Case No. 24) British Military Court Luneberg (6-10 May 1946) 4 *L.R.T.W.C.* 118 (United Nations War Crimes Commission His Majesty's Stationery Office 1947); *Trial of Wilhelm Von Leeb and Thirteen Others* (Case No. 72 High Command Trial) U.S. Military Tribunal Nuremberg (30 December 1947–28 October 1948); 12 *L.R.T.W.C.* United Nations War Crimes Commission His Majesty's Stationery Office 1949 at 105; *Prosecutor v Blaskic* ICTY Trial Chamber Judgement (3 March 2000) IT-95-14-T at para 716; *Prosecutor v Aleksovki* ICTY Trial Chamber Judgement (25 June 1999) IT-95-14/1-T at para 229; *Prosecutor v Karadzic and Mladic* ICTY First Initial Indictment (July 1995) IT-95-5-I para 47.

⁶¹ *Prosecutor v Kupreskic* ICTY Trial Chamber Judgment (14 January 2000) IT-95-16-T paras. 524-25, Michael N Schmitt 'Human Shields in International Humanitarian Law' 2008 38 *Israel Yearbook on Human Rights* 18 at 33).

⁶² 2187 *U.N.Treaty Series* 3 article 8(2)(b)(xxiii) (entered into force 1 July 2002) 'Rome Statute'; Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 885.

⁶³ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 885.

whether 'military objectives are placed in the midst of civilians'⁶⁴, 'legal experts seem to agree that it is an absolute obligation of result'⁶⁵. That said, there are two aspects of the prohibition that deserve highlighting: one is that there needs to be intention to use the presence of civilians as a human shield, and the second is that the shielded site must be a military objective. As the International Criminal Court's Elements of Crimes stipulates: 'the mental element' of the crime 'is the intention to shield a military objective from attack or to shield, favour or impede military operations'⁶⁶. Ascertaining the mental intent of the violator, and the military status of the objective or operation which is the subject of the shielding, is key to ascertaining a violation of the prohibition⁶⁷. In short, this intent element means that 'no violation of the human shielding prohibition occurs in situations involving truly consenting shields'. Moreover, Schmitt argues that in instances of truly consensual shielding, belligerent parties are not legally 'obliged under API article 58 to prevent them from acting in this manner'⁶⁸.

7.4 IHL on the subject of VHSs

While IHL has approached the issue of human shields with a direct and absolute prohibition, 'it is unlikely that the shielding norm was originally devised to cover an event where individuals acted knowingly and on their own initiative'⁶⁹. An examination of treaty law and customary international law, reveals no similar comprehensive treatment of the issue of civilians who, of their own volition, elect to position themselves near strategic sites, be they military, civilian or dual-use sites⁷⁰.

That said, there are some IHL academics who maintain that 'the mere fact that voluntary shielding was not in the contemplation of the drafters does not necessarily suffice to remove voluntary shielding from its reach'⁷¹. After all, IHL is and must 'remain, responsive to the evolving nature of warfare'⁷² and if VHSs are the new actors in international armed conflicts, then IHL needs to guide military commanders facing such actors. However, even these academics concede that it is 'debatable' whether the prohibitions against shielding generally, can simply be applied to VHSs⁷³. So, for example, if we

⁶⁴ *Ibid.*

⁶⁵ *Idem* at 886.

⁶⁶ One need not prove 'ignorance on the part of the people concerned or that they be constrained' (*Ibid.*).

⁶⁷ *Ibid.*

⁶⁸ Schmitt bases this argument on the fact that AP I article 51(3) removes the 'protection afforded by this section' to those who engage in 'direct participation', which he concludes 'would relieve the defender of any such obligation under article 58'. Consequently, according to Schmitt, if 'voluntary shields retain full civilian protection because they are not directly participating, then article 58 remains applicable', which would oblige belligerents 'only to the extent feasible' to 'prevent civilians from placing themselves at risk' (Schmitt 'Human Shields in International Humanitarian Law' at 322).

⁶⁹ *Idem* at 316.

⁷⁰ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 886.

⁷¹ Schmitt 'Human Shields in International Humanitarian Law' at 316.

⁷² *Ibid.*

⁷³ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 315.

examine the wording of AP I article 51(7), it is safe to conclude that this prohibition encompasses instances where civilians' movements are directed, or where civilians are used (in a manner which appears to be of their 'own accord'), but which in fact reveals some 'duress or, at minimum, without knowledge of the way in which they are being manipulated to shield a military objective'⁷⁴.

Even if the existing provisions dealing with traditional human shields cannot be applied directly to every situation involving VHSs, it is possible that other principles of IHL can be used to provide some guidance for military commanders faced by VHSs. What follows is a summary of IHL provisions which may have some bearing on the subject of VHSs:

i. Acceptable collateral damage and the proportionality principle

While IHL might not explicitly set out attackers' obligations in instances where VHSs are situated at a military site, IHL is founded on the twin principles of 'distinction and proportionality'⁷⁵. In short, these principles oblige a belligerent to distinguish between combatants and civilians, to 'do "everything feasible" to verify that a target qualifies as a military objective'⁷⁶, and only launch and attack 'if and only if the potential damage to civilians is not "excessive in relation to the concrete and direct military advantage anticipated"⁷⁷.

So, in the case of civilian workers in a munitions' factory, IHL experts are generally in agreement that 'these civilians will bear the risk of falling victim to a legitimate attack' on the munitions' factory (as a legitimate military target)⁷⁸, if the proportionality analysis concluded that the 'military advantage is such that the collateral damage is acceptable'⁷⁹. That said, it is also agreed that the workers themselves, once they have left the factory, 'shed the risk of being subject to attack', and they are not military objectives in and of themselves⁸⁰. Furthermore, provided they do not 'live within the "target area"', they are fully protected as civilians 'in their homes'⁸¹.

Similarly, when 'military objectives' are surrounded by human shields, they do not 'cease to be legitimate targets for attack simply because of the presence of those shields'⁸². Therefore, if we presume that VHSs enjoy

⁷⁴ *Ibid.*

⁷⁵ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 897.

⁷⁶ AP I article 57(2)(a)(1), Henckaerts and Doswald Beck *Customary International Humanitarian Law* rule 16 at 55.

⁷⁷ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 900; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 14. 'This means that the expected civilian losses must be weighed against the size of the concrete military advantage to be anticipated if the military objective is neutralised' (Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 900).

⁷⁸ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 897.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Although, as Bouchié de Belle points out, the cost of 'conducting an attack despite their presence, may have a considerable media and political impact' (*Idem* at 900).

civilian status⁸³, their mere presence at a legitimate military objective will have to be factored in to any decision to target the site which they shield. A military commander faced with human shields 'must reason, as in the case of any other legitimate military objective, an attack on which runs the risk of causing collateral damage to civilians'⁸⁴. While this does not mean that VHSs 'lose their right to protection as civilians, they may lose *de facto* protection by staying close to a military target'⁸⁵. In short 'these civilians will bear the risk of falling victim to a legitimate attack on the shielded object'⁸⁶, if the proportionality analysis concludes that the 'military advantage is such that the collateral damage is acceptable'. As Bouchié de Belle correctly points out, 'given the significant military advantage that can generally be gained from the destruction of a strategically located bridge, relatively high civilian casualties would ordinarily be deemed a reasonable collateral damage'⁸⁷. Consequently, 'in the case of human shields ... a sufficiently significant military advantage in relation to the danger to which human shields are exposed could render an attack on a military objective legitimate despite their presence'⁸⁸. Moreover, under IHL, belligerent parties are obliged to 'cancel or suspend an attack if the attack would be disproportionate'⁸⁹ - in other words, if it became apparent that the target was surrounded by sufficient VHSs to tip the proportionality analysis in their favour. That said, collateral damage is only acceptable when it can be shown conclusively that the target is a legitimate military objective. If it were to be shown that VHSs were injured as a result of an attack aimed at a site which was not a military objective (for example a civilian objective), this would constitute a prohibited attack on 'civilians and civilian property'⁹⁰.

ii. Precautions in attack

Many IHL principles are firmly founded on the principle that belligerent parties are obliged to take precautions when attacking, to ensure that only military objectives are targeted, and that civilians are protected against the effects of hostilities⁹¹. This fundamental IHL 'obligation to choose means and methods of attack with a view to avoiding, and in any event minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects'⁹² lies at the

⁸³ I will explore the question of what IHL status VHSs enjoy, later on in this chapter.

⁸⁴ Yves C Sandoz, Christophe Swinarski and Bruno Zimmerman (eds) (1987) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* ICRC/Nijhoff: Geneva/Dordrecht at para 2191.

⁸⁵ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 897.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Idem* at 903.

⁸⁹ AP I article 57(2)(b).

⁹⁰ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 903.

⁹¹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 15; AP I article 57.

⁹² AP I article 57(2)(a)(ii): Those planning or deciding on an attack must 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.

heart of IHL. Moreover, according to the 'lesser evil'⁹³ rule, 'when there is a choice between two military objectives for obtaining a similar military advantage, commanders are obliged to choose the one which may be expected to cause the least danger to civilians'⁹⁴.

Applying these precautionary principles to the situation of VHSs, 'if human shields are not in front of the military objective all the time, an attack should be launched at a time when they are not present'⁹⁵. Similarly, 'where the military objective is protected by human shields, the attacker should use weapons that will destroy the target without harming the human shields around it or will harm them as little as possible'⁹⁶. Furthermore, should a pilot receive an 'order to bomb an objective but he realises at the last minute that it is protected by a human shield, he should suspend the attack and refer back to his command'⁹⁷.

iii. Effective advance warning of an attack

Another of the IHL principles which could impact upon VHSs, is the obligation upon belligerents 'to give effective advance warning of attacks which could affect the civilian population, unless circumstances do not so permit'⁹⁸. Traditionally this has required warning 'sufficiently in advance to allow the evacuation of civilians', without being 'too far in advance ... so that civilians may think that the danger has passed'⁹⁹. Finally, it should be remembered that complying with the obligation to warn, does not release the attacker from his duty to observe all the other 'precautionary measures' set out in IHL¹⁰⁰.

So, for example, if after 'effective advance warning', VHSs (assuming that they are civilians) elected to remain in the vicinity of the target, they would still 'enjoy the same protection as any other civilians', calling into play the proportionality calculations and all the precautions in attack¹⁰¹. As Schmitt points out, 'the mere fact that the shields were acting voluntarily, and not at the behest of the defender, would not release that party from a duty to comply with the obligations'¹⁰² set out in IHL. Consequently, it is incumbent on belligerent parties to 'express disquiet' at the shielding movement of VHSs, because their 'passive indifference'¹⁰³ to even *voluntary* shielding activities will constitute a breach of IHL. In short, the IHL obligations to respect the principle of distinction and take precautionary measures in attack, and give advance warning, 'applies both when the civilians are hostages and when

⁹³ AP I article 57(3). 'For example, if human shields are positioned on a bridge and the communication line can be broken by attacking another bridge that is not surrounded by civilians, the obligation set out in article 57(3) obliges the attacker to take that option' (Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 905).

⁹⁴ *Ibid.*

⁹⁵ *Idem* at 904.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Schmitt 'Human Shields in International Humanitarian Law' at 321-322.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 315.

they have volunteered to shield military targets¹⁰⁴.

That said, many of these provisions are intended to protect civilians in the theatre of armed conflict. Applying these protections to VHSs presumes that VHSs enjoy civilian status, in accordance with AP I article 50(1)'s presumption of protected civilian status. As with any presumption, there is always the possibility to rebut the presumption. If it were to be successfully shown that VHSs had by their actions compromised their civilian status (by potentially participating directly in hostilities), a different legal status and consequent legal regime would apply. I now turn my attention to exploring the various IHL status', in an attempt to locate VHSs in existing IHL.

7.5 The notion of IHL combatant/civilian status

The concept, which underpins much of IHL, is that every individual in the theatre of war possesses a recognised primary status, as either a combatant or a civilian¹⁰⁵. It is this primary status which informs the protections which they are afforded under IHL, as well as the legal rights and obligations which they bear¹⁰⁶. Depending on their primary status, individuals are then granted or refused secondary prisoner of war (POW) status. Moreover, a primary status (as combatant or civilian) determines the legal consequences that flow from one's actions¹⁰⁷, and the legal obligations imposed by international law upon one's captors¹⁰⁸.

I will now turn to the task of explaining and evaluating the characteristics and functions of these different IHL categories, in the hopes of arriving at a reasoned argument for the classification of VHSs:

i. Combatants (belligerents)

As a rule, the members of the armed forces¹⁰⁹ are granted combatant status and are authorised to participate directly in hostilities, subject to the limitations imposed upon them by international law regarding methods and means of warfare¹¹⁰. Under IHL, the term 'armed forces' is understood to 'consist[s] of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates ... and subject to an internal disciplinary system'¹¹¹. In order to enjoy combatant

¹⁰⁴ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 886.

¹⁰⁵ Kurt Ipsen (1995) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 65.

¹⁰⁶ Ipsen 'Combatants and Non-combatants' at 65.

¹⁰⁷ For example, a civilian who participates directly in hostilities might face criminal prosecution for their actions, while combatants are not prosecuted for participating in hostilities, provided they observe the rules of war.

¹⁰⁸ Ipsen 'Combatants and Non-combatants' at 65.

¹⁰⁹ It is worth mentioning at this juncture, that in an armed conflict, only a recognised subject of international law can clothe their armed forces with authorised combatant status. This status is not given to the individual, but rather is granted as a result of his or her affiliation to a party to the conflict, which is a subject of international law (Ipsen 'Combatants and Non-combatants' at 66-67).

¹¹⁰ Failure to observe these limitations will expose combatants to prosecution before a military tribunal (Ipsen 'Combatants and Non-combatants' at 68).

¹¹¹ AP I article 43.

status, an individual either needs to show that they are a member of the armed forces as defined by international law¹¹², or that they are members of a volunteer corps or militia and then they need to satisfy the criteria for combatant status as listed in the 1907 Hague Regulations (HR)¹¹³, and developed through GC III¹¹⁴ and the AP I¹¹⁵. Those criteria require that combatants emanating from a volunteer corps or militia¹¹⁶ must 'be commanded by a person responsible for his subordinates'; wear 'a fixed distinctive sign recognisable at a distance'; 'carry their arms openly' during and in preparation for an attack; and 'conduct their operations in accordance with the laws and customs of war'¹¹⁷. Although members of the traditional armed forces acquire their combatant status without any further enquiry into their compliance with the criteria set out in GC III article 4A(2), they do as a matter of customary law nevertheless adhere to the four conditions. In API article 43(1) we find a new definition of 'armed forces', described as:

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

In essence, what this new article achieved, was to do away with the prior 'distinction between regular and irregular voluntary corps, militia and other organised groups (that existed in the HR and GC III)'¹¹⁸. Instead, the six

¹¹² GC III article 4A(1).

¹¹³ HR article 1.

¹¹⁴ ICRC 'Commentary on GC III Article 4' available at <http://www.icrc.org/ihl.nsf>. (accessed 12 May 2012).

¹¹⁵ AP I article 43(1) reiterates the principle set out in article 1(a) of the HR IV. AP I article 44 states that:

'combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising, 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.'

¹¹⁶ GC III article 4 includes in this category organised resistance movements, provided they fulfill the four criteria set out in article 4A(2)(a-d). Also mentioned are civilians who are accompanying the armed forces, and crews of merchant marine or civil aircraft. For the purposes of this investigation into the status of VHSs, I shall deal with the category of civilians accompanying the armed forces further, below.

¹¹⁷ It is worth noting that failure to observe the laws of war will not render the combatant an unlawful combatant. It will, however, expose them to military prosecution, provided they meet the other requirements for combatant status (GC III article 82ff).

¹¹⁸ Robert Goldman and Brian Titemore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' (2002) *ASIL Task Force Paper* available at www.asil.org/taskforce/goldman.pdf (accessed 21 February 2012) at 17.

onerous requirement for combatant status, set out in GC III, are replaced by two conditions: '1. responsible command under a party to the conflict and 2. behaviour in accordance with the laws of war'¹¹⁹. As Rogers points out, 'it is a matter of organisation and discipline, which goes to the root of the definition of armed forces'¹²⁰.

As a result of this authorisation, combatants enjoy two important privileges¹²¹. Firstly, those who enjoy primary combatant status are afforded secondary status as POWs in the event of capture, and consequently they enjoy special protections whilst interned¹²². Secondly, combatants who do not breach the laws of war¹²³ cannot be prosecuted for their mere participation in hostilities, on account of their authorisation to participate in hostilities¹²⁴.

The most common way in which combatants assert their status is by their use of uniforms. It is this distinctive dress which distinguishes them from the civilian population. The obligation to distinguish themselves from the civilian population, is one of the basic duties which combatants are trained to observe whenever they are engaging in military activities or preparing to engage in such activities¹²⁵. This obligation is so fundamental that combatants who are not uniformed¹²⁶, are still required to wear a 'permanent distinctive sign visible from a distance and carry their arms openly'¹²⁷. A failure to do so, will render them unlawful combatants or spies, guilty of perfidy, and being unable to claim POW status¹²⁸.

Non-combatant members of the armed forces

As an exception to this general rule, that members of the armed forces are by definition 'combatants', there are a number of groups of service personnel within the ranks of the armed forces, who are denied authorisation (by national legislation) to 'use a weapon or a weapons system'¹²⁹, and are consequently called non-combatants¹³⁰. Within this broader category of non-combatants, we find 'quartermasters, members of the legal services and

¹¹⁹ Daphne Richemond-Barak (2011) 'Non-State Actors in Armed Conflict' in William C. Banks (ed) (2011) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia Studies in Terrorism and Irregular Warfare at 2502-9 (ebook version).

¹²⁰ Anthony PV Rogers 'Unequal Combat and the Law of War' (2004) 7 *Yearbook of International Humanitarian Law* 3 at 14-15.

¹²¹ It must be noted that these privileges may be forfeited as a result of the actions of the particular individuals, for example engaging in spying (Ipsen 'Combatants and Non-combatants' at 65-66; HR article 3 and AP I article 43(2)).

¹²² HR article 3(2), GC III article 4A(1-3), AP I article 44(1). POW status is afforded to all who fall within the categories listed in GC II article 4A(1-3) and (6), and AP I articles 43 and 44(1).

¹²³ The breach of the laws of war does not, however, result in the forfeiture of their secondary POW status, unless they also breached the fundamental obligation of distinction (AP I article 44 (4); Ipsen 'Combatants and Non-combatants' at 81). This principle will be explored further under section on unlawful belligerents.

¹²⁴ Ipsen 'Combatants and Non-combatants' at 93.

¹²⁵ AP I article 44(3).

¹²⁶ Although militia groups, volunteer corps and organised resistance movements are exempt from wearing uniforms, they are still required to distinguish themselves from the civilian population (Ipsen 'Combatants and Non-combatants' at 76-77).

¹²⁷ GC I article 4A(2), AP I article 44(3).

¹²⁸ The status of 'unlawful combatants' will be explored further below.

¹²⁹ AP I article 43(2).

¹³⁰ HR article 3.

other non-fighting personnel'¹³¹ who, despite being members of the armed forces, are expressly prohibited from participating directly in hostilities, and enjoy special protection as a result of this limitation¹³². Others who fall within the category of non-combatants, are those who - but for their injuries - would be classified as ordinary combatants (e.g. the wounded, sick and shipwrecked)¹³³. For all of these individuals, their status as members of the armed forces, albeit non-combatant members, guarantees their secondary status as POW upon capture, and precludes them from being awarded civilian status¹³⁴.

As members of the armed forces, non-combatants do not enjoy the protection afforded civilians against the dangers inherent in an armed conflict¹³⁵. Non-combatants are not protected by a prohibition against attack (as is the case with civilians), and remain fundamentally a 'military objective'¹³⁶. With the exception of the religious and medical personnel (who enjoy specific protections under IHL), all other non-combatants contribute to the achievement of a military advantage, and are a military objective open to attack, without special considerations or collateral-damage calculations¹³⁷. All non-combatants are entitled to defend themselves against attack, despite the fact that they are not, by definition, authorised to participate directly in hostilities¹³⁸. The authorisation to participate in hostilities is afforded to all members of the armed forces, and this right which attaches to non-combatants (albeit in a de-activated form) is activated by an attack upon their person¹³⁹.

Medical and religious personnel

As already mentioned, medical and religious personnel enjoy unique protections under IHL. Consequently, and despite being members of the armed forces, they are expressly prohibited from participating directly in hostilities, and enjoy special protection because of this limitation¹⁴⁰. While medical and religious personnel wear the uniform of the armed forces - albeit with distinctive emblems denoting their religious or medical function - they are, however, not authorised to participate directly in hostilities. For the purposes of classification, they are not classed with traditional non-combatant members of the armed forces. Instead, these medical and religious personnel enjoy 'special primary status'¹⁴¹ under Geneva law¹⁴².

¹³¹ Ipsen 'Combatants and Non-combatants' at 82.

¹³² GC I articles 24, 26 and 27.

¹³³ The protections afforded these non-combatants, are explored comprehensively in GC I and GC II.

¹³⁴ AP I article 50(1) precludes this by its restrictive definition of a civilian (Ipsen 'Combatants and Non-combatants' at 84).

¹³⁵ AP I article 51(1); Ipsen 'Combatants and Non-combatants' at 84.

¹³⁶ 'Those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage' (AP I article 52(2)).

¹³⁷ Ipsen 'Combatants and Non-combatants' at 85.

¹³⁸ GC I article 22(1); GC II article 35(1); AP I article 13(2)(a).

¹³⁹ Ipsen 'Combatants and Non-combatants' at 91.

¹⁴⁰ GC I articles 24, 26 and 27.

¹⁴¹ GC I affords protected status to medical and auxiliary personnel who collect and care for the wounded, and who administer medical units (GC I articles 24-27).

During international armed conflicts, they are to be 'respected and protected' and can never form part of the military objective, as do other non-combatant members of the armed forces. Any attack upon these specially protected personnel, is unlawful¹⁴³. While they may not participate directly in hostilities, medical personnel in particular, are nevertheless entitled to use small arms to defend themselves and the injured in their care. Upon capture, they are granted the same legal protections afforded POW's (although technically they are more correctly termed detainees¹⁴⁴), and they can only be detained in so far as it is necessary for assisting the other POWs¹⁴⁵.

ii. Civilians

IHL defines civilians in the negative, as any person who is not a combatant¹⁴⁶. There exists in IHL a presumption that where there is 'doubt a person shall be considered to be a civilian'¹⁴⁷, and consequently such person will enjoy protection from hostilities. Unlike combatants, civilians are not obliged to carry any form of identification, or to wear any symbols confirming their IHL status¹⁴⁸.

With the exception of the *levée en masse* (which shall be discussed further below), civilians are not authorised to participate directly in hostilities. It is this limitation that serves to shield the civilian population from being the target of direct military attack, as a matter of customary international law¹⁴⁹. Provided they do not take part in the hostilities, civilians are to be respected¹⁵⁰, shielded from attack, and may not be 'taken prisoner without sufficient reason'¹⁵¹. This obligation demands not only that the armed forces refrain from acts which would cause harm to civilians, but also requires that steps are taken to ensure the safety of civilians¹⁵². Attacks which result in death or serious injury to civilians, are considered to be a grave breach of AP

¹⁴² Ipsen 'Combatants and Non-combatants' at 89.

¹⁴³ *Ibid.*

¹⁴⁴ However 'if a physician or a chaplain refuses to employ his professional abilities...he will be removed from the category of retained personnel and be detained as an ordinary POW' (Yoram Dinstein (2004) *The Conduct of Hostilities Under the Law of International Armed Conflict* Cambridge University Press: Cambridge at 42).

¹⁴⁵ GC I articles 28 and 30; GC II articles 36 and 37; GC III article 33. For further material on religious personnel, see Walter Rabus (1995) 'Religious personnel' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford.

¹⁴⁶ AP I article 50(1).

¹⁴⁷ Where there is doubt as to whether an individual qualifies for protected status under these conventions, they shall be 'presumed to have protected status until such time as their status is determined by a competent tribunal' (GC III article 5 and AP I article 45(1) and 50(1); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* rule 6 at 23-24). Moreover, in AP I, there is a similar presumption that objects 'normally dedicated to civilian purposes' are civilian, whenever doubt exists (article 52(3)).

¹⁴⁸ Hans-Peter Gasser (1995) 'Protection of the Civilian Population' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 210; GC IV article 27(1).

¹⁴⁹ Gasser 'Protection of the Civilian Population' at 210.

¹⁵⁰ This means that they are entitled to 'respect for their persons, their honour, their family rights, their religious convictions', their manners and customs (GC IV article 27(1)), and their property (HR article 46(2)).

¹⁵¹ AP I article 51(2); AP II article 13(2).

¹⁵² Gasser 'Protection of the Civilian Population' at 212.

I¹⁵³. Furthermore, all attacks on legitimate military objectives must first be assessed in order to establish that the loss caused to civilian life, is not 'excessive in relation to the concrete and direct military advantage anticipated'¹⁵⁴. Incidental harm (often termed acceptable collateral damage), caused to civilians and their civilian objects, is only lawful when it is an 'unavoidable and proportionate side effect of lawful attacks on military objectives'¹⁵⁵. In every attack, precautions must be taken to ensure that civilian losses are kept to a minimum; civilians are warned of imminent attacks, and where feasible, civilians should be removed from the vicinity of the military objective¹⁵⁶.

The immunity from attack which civilians enjoy, makes it tempting for combatants to use civilians to shield certain military targets from attack. Consequently, the taking of hostages or the use of human shields, are both expressly prohibited by IHL - because the use of protected civilians would grant a military advantage in circumstances where the order to attack would otherwise be lawful¹⁵⁷.

The laws of war dictate that persons who participate directly in hostilities¹⁵⁸ are not permitted to enjoy the protections afforded civilians under IHL¹⁵⁹. Civilians who play an active part in the hostilities, open themselves to attack from the opposition acting in self-defence during, 'and for such time as, they continue to actively participate in hostilities'¹⁶⁰. Even under such instances, combatants are obliged to resist such hostility from civilians in a way that will observe the principle of proportionality, shield other civilians from attack, and keep to a minimum the resultant civilian losses¹⁶¹.

If civilians do participate directly in hostilities, they do not, as a result of their hostile actions, acquire combatant status. Once they are *hors de combat*, they are once again clothed with their primary civilian status¹⁶². Should they fall into enemy hands after such resistance, they will still be treated humanely as civilians, held to account for their unauthorised actions, and afforded the 'regular and fair judicial guarantees extended to civilians'¹⁶³.

Levée en masse

As just explained, civilians are expected to have no part in the hostilities. There is, however, one instance in which civilians may legitimately participate in hostilities, despite not being properly authorised to do so. When belligerents invade a territory and the local civilian inhabitants 'spontaneously take up arms against invading troops; without having had time to form themselves into armed units', they are permitted to participate in hostilities, provided 'they carry their arms openly and respect the laws and customs of

¹⁵³ Article 85(3)(a).

¹⁵⁴ AP I article 51(b).

¹⁵⁵ Gasser 'Protection of the Civilian Population' at 214.

¹⁵⁶ AP I articles 57 and 58(a).

¹⁵⁷ GC IV article 28; AP I article 51(7).

¹⁵⁸ Exactly what constitutes 'direct participation in hostilities' will be explored further below.

¹⁵⁹ AP I article 51(3).

¹⁶⁰ AP I article 51(8).

¹⁶¹ Gasser 'Protection of the Civilian Population' at 211.

¹⁶² *Idem* at 233.

¹⁶³ GC IV article 5(3) and AP I article 75; Gasser 'Protection of the Civilian Population' at 211.

war in their military operations¹⁶⁴. These individuals (more correctly referred to as the *levée en masse*) enjoy the secondary POW protections afforded traditional combatants¹⁶⁵, despite the fact that they are not authorised by a 'State party to a conflict'¹⁶⁶ to participate directly in hostilities. They enjoy this primary status as combatants on condition that they distinguish themselves from the civilian population, and carry their weapons openly. Unlike other civilians who elect to participate in hostilities, it is only the *levée en masse*¹⁶⁷ who acquire POW status upon capture¹⁶⁸.

Persons accompanying the armed forces

Nestled in the category of civilians, we find individuals who can often be found with combatants, but who do not wear the uniform of the armed forces, are not armed, and are not permitted to engage in hostilities in any direct way¹⁶⁹. They do, however, carry an identity card confirming their function¹⁷⁰. This category has come to be known as 'persons accompanying the armed forces', and in more recent literature are often referred to as civilian contractors¹⁷¹.

Despite their close association with the armed forces, these civilian contractors enjoy primary civilian status as a consequence of their non-combative function¹⁷². These civilians often provide the necessary specialised expertise¹⁷³ which the armed forces might be lacking. Civilian contractors still retain their inherently civilian status, despite their activities aimed at 'maintaining the effectiveness of a piece of hardware', which might be used to win a military advantage over the opposition¹⁷⁴. Despite their civilian status, the assistance that they render to the armed forces exposes them to collateral injury, whilst providing support of weapons and infrastructure¹⁷⁵.

While these individuals can be detained for security reasons, they are only entitled to the privileges afforded traditional POWs, if they can produce the identity card issued by the armed forces which they are accompanying¹⁷⁶. This is the only essentially civilian group who are afforded secondary POW status, without having primary combatant status¹⁷⁷.

¹⁶⁴ HR article 2; GC III article 4A.

¹⁶⁵ GC III article 4(6).

¹⁶⁶ AP I article 43(1); Ipsen 'Combatants and Non-combatants' at 79.

¹⁶⁷ This is discussed above, under the section entitled 'combatants'.

¹⁶⁸ GC III article 4A(6).

¹⁶⁹ Examples include war correspondents, members of labour units, and others who care for the welfare of the soldier (Ipsen 'Combatants and Non-combatants' at 95).

¹⁷⁰ GC III Annex IV A.

¹⁷¹ HR IV article 13; GC III article 4A(4); AP I article 50(1).

¹⁷² GC III article 4A(4) and AP I article 50(1); Ipsen 'Combatants and Non-combatants' at 65 and 95.

¹⁷³ These might include 'civilian members of military aircraft crews; war correspondents; supply contractors'; reconstruction contractors; 'members of labour units'; and those providing 'services for the welfare of the armed forces' (Richard Parrish 'The International Legal Status of Voluntary Human Shields' (17 March 2004) paper presented at the annual meeting of the International Studies Association, Montreal available at <http://www.polisci.wisc.edu> (accessed 12 May 2012) at 8).

¹⁷⁴ *Ibid* at 10.

¹⁷⁵ Ipsen 'Combatants and Non-combatants' at 95.

¹⁷⁶ GC III article 4A(4).

¹⁷⁷ Ipsen 'Combatants and Non-combatants' at 95.

iii. The unlawful belligerent and spies

There has emerged a practice amongst some IHL academics, to use the term unlawful belligerent/unlawful combatant to refer to persons who actively participate in hostilities, despite not being properly authorised to do so - the so-called 'unlawful belligerents'¹⁷⁸. The term is novel in that it 'is not acknowledged or otherwise mentioned in the laws of war', the Geneva Conventions or in any other IHL treaties¹⁷⁹, or customary IHL¹⁸⁰. Moreover, it does not create a third category of status in IHL¹⁸¹. The status *quo* remains that all participants in armed conflicts are classified as either combatants or civilians.

Although civilians who participate in hostilities without authorisation have also been termed 'unlawful belligerents', the term is most often used to refer to combatants who disguise themselves as civilians or members of the opposition's armed forces, in order to gain a special military advantage¹⁸². So, for example, AP I article 44(3) demands that the principle of distinction be observed at all times, even when plain-clothed Special Forces and spies are operating in the adversaries' territory. Failure to distinguish oneself from the civilian population - even by the minimum requirements of distinction set out in AP I article 44(3) - while launching an attack, is perfidious and can result in the forfeiture of combatant status¹⁸³.

Rather than give rise to a new category, the label describes the unlawfulness of the actions of these civilians and combatants. In essence, although these individuals retain their primary status as civilians or combatants (as the individual case may be), their unauthorised conduct serves to undermine the protections ordinarily afforded them on the grounds of their primary status. Their unlawful actions result in the forfeiture of combatant/civilian privileges. Those combatants acting unlawfully might lose the right to claim POW status, and could be prosecuted under criminal law for their unlawful actions¹⁸⁴, while civilians participating in hostilities without authorisation (or *levée en masse* status), lose the presumptive immunity from attack which attaches to civilian status. Despite this, they are still entitled to basic humane treatment, fundamental human rights guarantees, and fair judicial procedures, upon capture¹⁸⁵.

¹⁷⁸ *Idem* at 68.

¹⁷⁹ Luisa Vierucci 'Prisoners of War or Protected Persons Qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees are Entitled' (2003) *Journal of International Criminal Justice* 284 at 295.

¹⁸⁰ Shlomy Zachary 'Between the Geneva Conventions: Where does the Unlawful Combatant Belong?' (2005) 38 *Israel Law Review* 378 at 385.

¹⁸¹ Gary Solis (2011) *The Law of Armed Conflict: International Humanitarian Law in War* Cambridge University Press: New York at 207.

¹⁸² Parrish 'The International Legal Status of Voluntary Human Shields' at 8.

¹⁸³ Perfidy is expressly prohibited under AP I article 37(1)(d).

¹⁸⁴ Ipsen 'Combatants and Non-combatants' at 94; AP I article 45. The Hague Regulations also deny the right to claim POW status to spies captured in the act of spying, despite the fact that they may be members of the armed forces (HR articles 29-31). In *Ex Parte Quirin* 317 U.S. 1 (1942), the court reiterated that spies or saboteurs who fail to adhere to the laws of war were not entitled to belligerent status and the privileges afforded belligerents upon capture.

¹⁸⁵ AP I article 75; Ipsen 'Combatants and Non-combatants' at 68.

7.6 Conclusion on the status of VHSs under current IHL

There is a presumption which operates in IHL to afford every person who falls into enemy hands protected status, until a competent tribunal can accurately determine their status¹⁸⁶. This presumes that, for every case brought before a tribunal, a particular recognised status will always be discernible. At present, IHL makes mention of human shields, but does not make any direct reference to human shields who act of their own volition (so-called VHSs), making it somewhat difficult to locate VHSs squarely within one of these recognised categories. What I turn to now, is assessing the reality of VHSs against the IHL categories (and sub-categories) set out in the previous section. In undertaking this comparative exercise, I will tease out a response to the question of what IHL status VHSs enjoy, in situations of international armed conflict.

i. VHSs as combatants

There are some IHL academics who argue that VHSs who deliberately locate themselves 'in front of a military objective in order to protect it from attack' are combatants¹⁸⁷. That said, there are many characteristics which distinguish VHS from traditional combatants (as understood by IHL). Probably the most crippling argument against the conclusions that VHSs are combatants, is the fact that they simply 'do not fit the definition of a combatant as set out either in article 4 of the Third Geneva Convention or in article 43 of Protocol I'¹⁸⁸.

Moreover, in many ways, VHSs do not fulfill the established criteria for belligerent status set out in IHL. VHSs are often an *ad hoc* collective of activists, both local and foreign in origin, and some even come from nations who are not party to the conflict. While they may arrange themselves in loose associations, like the Iraqi Peace Team and the International Action Centre¹⁸⁹, they cannot be said to be subject to a command structure which bears responsibility for its subordinates¹⁹⁰. In fact, the fluid manner in which volunteers came and went from Iraq during 2003 illustrates that there was no real command structure within any of the organising associations. Moreover, the associations, once on Iraqi soil, had little control over where their members would be positioned to carry out their shielding duties¹⁹¹. It was also apparent that these associations did not carry out, nor intend to convene disciplinary proceedings, against volunteers who chose to abandon the

¹⁸⁶ AP I article 45(1).

¹⁸⁷ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 892.

¹⁸⁸ *Ibid.*

¹⁸⁹ International Action Centre available at <http://www.iacentre.org>. (accessed 14 July 2012)

¹⁹⁰ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 892.

¹⁹¹ Abdul Razaq al-Hashimi (head of the Iraqi Organisation of Friendship, Peace, and Solidarity) was the Iraqi official charged with determining where the human shields could be located. Media reports confirm that many volunteers left Iraq when they discovered that they would be forced to shield oil refineries and other possible military targets (Mario Jimenez 'Human Shield Thinks Again' (29 March 2003) *The Ottawa Citizen*).

cause. Their civilian attire and failure to don a uniform or wear a fixed distinctive emblem, made them indistinguishable from the civilian population, confirming that they clearly did not observe the fundamental rule of distinction, which is demanded of combatants. In fact, in instances where they did make use of a distinctive sign (or t-shirt printed with a protest slogan), their intention was to 'indicate that they are members of the civilian population'¹⁹², not that they were combatants. As for the requirement that combatants are to carry their arms openly when preparing and engaging in an attack, VHSs shield sites by their presence alone, without arms, and without engaging in any offensive activities¹⁹³. Fusco argues that since 'in both the Hague and Geneva conventions, combatants, lawful and unlawful, are armed or in possession of weapons ... human shields cannot be considered as combatants, even if they are volunteers, acting in a "hostile way" against one of the parties in conflict'¹⁹⁴ for the pure reason that they are unarmed. As Bouchié de Belle points out, 'the whole point of a human shield is to play on the enemy's concern not to take the risk of killing or wounding civilians, in order to ward off military attack'¹⁹⁵.

VHSs as the levée en masse

VHSs will also not constitute a *levée en masse*¹⁹⁶ because they have not 'spontaneously taken up arms against invading troops; without having had time to form themselves into armed units'¹⁹⁷. In fact, frequently they are not citizens of the territory in which the conflict takes place, and they do not 'take up arms' and organise themselves into armed units to shield their sites. As such, under the HR IV, GC III and AP I, VHSs will not enjoy the right to participate directly in hostilities as a *levée en masse*¹⁹⁸.

VHSs and non-combatant members of the armed forces

In one important respect, however, VHSs do share something in common with regular combatants: they find themselves in the cross-hairs of military hostilities. Given that VHSs adopt a passive shielding stance, coupled with the fact that they are not authorised to participate directly in hostilities, they would seem to be akin to non-combatant members of the armed forces. However, the fact that VHSs are not members of the armed forces is of fundamental importance in assessing their status, and this fact alone denies them primary non-combatant status, and secondary POW status. Furthermore, without special qualification and authorisation by the armed

¹⁹² Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 892.

¹⁹³ *Ibid.*

¹⁹⁴ Fusco 'Legal Status of Human Shields' at 25.

¹⁹⁵ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 892.

¹⁹⁶ GC III article 4(6) affords the status of a 'lawful belligerent' to citizens who 'spontaneously take up arms' to oppose an imminent invasion upon their territory.

¹⁹⁷ HR article 2; GC III article 4A.

¹⁹⁸ Article 43(2) of the AP I states that 'members of the armed forces of a party to the conflict ... are combatants, that is to say, they have the right to participate directly in hostilities.'

forces, VHSs also fail to fall within the special protections afforded to medical and religious personnel.

The upside of not being a member of the armed forces (even the non-combatant variety), is that VHSs might possibly claim protection against the dangers inherent in armed conflicts, in a way that non-combatants may not. Without membership of the armed forces, VHSs cannot be considered a military objective. However, as we will explore further below, there is some debate around the whether VHSs, by their actions, might actually be making an 'effective contribution to military action and whose partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'¹⁹⁹. If that is determined to be the case, these 'combatant'-VHSs then become 'legitimate objects of attack'²⁰⁰.

ii. VHSs as civilians

As mentioned previously, IHL defines civilians negatively, as anyone who is 'not a member of the armed forces'. Given this definition, and since VHSs 'do not fall within any of the categories of persons referred to in article 4 A (1), (2) and (3) of the Third Geneva Convention, and in article 43 of the Additional Protocol I'²⁰¹, they will always be categorised as civilians. Moreover, for so long as there remains any doubt as to the definitive status of VHSs under IHL, a legal presumption operates to clothe them with civilian status²⁰². Importantly, if it is established that the VHS 'is a civilian, he enjoys the protection associated with civilian status, and cannot be targeted during an attack'²⁰³.

That said, IHL is founded on the belief that civilians do not participate directly in hostilities. VHSs challenge this assumption, in that they operate 'as civilian actors in, rather than as passive subjects of, armed conflict'²⁰⁴. Herein lies the conundrum: while VHSs play a passive and defensive role in hostilities, they are nevertheless contributing (sometimes in a significant way) to the manner in which the conflict plays itself out. Sometimes, perhaps even quite unintentionally, VHSs by their presence 'enhance the survivability of belligerents, their weapons systems, command and control facilities, and infrastructure', and consequently support 'a belligerent State's war effort'²⁰⁵. However, as innocuous a group of unarmed VHSs shielding a site may seem, the reality remains that their presence impacts upon the decision by opposition forces to target that particular site.

Technically, as civilians, VHSs could claim all the protections traditionally afforded civilians, provided they do not compromise their status by participating directly in hostilities. That said, exactly what activities amount to direct participation in hostilities is still highly debated. The courts decision

¹⁹⁹ AP I article 52(2).

²⁰⁰ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 891.

²⁰¹ Fusco 'Legal Status of Human Shields' at 25.

²⁰² AP I article 50(1).

²⁰³ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 891.

²⁰⁴ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 316.

²⁰⁵ Parrish 'The International Legal Status of Voluntary Human Shields' at 8.

in *PCATI v Government of Israel*²⁰⁶ is analysed by Ben-Naftali and Michaeli, who conclude that ‘the Palestinian militants fail to meet the qualifying conditions set in the Hague Regulations and in the Geneva Conventions for combatants. Consequently, they are civilians. They are not, however, entitled to the full protection granted to civilians who do not take a direct part in the hostilities’²⁰⁷. Kenneth Anderson ‘argues that VHSs have compromised their civilian status and if killed or seriously injured should not be regarded as civilian collateral damage because they have volunteered to be at the military target’²⁰⁸. Having said that, he ‘adds that this does not mean that they are combatants’²⁰⁹.

The concern that IHL will adopt a notion that there can be varying degrees of civilian status, motivated the ICRC to hold successive conferences with legal experts - aimed at clarifying what amounts to ‘direct participation in hostilities’²¹⁰. At the first expert meeting, participants ‘diverged on the issue of distinguishing between classes of civilian on both practical and jurisprudential grounds’²¹¹. I will return to explore the finding of these expert discussions later on.

VHSs as persons accompanying the armed forces

Parrish argues that ‘VHSs are neither combatants nor civilians’ and instead proposes that they are akin to ‘civilian personnel who accompany armies in the field’, because the exploitation of their ‘presumed civilian status’ means that they have ‘become involved in combat, albeit not in any traditionally recognised way’²¹². What Parrish misses, however, is that legally speaking these ‘persons accompanying the armed forces are in fact civilian’²¹³. Admittedly, like these ‘persons accompanying the armed forces,’ VHSs do not wear the uniform of the armed forces, are not armed, and are not permitted to engage in hostilities in any direct way. Unlike ‘persons accompanying the armed forces,’ VHSs do not possess a recognised identity card confirming their essentially civilian status under IHL. However, it is accepted that when the Geneva Convention drafters included the provision regarding the identity card for those accompanying the armed forces, it was

²⁰⁶ *Public Committee against Torture in Israel ('PCATI') v Government of Israel* (2006) HCJ 769/02 (Israel) available in English at <http://elyoni.court.gov.il/eng/home/index.html> (accessed 23 September 2008).

²⁰⁷ Oma Ben-Naftali and Keren Michaeli 'International Decisions: Legality of Preventive Targeted Killings - International Armed Conflict' (2007) 101 *American Journal of International Law* 459 at 460.

²⁰⁸ Kenneth Anderson 'International Humanitarian Law and Human Rights: How Relevant are they in Today's Wars?' (19 March 2003) Statement at Conference of the Swiss Foundation for World Affairs available at <http://www.sais-jhu.edu/swissfoundation/march192003event.htm> (accessed 24 May 2012).

²⁰⁹ Anderson 'International Humanitarian Law and Human Rights: How Relevant are they in Today's Wars?'.

²¹⁰ ICRC 'Direct Participation in Hostilities Under International Humanitarian Law' *First ICRC Expert Meetings* 2 June 2003 (the Hague) at 7.

²¹¹ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 317.

²¹² Parrish 'The International Legal Status of Voluntary Human Shields' at 13-14.

²¹³ Haas 'Voluntary Human Shields: Status and Protection Under International Humanitarian Law' at 199.

agreed that 'possession of one was a supplementary safeguard for the person concerned, but not an indispensable prerequisite for being granted POW status'²¹⁴. Like civilian contractors, VHSs are intent on prolonging the effectiveness of a piece of infrastructure and thereby securing some military advantage for the party whose infrastructure they shield. It is this involvement in the war effort which has raised concerns as to whether VHSs might actually be found to be participating directly in hostilities. As Parrish put it, 'even though the human shield is not actually armed, he has implicated himself in the war-making apparatus of a belligerent party'²¹⁵. It could be argued that the assistance which the VHS render to the armed forces, by shielding a particular site (provided the site has some military importance), is akin to the assistance that civilian contractors render to the military. It is this act of assistance which exposes the civilian contractor to collateral injury, whilst providing support of weapons and infrastructure. By analogy, one could make a case that VHSs might also be exposed to collateral injury, while they shield sites of military importance²¹⁶.

Unfortunately for VHSs, without the authorised accompanying status (irrespective of whether they are in possession of a designated identity card or not) VHSs will be unable to claim POW status upon capture. Moreover, belligerent parties are not permitted to authorise otherwise-protected persons (like civilians) to position themselves as human shields in an attempt to safeguard legitimate military targets from attack²¹⁷. Consequently, it would be a prosecutable offence under IHL for a belligerent party to authorise a VHS to engage in these activities.

iii. VHSs as unlawful belligerents

It might be argued that VHSs, like so-called 'unlawful belligerents', are also guilty of using their civilian appearance to convince the adversary that they enjoy protected status under IHL. However, where VHSs differ from traditional unlawful belligerents, is that the latter use this ruse to their advantage, while they intend to harm the enemy. It is their unlawful perfidious actions, which forfeit unlawful belligerents their right to claim protected POW status upon capture.

²¹⁴ Emmanuel Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 *International Review of the Red Cross* 525 at 537.

²¹⁵ Parrish 'The International Legal Status of Voluntary Human Shields' at 10.

²¹⁶ The effect of the type of site which is shielded, will be explored further below.

²¹⁷ GC IV article 28 states that 'the presence of a protected person may not be used to render certain points or areas immune from military operations.' AP I article 51(7) reiterates that 'the parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attack or to shield military operations.'

While VHSs also do not wear a uniform, the crucial distinction remains, that unlawful belligerents possess weapons and intend to use them to harm the enemy. For VHSs, the opposite is true. They do not carry weapons, and 'their only intention is the protection of certain potential targets by virtue of their unarmed presence there'²¹⁸. VHSs do nothing more than position themselves at a particular site; they do not lure belligerent powers by their appearance of protected civilian status, and then act in a perfidious way.

In the end, different academics locate VHSs in different IHL categories: According to Schmitt, Dinstein labels VHSs 'unlawful combatants' on account of what he perceives to be their direct participation in hostilities²¹⁹. Schmitt agrees to a degree, concluding that VHSs have 'a status similar to that of illegal combatant'²²⁰. Parrish conceded that VHSs are not 'traditional civilians', but concludes that they are also 'neither lawful nor unlawful belligerents'²²¹. Even at the first ICRC meeting of legal experts gathered to settle on a definition of what actions amount to direct participation in hostilities, VHSs 'were included in the 'unclear situations' that ... could not [be] categorised'²²². James Ross²²³ maintains that 'human shields, even if they were volunteers, maintained their civilian status. They were not combatants'²²⁴. This is also the view favoured by Haas²²⁵.

The controversy is further complicated by the fact that under IHL, 'breaches of the law do not strip individuals of their status, but affect the nature of the rights and protections that individuals can rely on'²²⁶. So, for example, when civilians take an active part in hostilities, they do not forfeit their inherent civilian status - they merely compromise their 'immunity from direct attack'²²⁷. In short, if we conclude that VHSs are inherently civilian in characterisation, then they cannot (by their actions) 'acquire combatant status'²²⁸. Moreover, for as long as they continue to participate directly in hostilities, while they might 'lose protection from attack', they will not lose

²¹⁸ Parrish 'The International Legal Status of Voluntary Human Shields' at 1.

²¹⁹ Michael N. Schmitt 'Ethics and Military Force: The Jus in Bello' (7 January 2002) Speech delivered at the Carnegie Council Workshop on European and North American Perspectives on Ethics and the Use of Force, Cambridge available at <http://www.cceia.org/resources/transcripts/98.html> (accessed 12 May 2012).

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² ICRC 'Summary Report: First Expert Meeting on Direct Participation in Hostilities Under International Humanitarian Law' (September 2003) available at <http://www.icrc.org/Web/eng/siteengO.nsf/htmlall/participation-hostilities-ihl-311205> (accessed 12 May 2012) at 2.

²²³ James Ross 'International Humanitarian Law and Human Rights: How Relevant are they in Today's Wars?' (19 March 2003) Statement at the Conference of the Swiss Foundation for World Affairs available at <http://www.sais-jhu.edu/swissfoundation/march192003event.htm> (accessed 24 May 2012).

²²⁴ *Ibid.*

²²⁵ Haas 'Voluntary Human Shields: Status and Protection Under International Humanitarian Law' at 200.

²²⁶ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 318.

²²⁷ Haas 'Voluntary Human Shields: Status and Protection Under International Humanitarian Law' at 200.

²²⁸ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 319; Haas 'Voluntary Human Shields: Status and Protection Under International Humanitarian Law' at 200.

their 'civilian status'²²⁹. Even if it is concluded that VHSs are participating directly in hostilities, whether or not they can be labelled unlawful *combatants*²³⁰ as Dinstein proposes, and whether in fact such a classification exists under IHL, is debatable.

Irrespective of the conclusion reached regarding the IHL status of VHSs, one thing is certain - their presence in the theatre of armed conflict 'seriously jeopardises the protection of the civilian population'²³¹. Moreover, their 'proximity to a lawful target' exposes them to the increased risk of being injured as a result of acceptable collateral damage²³².

7.7 VHSs and the notion of direct participation in hostilities

i. Introducing the concept and controversies surrounding the IHL notion of 'direct participation in hostilities'

The phrase 'direct participation in hostilities'²³³ is used in IHL to describe 'combat-related activities' that would normally be undertaken only by members of the armed forces²³⁴. The phrase emerged from the treaty-law expression given to the IHL principle that 'civilians are protected persons for so long as they do not act to compromise their protected status by engaging in 'combat related activities'²³⁵. Initially, the treaties used the phrase 'active part in the hostilities'²³⁶, but more recently the phrase has evolved into 'direct participation in hostilities', as is evidenced by the text in AP I article 51(3). As the ICRC commentary on AP I article 51(3) explains: 'a civilian who takes part in an armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he "takes part in hostilities"²³⁷. It is clear from the commentary that there are two aspects to this concept, and its legal consequences. The first is that only some specific

²²⁹ Gasser 'Protection of the Civilian Population' at 209.

²³⁰ Schmitt 'Human Shields in International Humanitarian Law' at 321.

²³¹ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 869.

²³² Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 897.

²³³ This phrase is sometimes used interchangeably with the phrases 'taking a direct part' and 'taking an active part' in hostilities (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 43). The commentary on AP I and the jurisprudence of the International Criminal Tribunal for the Rwanda (in *The Prosecutor v Jean-Paul Akayesu* ICTR (2 September 1998) ICTR-96-4-T at 629) considered these various legal formulations to be synonymous.

²³⁴ Rogers cites the following examples of actions that amount to 'direct participation in hostilities': 'attacks with roadside bombs on military patrols, sabotage of military communications installations, electronic interference with weapons systems or capturing members of the armed forces' (Rogers 'Unequal Combat and the Law of War' at 19). These activities must be distinguished from 'support activities, such as provision of supplies and services ... which do not amount to taking a direct part in hostilities' (*Ibid*).

²³⁵ Michael Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *International Law and Politics* 697 at 714.

²³⁶ GC I-IV common article 3.

²³⁷ Eric Talbot Jensen (2011) 'Direct Participation in Hostilities' in William C. Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* at 1996-2004 (ebook version).

actions²³⁸ will result in the civilian losing their immunity, and secondly that their loss of protection is limited to the 'length of time'²³⁹ during which they persist in their direct participation²⁴⁰.

The phrase 'direct participation in hostilities' (in its various forms), has been bandied about in IHL treaties and customary law for many years, yet 'despite the serious legal consequences involved, neither the Geneva Conventions nor their Additional Protocols²⁴¹ provide a definition of what activities amount to "direct participation in hostilities"²⁴². In addition, at present, 'experts are very divided on the question of whether or not acting as a VHS is tantamount to taking direct part in hostilities'²⁴³. On the one hand, the actions of a VHS 'do not square easily with what we can consider as taking a direct part in hostilities'²⁴⁴. On the other hand, if we were to conclude that their actions amounted to direct participation in hostilities, then they themselves would become legitimate military targets, and their intended 'civilian' shielding 'presence in front of a military target would therefore be entirely pointless'²⁴⁵.

Historically, there have been jurists arguing vociferously both for and against a conclusion that the actions of VHSs amount to direct participation in hostilities²⁴⁶. Those in the 'yes' camp argue that VHSs, much like anti-aircraft defence systems²⁴⁷, are 'deliberately trying to ward off an attack on a military objective', which they claim 'is indeed tantamount to taking direct part in hostilities'²⁴⁸. Proponents of this position argue that since IHL understands

²³⁸ The ICRC's commentary on AP I article 51(3) 'takes a narrow interpretation of the phrase "direct participation in hostilities", requiring an act that causes "actual harm" to the equipment or personnel of the opposing military forces' (Jensen 'Direct Participation in Hostilities' at 2006-2004).

²³⁹ The ICRC commentary on AP I article 51(3) concedes 'that this would include "preparation for combat and the return from combat", but then adds "once he ceases to participate, the civilian regains his right to the protection under this section ... and he may no longer be attacked"' (Jensen 'Direct Participation in Hostilities' at 2006-2004)

²⁴⁰ Jensen 'Direct Participation in Hostilities' at 2004-13.

²⁴¹ Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 292.

²⁴² ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

²⁴³ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 893; ICRC 'Summary Report: Second Expert Meeting on Direct Participation in Hostilities Under International Humanitarian Law' (25-26 October 2004) The Hague available at <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ih1-311205> (accessed 27 May 2012) at 6.

²⁴⁴ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 895; ICRC 'Summary Report: Second Expert Meeting on Direct Participation in Hostilities Under International Humanitarian Law' at 6.

²⁴⁵ *Ibid.*

²⁴⁶ Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 293.

²⁴⁷ According to Schmitt, VHSs are 'deliberately attempting to preserve a valid military objective for use by the enemy' and 'are no different from point air defenses' (Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' at 541).

²⁴⁸ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 893; Michael N Schmitt 'Targeting and Humanitarian Law: Current Issues' 2004 (34) *Israel Yearbook on Human Rights* at 95; Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 130; Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' at 23.

the term 'attack' to include both offensive and defensive acts²⁴⁹, and moreover that hostile acts do not 'necessarily involve the use of weapons'²⁵⁰, that VHSs 'who place themselves unarmed in front of military objectives, in order to ward off an attack, in other words to defend it, are taking a direct part in hostilities'²⁵¹. By his intentional actions, a VHS 'contributes to military action in a direct causal way; it is difficult to style his behavior as anything but direct participation'²⁵². Some even argue that VHSs are more effective in hindering an attack on a legitimate military target than if they actually took up arms against the opposing forces, and once a sufficiently large number of VHSs have surrounded an intended target, their presence can *de facto* 'absolutely immunise a target from attack'²⁵³ by what is sometimes referred to as the 'CNN effect'²⁵⁴. As Schmitt explains, 'in an era when civilian casualties become instant global news', the presence of VHSs at the site of a military objective, can 'be more effective than kinetic defences' or 'traditional defences such as anti-aircraft artillery or surface-to-air missiles'²⁵⁵.

With regard to deciding what actions amount to direct participation in hostilities, the 'liberal school'²⁵⁶ of thought proposes an approach ... which essentially encompasses all conduct that functionally corresponds to that of government armed forces, including not only the actual conduct of hostilities, but also the activities such as planning, organising, recruiting and assuming logistical functions'²⁵⁷. Those who support this liberal interpretation, argue that VHSs make targeting decisions 'politically complex, but not ... legally difficult [because in] attempting to defend an otherwise legitimate target from attack VHSs make themselves part of the defense system of the objective they seek to shield'²⁵⁸. Consequently, those in this school of thought conclude that VHSs 'who seek to exploit their presumed civilian status to enhance the survivability of belligerents, their weapons systems, command and control facilities, and infrastructure that directly supports a belligerent State's war effort, have clearly become involved in combat, albeit not in any traditionally

²⁴⁹ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 894; AP I article 49.

²⁵⁰ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 894; Sandoz, Swinarski and Zimmermann *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* at para 1943.

²⁵¹ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 894. Parrish suggests that VHSs are analogous to military-employed contractors 'due to their attempts to protect, and thus increase the effectiveness of, war-waging equipment' (Parrish 'The International Legal Status of Voluntary Human Shields' at 13).

²⁵² Schmitt 'Human Shields in International Humanitarian Law' at 318.

²⁵³ Schmitt 'Fault Lines in the Law of Attack' at 299.

²⁵⁴ Schmitt 'Human Shields in International Humanitarian Law' at 318.

²⁵⁵ Schmitt 'Targeting and Humanitarian Law: Current Issues' at 96.

²⁵⁶ See for example: Michael N Schmitt (2004) 'Direct Participation in Hostilities' and 21st Century Armed Conflict' In *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*. Fischer Horst: Berlin 505 available at <http://www.michaelschmitt.org/images/Schmittfinal.pdf> (accessed 15 May 2012); Ricou Heaton J 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' (2005) 57 *Air Force Law Review* 155.

²⁵⁷ Melzer *Targeted Killings in International Law* at 338.

²⁵⁸ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 320.

recognised way²⁵⁹.

On the other hand there are those who consider that the actions of VHSs do not amount to direct participation in hostilities²⁶⁰. They consider that 'it would be incorrect to state that people who place themselves voluntarily in front of a legitimate target are taking direct part in hostilities'²⁶¹. They draw attention to the fact that the VHS does not 'pose a direct risk to opposing forces'²⁶², they do 'not strike the enemy forces', rather 'he merely protects by a passive attitude the personnel or hardware of his own armed forces'²⁶³. At most, they concede that VHSs participate indirectly by contributing 'to a State's war capabilities'²⁶⁴. Moreover, they point to the very fact that 'States perceive the presence of VHSs as a legal obstacle to their military operations', as support for their conclusion that the actions of VHSs are not considered 'direct participation in hostilities'²⁶⁵. Instead they adopt 'more restrictive interpretations of the term "direct participation in hostilities"²⁶⁶, equating actual combat operations with direct participation in hostilities'²⁶⁷.

ii. IHL treaty-law references to the notion of direct participation in hostilities

The concept of direct participation in hostilities has a longstanding history in many treaty provisions of IHL²⁶⁸. It's most often cited in reference to the fact that 'civilians lose their protection against attack when and for such time as they take a direct part in hostilities'²⁶⁹. Early legal commentaries on this phrase explain that 'direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and

²⁵⁹ Parrish 'The International Legal Status of Voluntary Human Shields' at 8.

²⁶⁰ Including Haas ('Voluntary Human Shields: Status and Protection Under International Humanitarian Law' at 203 and 205), Human Rights Watch, and Laurent Colassis (a legal advisor to the ICRC).

²⁶¹ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 894;

²⁶² Michael N. Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' at 22.

²⁶³ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 894.

²⁶⁴ *Idem* at 895.

²⁶⁵ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 872.

²⁶⁶ See for example: Orna Ben-Naftali and Keren R Michaeli 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' (2003) *Cornell International Law Journal* at 233; Roy S Schondorf 'Are "Targeted Killings" Unlawful? The Israeli Supreme Court's Response: A Preliminary Assessment' (2007) *May Journal of International Criminal Justice* at 301.

²⁶⁷ Melzer *Targeted Killings in International Law* at 335.

²⁶⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12; GC I-IV common article 3; AP I article 51(3).

²⁶⁹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23. There were no reservations made to this provision, when states signed up to AP I, and 'at the diplomatic conference leading to the adoption of the Additional Protocols, Mexico stated that article 51 of API was so essential that it "cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis"' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23).

equipment of the enemy armed forces²⁷⁰, or 'present an immediate threat to the [adverse] party'²⁷¹. Moreover, these early legal commentaries are at pains to point out that 'direct participation' is to be distinguished from general 'war effort'²⁷². Consequently, direct participation does not extend to every act that might result eventually in a threat to the enemy²⁷³.

If we trawl through the commentaries on the IHL conventions, we find the overwhelming tendency is towards a causal enquiry²⁷⁴ when assessing what amounts to 'direct participation in hostilities'. In the final analysis, the commentary to AP I 'suggests a narrow interpretation of direct participation in hostilities'²⁷⁵, albeit without a treaty-law based definition of 'direct participation in hostilities'²⁷⁶, or a list of examples of actions which 'might amount to 'direct participation in hostilities'²⁷⁷. Haas argues that in applying this interpretation found in the commentary to AP I, 'VHSs do not take a direct part in hostilities because they do not perpetrate acts "which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces"'²⁷⁸.

iii. The customary IHL approach to direct participation in hostilities

The principle that civilians who participate in hostilities lose their immunity against attack is evidenced by several national military manuals²⁷⁹, reported

²⁷⁰ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 711.

²⁷¹ Michael Bothe, Karl Josef Partsch and Waldemar A Solf *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) Martinus Nijhoff Publishers: The Hague at 301 (para 2.4.1).

²⁷² Pilloud *et al* (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* at para 1679. As Schmitt points out in modern conflicts, almost any 'activities of the nation contribute to the conduct of hostilities, directly or indirectly' - this has traditionally been termed general war effort (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 711).

²⁷³ Civilians employed in industries which support the war effort (like those working in an armaments factory) are not considered to be engaging in a 'military activity' (Gasser 'Protection of the Civilian Population' at 211 and 233), although the ammunitions factory itself would still constitute a military objective.

²⁷⁴ Statements like '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' (ICRC 'Commentary to Additional Protocol I to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts' (1997) 16 *International Legal Materials* 1391 at para 1679). Elsewhere the commentaries describe direct participation as 'acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.' (Pilloud *et al* *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* at para 1942). Later references state that 'the notion of direct participation in hostilities implies that there is a sufficient causal relationship between the act of participation and its immediate consequences.' (*Idem* at para 4787).

²⁷⁵ Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' at 177.

²⁷⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 41.

²⁷⁷ *Idem* at 12.

²⁷⁸ Haas 'Voluntary Human Shields: Status and Protection Under International Humanitarian Law' at 205.

²⁷⁹ See for example the military manuals of: Australia; Belgium; Ecuador; El Salvador; India; the Netherlands; the United States; and Yugoslavia (Henckaerts and Doswald-Beck

State practice and judicial decisions²⁸⁰, even by States that were not party to AP I²⁸¹. According to the ICRC's investigation into the customary international law status of IHL, no 'official contrary practice was found'²⁸², and on the whole the principle that civilians lose their immunity from prosecution when they participate in hostilities, is seen as a 'valuable reaffirmation of an existing rule of customary international law'²⁸³.

At a regional level, the Inter-American Commission on Human Rights understand the term 'direct participation in hostilities' as being 'generally understood to mean "acts which, by their nature or purpose, are intended to cause actual²⁸⁴ harm to enemy personnel and materiel"²⁸⁵. Moreover, the Commission points out that activities which only indirectly serve to support the armed forces, and do not 'pose an immediate threat of actual harm to the adverse party', cannot amount to direct participation in hostilities²⁸⁶.

When one looks at State practice, it is apparent that there is no agreed interpretation as to exactly what activities amount to direct participation in hostilities²⁸⁷. As Henckaerts points out, 'despite the references made to the fact that civilian 'use of weapons or other means to commit acts of violence against human or material enemy forces is prohibited ... a clear and uniform definition of direct participation in hostilities has not been developed in State practice'²⁸⁸. Moreover, the ICRC's study into customary international law confirms that 'a precise definition of the term "direct participation in hostilities" does not exist'²⁸⁹. This leaves States having to interpret 'the notion of direct participation in hostilities ... in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the

Customary International Humanitarian Law at 22). Some states' military manuals 'give several examples of acts constituting direct participation in hostilities, such as serving as guards, intelligence agents, lookouts on behalf of military forces²⁷⁹ ... spies or couriers' (*Idem* at 22-23).

²⁸⁰ The Israeli Supreme Court concluded in *PCATI v Israel* (s37) that:

'the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take "a direct part". The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active)' (Melzer *Targeted Killings in International Law* at 337).

²⁸¹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23.

²⁸² *Ibid.*

²⁸³ This was the expressed opinion of the United Kingdom (*Ibid.*).

²⁸⁴ These acts were to be distinguished from 'civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties' (*Idem* at 23).

²⁸⁵ Inter-American Commission on Human Rights 'Third Report on Human Rights in Colombia' (cited in Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 22).

²⁸⁶ *Ibid.* Having said that, 'it is clear, however, that international law does not prohibit States from adopting legislation that makes it a punishable offence for anyone to participate in hostilities, whether directly or indirectly' (*Idem* at 23).

²⁸⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 41.

²⁸⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* 23.

²⁸⁹ *Idem* at 22.

object and purpose of IHL²⁹⁰. Admittedly 'so far, there has been no generally accepted State practice of directly attacking VHS separately from the shielded objective'²⁹¹, suggesting that for States anyway the idea that VHSs are participating directly in hostilities is not settled. This led Melzer to note that the liberal approach 'stands in contradiction not only to the prevailing opinion in the doctrine, but also to State practice, and to the express distinction drawn in convention law between "direct participation in hostilities" on the one hand, and work of a military character, activities in support of military operations and an activity linked to the military effort, on the other hand'²⁹².

As for international judicial writings, the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadić case, adopted a case-by-case approach, concluding that it was necessary to 'examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time'²⁹³. The Israeli High Court of Justice, in the *Targeted Killing case (PCATI)*, concluded that if VHSs 'do so of their own free will, out of support for'²⁹⁴ the terrorist organisation, they should be seen as persons taking direct part in the hostilities'²⁹⁵. However, as Kalshoven correctly points out regarding the task of discerning a VHS's intent, 'on the spot ... the distinction probably is imperceptible, or to all intents and purposes unverifiable'²⁹⁶.

iv. 'Direct participation in hostilities' as interpreted by the ICRC

In 2009, the ICRC published an Interpretive Guide²⁹⁷ on the notion of direct participation in hostilities, in an attempt to 'reflect the ICRC's institutional position as to how existing'²⁹⁸ IHL should be interpreted in light of the

²⁹⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 41.

²⁹¹ *Ibid.*

²⁹² Melzer *Targeted Killings in International Law* at 339.

²⁹³ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 895. ICTY *The Prosecutor v Dusko Tadić* ICTY Judgement (7 May 1997) IT-94-1-T at para 616.

²⁹⁴ Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors and Civilian Employees' at 533; Melzer *Targeted Killings in International Law* at 25. The difficulty with a definition which relies upon proof of intent is that VHSs may (as was the case in Iraq) be 'deliberately serving as a human shield without the necessary intention to "support" the combatants who are thereby shielded'; their intent was 'simply to protest the war' (Gabriel H Teninbaum 'American Volunteer Human Shields in Iraq: Free Speech or Treason?' (2004) 28 *Suffolk Transnational Law Review* 139 at 157-8).

²⁹⁵ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 893; *The Public Committee v The Government of Israel* (Judgment) High Court of Justice of Israel (14 December 2006), para 36, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (accessed 27 May 2012).

²⁹⁶ Frits Kalshoven and Liesbeth Zegveld (2011) *Constraints on the Waging of War* (4th ed) ICRC: Geneva at 103.

²⁹⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 9. It must also be stated that the Interpretive Guide is not legally binding, as 'a legally binding interpretation of IHL can only be formulated by a competent judicial organ or, collectively, by the states themselves' (*Idem* at 10).

²⁹⁸ The guide expressly stated that it was not intended to change the existing and 'binding rules of customary or treaty IHL' (*Idem* at 9).

circumstances prevailing in contemporary armed conflicts²⁹⁹. The ICRC hoped that their recommendations would have ‘substantial persuasive effect’³⁰⁰ ‘for States, non-State actors, practitioners, and academics alike’³⁰¹. Some argue that the guidance ‘may even be viewed as a secondary source of international law ... analogous to writings of the “most highly qualified publicists”’³⁰².

While there has been much academic critique³⁰³ levelled at the Interpretive Guide, Melzer (the ICRC’s appointed author of the guide) maintains that the guidance adopted a neutral, impartial and balanced approach, resisting proposals coming from both extremes, whilst ensuring ‘a clear and coherent interpretation of IHL consistent with its underlying purposes and principles’³⁰⁴. He argues that much of the critique directed at the Interpretive Guide comes from a position which favours concerns around military necessity, without being ‘balanced by equally important considerations of humanity’³⁰⁵.

Specific hostile acts which amount to direct participation in hostilities

According to the ICRC Interpretive Guide, ‘in order to qualify as direct participation in hostilities, a specific act must meet three cumulative criteria’³⁰⁶:

- ‘1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)’³⁰⁷.

²⁹⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 9.

³⁰⁰ Fenrick ‘ICRC Guidance on Direct Participation in Hostilities’ at 300.

³⁰¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 10.

³⁰² Damien van der Toorn “‘Direct Participation in Hostilities’: A Legal and Practical Evaluation of the ICRC Guidance’ (2009) available at http://works.bepress.com/damien_van_der_toorn/1 (accessed 27 May 2012) at 22.

³⁰³ For more on this issue see Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’ 697; Bill Boothby “‘And For Such Time As’: The Time Dimensions to Direct Participation in Hostilities’ (2010) 42 *International Law and Politics* 741; Kenneth Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ (2010) 42 *International Law and Politics* 641.

³⁰⁴ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 914.

³⁰⁵ *Ibid.*

³⁰⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 46.

The first criterion, which is referred to as the ‘threshold of harm’ determination requires that harm³⁰⁸:

- a) of a specifically military nature, or³⁰⁹
- b) harm (by inflicting death, injury or destruction³¹⁰) of a protected person or object,

must be reasonably expected to result from a civilian’s actions before the civilian can be said to be participating directly in hostilities³¹¹. The Interpretive Guide expressly recognises the need for the concept of direct participation in hostilities to be interpreted to include not only the obvious individual armed activities, but also the ‘unarmed activities adversely affecting the enemy’³¹². Moreover, all that is required is the ‘objective likelihood³¹³ that the act will result in such harm’, not necessarily the actual ‘materialisation of harm’³¹⁴, and it is not the ‘quantum of harm caused the enemy’ which determines whether it reaches the necessary threshold of harm criterion³¹⁵.

Already at the second round of ICRC expert meetings, which was convened to draft the Interpretive Guide, the issue of VHSs found its way into the discussions³¹⁶. Moreover, ‘whether an act of “human shielding” qualifies as direct participation in hostilities depends on exactly the same criteria as would apply to any other activity’³¹⁷. This three-pronged test provides the

³⁰⁷ *Idem* at 47.

³⁰⁸ The degree of harm includes ‘not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict’ (*Ibid*).

³⁰⁹ From a cursory examination of the criteria, it is apparent that test is framed in the alternative ‘that is, the harm contemplated may either adversely affect the enemy or harm protected persons or objects’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 713).

³¹⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47.

³¹¹ *Ibid*.

³¹² Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 882.

³¹³ In other words ‘harm which may reasonably be expected to result from an act in the prevailing circumstances’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47). As was discussed at the expert discussions, ‘wherever a civilian had a subjective “intent” to cause harm that was objectively identifiable, there would also be an objective “likelihood” that he or she would cause such harm’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 724).

³¹⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 33. Schmitt concedes that this is a sensible requirement, since it would be ‘absurd to suggest that a civilian shooting at a combatant, but missing, would not be directly participating because no harm resulted’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 724)

³¹⁵ Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 716.

³¹⁶ ICRC ‘Summary Report: Second Expert Meeting on Direct Participation in Hostilities Under International Humanitarian Law’ at 23; Lyall ‘Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States’ at 321.

³¹⁷ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 869.

‘means of determining when their actions result in the loss³¹⁸ of their otherwise-protected civilian immunity’³¹⁹.

For the purposes of exploring the role played by VHSs in armed conflicts, I will restrict my focus to the ‘military harm’ aspect of the threshold test, since it seems unlikely that VHSs will be engaging in acts (attacks³²⁰) which result in the ‘death, injury or destruction’³²¹ of a protected person or object. While it is unlikely that VHSs will be inflicting ‘death, injury, or destruction on military personnel and objects’³²², it is entirely possible that their presence at a site will have an adverse consequence ‘affecting the military operations or military capacity of a party to the conflict’³²³. Several activities which are generally accepted as satisfying the threshold of harm requirement³²⁴ might be imputed to the shielding actions of VHSs. For example, causing ‘functional damage to military objects, operations or capacity’³²⁵; sabotaging military capacity and operations; restricting or disturbing military ‘deployments, logistics and communications’³²⁶; exercising any form of control or denying the military use of ‘military objects and territory to the detriment of the adversary’³²⁷; and engaging in ‘sabotage or other unarmed activities [which], ... restrict or disturb logistics or communications of the opposition in a conflict’³²⁸. In fact, the Interpretive Guide goes so far as to state that ‘where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities’³²⁹. That said, the ICRC also concedes that ‘depending on the circumstances, it may also be questionable whether voluntary human shielding reaches the required qualitative threshold of

³¹⁸ Since the ‘loss is temporary’ Melzer suggests that it is ‘better described as a “suspension” of protection’ (Melzer *Targeted Killings in International Law* at 347).

³¹⁹ Schmitt ‘Deconstructing Direct Participation in hostilities: The Constituent Elements’ at 704.

³²⁰ The Interpretive Guide relies on AP I article 49’s definition of ‘attack’, which ‘does not specify the target, but the belligerent nexus of an attack, so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities’ (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 723). Legal precedence for this position can be found in the jurisprudence emerging from the ICTY, where it was concluded that ‘sniping attacks against civilians and bombardment of civilian villages or urban residential areas’ constitutes an ‘attack’ in the IHL sense (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 723).

³²¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47.

³²² Schmitt argues that ‘it only applies to objects which “contribute militarily” and not to civilian objects’, even if they may sometimes contribute to one belligerent’s success in the conflict (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 717).

³²³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47.

³²⁴ Most of these examples proved uncontroversial (Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 715).

³²⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47-48.

³²⁶ *Idem* at 48.

³²⁷ For example: ‘denying the adversary the military use of certain objects, equipment and territory’ (*Ibid.*).

³²⁸ *Ibid.*

³²⁹ *Idem* at 56.

harm³³⁰, since they (VHSs) ‘rarely pose a direct physical risk to combatants, and seldom physically obstruct their operations’³³¹.

The second requirement of the three criteria for a finding of ‘direct participation in hostilities’, is termed the ‘direct causation’ test, and its purpose is to ensure ‘a relatively close relationship between the act in question and the consequences affecting the ongoing hostilities’³³², in order for it to amount to direct participation in hostilities³³³. According to the ICRC’s Interpretive Guide, ‘direct causation should be understood as meaning that the harm in question must be brought about in one causal step’³³⁴. Clearly excluded are activities that only indirectly cause harm, and mere temporal or geographic proximity cannot on their own, without direct causation, amount to a finding of direct participation in hostilities³³⁵. As far as activities that satisfy the direct causation requirement and the case of VHSs go, while ‘a coordinated tactical operation that directly causes such harm’³³⁶ and ‘engaging in sabotage of military installations’³³⁷ would satisfy the direct causation test, it is generally felt that ‘voluntary human shielding’³³⁸ does not meet the direct causation test.

This conclusion is not uncontroversial. Other IHL experts argued that where (as in the case of VHSs) the ‘subjective intent’ to hamper military operations was discernable, their ‘conduct constitutes direct participation in hostilities’³³⁹. However, this interpretation was rejected for fear that it might ‘lead to VHSs easily being placed on the same footing as people taking direct part in hostilities’, which would mean, as some experts have pointed out, that they could be attacked ‘during their preparation, namely when moving towards the military objective to be shielded by their presence’³⁴⁰. Schmitt was also critical of the guide’s interpretation of direct causation necessarily being linked to a physical act causing harm, when in modern warfare ‘acts

³³⁰ *Idem* at 57.

³³¹ Schmitt ‘Human Shields in International Humanitarian Law’ at 317-318.

³³² Schmitt ‘Deconstructing Direct Participation in Hostilities: The Constituent Elements’ at 725.

³³³ *Ibid.*

³³⁴ The act must not only be causally linked to the harm, but it must also cause the harm directly. For example ‘the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 54 and 55). In short, where an ‘individual’s conduct ... merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities’ (*Idem* at 53).

³³⁵ *Ibid.*

³³⁶ *Idem* at 55.

³³⁷ Watkin ‘Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guide’ at 707.

³³⁸ Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 865

³³⁹ Lyall ‘Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States’ at 324.

³⁴⁰ Bouchié de Belle ‘Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law’ at 895. ICRC ‘Summary Report: Second Expert Meeting on Direct Participation in Hostilities Under International Humanitarian Law’ at 6

that directly enhance the military capacity or operations of a party, without resulting in direct and immediate harm to the enemy³⁴¹ may have a marked effect on the belligerent's capacity to win³⁴². In this regard, the ICRC's Interpretive Guide does caution that civilians must be careful not to disclose any tactical-targeting information which they might have gathered whilst shielding sites³⁴³. Van der Toorn opines that voluntary human shielding 'is a ruse of war, solely designed to defend a locality from attack ... (which) seeks to advance a party's military aims to the detriment of the enemy'³⁴⁴. Consequently, he concludes that 'if the attacking forces are able to determine that individuals are posing as human shields, they should be deemed to be participating in hostilities and may be targeted'³⁴⁵. When all is said and done, however, it is nevertheless true that VHSs 'are in practice considered to pose a legal - rather than a physical³⁴⁶ - obstacle to military operations', precisely because they 'are recognised as protected against direct attack'. Furthermore, while 'the presence of VHSs may eventually lead to the cancellation or suspension of an operation by the attacker, the causal relation between their conduct and the resulting harm remains indirect'³⁴⁷.

The third and final requirement for an act to amount to direct participation in hostilities, is the requirement which is termed the belligerent nexus. In short, this leg of the test requires that 'an 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'³⁴⁸. So, for example, if civilians are found causing 'harm in individual self-defence or defence of others ... [this] lacks the belligerent nexus required for a qualification as direct participation'³⁴⁹, and must be dealt with by means of the regular law-enforcement mechanisms³⁵⁰. Moreover, as Lyall correctly points out, VHSs 'who unambiguously do not support any party to a conflict, but act out of opposition to the conflict *per se*, arguably have a strong case for retaining full

³⁴¹ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 736.

³⁴² *Idem* at 725.

³⁴³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 49.

³⁴⁴ Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 34.

³⁴⁵ *Idem* at 35.

³⁴⁶ Van der Toorn argues that 'acting as a VHS in order to create a physical obstacle to the ground operations of the adversary would constitute direct participation' (*Idem* at 15).

³⁴⁷ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 57; Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' at 15.

³⁴⁸ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 872.

³⁴⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 64. 'For example, although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another' (*Idem* at 61).

³⁵⁰ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 873.

immunity from direct attack³⁵¹ - for the simple reason that their actions lack a belligerent nexus. In short, none of the examples of activities³⁵² which satisfy the belligerent nexus requirement, ring true for VHSs. That said, Schmitt is in favour of formulating the belligerent nexus test in the alternative, to read 'in support of a party to the conflict *or* to the detriment of another'³⁵³. Further, Melzer argues that if 'either element is missing' (support for a party to the conflict and the intention to act to the detriment of another party), the 'violence in question becomes independent of the armed struggle taking place between the parties to a conflict'³⁵⁴.

Probably the most common criticism levelled at the Interpretive Guide, is that there are 'deficiencies' to be found in each of the elements (of the three-pronged definition), and that these flaws are 'typically faults of under-inclusiveness'³⁵⁵. The Interpretive Guide's alleged pro-humanitarian treatment of the concept of direct participation reflects, in Schmitt's view, 'a troubling ignorance of the realities of 21st century battlefield combat'³⁵⁶.

In defence of the Interpretive Guide, Melzer maintains that the Interpretive Guide correctly excludes the actions of VHSs from the parameters of what constitutes direct participation in hostilities, because 'the decisive question must be whether the presence of human shields directly adversely affects the enemy's capability, and not merely his willingness, to attack and destroy the shielded objective'. That said, where VHSs 'attempt to give physical cover to fighting personnel or to impede the movement of opposing forces, they would, most likely, be regarded as engaging in direct

³⁵¹ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 332.

³⁵² Activities which satisfy the threshold of harm requirement include: 'acts of violence against human and material enemy forces'; causing 'physical or functional damage to military objects, operations or capacity'; sabotage of military capacity and operations; restricting or disturbing military 'deployments, logistics and communications'; exercising any form of control or denying the military use of 'military personnel, objects and territory to the detriment of the adversary; 'sabotage or other unarmed activities qualify, if they restrict or disturb logistics or communications of an opposing party to the conflict'; clearing mines placed by the opposition, 'guarding captured military personnel to prevent them being forcibly liberated'; even electronic interference, exploitation or attacks of 'military computer networks'; 'wiretapping the adversary's high command or transmitting tactical targeting information for an attack'; 'violent acts specifically directed against civilians or civilian objects, such as sniper attacks or the bombardment of civilian residential areas, satisfy this requirement'; 'building defensive positions at a military base certain to be attacked'; and 'repairing a battle-damaged runway at a forward airfield so it can be used to launch aircraft' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47-49; Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 715; Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 203; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 859).

³⁵³ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 736.

³⁵⁴ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 873.

³⁵⁵ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 739.

³⁵⁶ *Ibid.*

participation in hostilities³⁵⁷. 'On the other hand, where VHSs 'have voluntarily placed themselves around or on military objectives which might be subject to air or artillery attack, they would not be regarded as engaging in direct participation in hostilities'³⁵⁸. So, while for the most part VHSs will not be considered to be participating directly in hostilities, Melzer concedes that VHSs might be classified as direct participants where their presence 'impedes the visibility or accessibility of a legitimate target, but not where it poses an exclusively legal obstacle to an attack'³⁵⁹. For those who support this conclusion, 'simply causing the attacker moral pause or creating a legal barrier (through operation of the proportionality principle or precautions in attack requirements) is insufficient' to amount to direct participation in hostilities³⁶⁰.

*The 'temporal scope of the loss of protection "for such time as" civilians take a direct part in hostilities'*³⁶¹

Once an individual is classified as a civilian, their direct participation in the hostilities does not result in the loss of their primary civilian status³⁶². The temporary 'suspension of a civilian's immunity from attack'³⁶³, is only afforded civilians who participate in hostilities on a 'spontaneous, unorganised or sporadic basis'³⁶⁴, and only "for such time" as they participate in hostilities³⁶⁵.

Where no prior deployment is required, the loss of civilian immunity 'will be restricted to the immediate execution of the act and preparatory measures forming an integral part of that act'³⁶⁶. However, where the specific act requires 'prior geographic deployment', that preparatory deployment 'already constitutes an integral part of the act in question' and results in the loss of civilian immunity³⁶⁷. Dinstein maintains that 'since not much preparation is required for either "deployment" or "disengagement" of VHSs - they can only be attacked "for such time" as they are physically in or near the lawful target'³⁶⁸, and I would add for such time as they are actually directly participating in hostilities. As far as VHSs are concerned, were their actions to satisfy the three-pronged test for a particular hostile act which amounts to direct participation in hostilities, their loss of civilian immunity from attack would only persist for such time as they persisted in acts which amount to direct participation in hostilities.

³⁵⁷ Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 293.

³⁵⁸ *Ibid.*

³⁵⁹ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 869.

³⁶⁰ Schmitt 'Human Shields in International Humanitarian Law' at 317.

³⁶¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71.

³⁶² *Idem* at 70.

³⁶³ *Ibid.*

³⁶⁴ *Idem* at 71.

³⁶⁵ *Idem* at 70.

³⁶⁶ *Idem* at 68.

³⁶⁷ *Idem* at 67.

³⁶⁸ Dinstein 'The Conduct of Hostilities Under the Law of International Armed Conflict' at 154.

v. Conclusions regarding VHSs and direct participation in hostilities

What we can glean from the ICRC's Interpretive Guide, as well as IHL treaty-law commentaries and customary international law, is that it is impossible to conclude in 'absolute terms that a VHS is, or is not taking a direct part in hostilities'³⁶⁹. As Bouchié de Belle correctly points out, 'this can only be ascertained by an appraisal *in concreto* of the way in which the human shield indeed tries to protect the military objective in question'³⁷⁰. So, for example, to her mind 'a small number of human shields standing near a military objective to protect it from an air strike do not constitute a real obstacle for the attacking party in the material sense of the word'³⁷¹. For the most part, 'civilians acting as human shields, whether voluntary or not, contribute indirectly to the war capability of the State ... because they are not directly engaged in hostilities against an adversary, they retain their civilian immunity from attack'³⁷².

What we can conclude, however, is that although VHSs may give their attackers pause to consider the media impact of a decision to target a site shielded by civilians, it does not constitute direct participation on the part of VHSs³⁷³. Moreover, because of the fundamental importance of the principle of distinction, and 'in order to avoid the erroneous or arbitrary targeting of civilians', there is a presumption in favour of protective civilian status³⁷⁴ in all assessments as to whether an individual has directly participated in hostilities. In other words, 'in case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not'³⁷⁵ amount to direct participation in hostilities. Consequently, any interpretation which 'increases the risks to the innocent, uninvolved civilian'³⁷⁶, must conflict with a reading of the 'terms of the treaty in their context and in the light of its object and purpose'³⁷⁷, and with the presumption of civilian status. In light of this, it is probably safe to conclude that in most instances the action of VHSs will not amount to direct participation in hostilities, and that consequently they retain 'the full protection due to their civilian status'³⁷⁸.

³⁶⁹ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 896.

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

³⁷² Haas 'Voluntary Human Shields: Status and Protection Under International Humanitarian Law' at 203.

³⁷³ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 896.

³⁷⁴ 'In case of doubt, the person must be presumed to be protected against direct attack' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law* at 74 and 76).

³⁷⁵ *Idem* at 75.

³⁷⁶ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 886.

³⁷⁷ *Ibid.*

³⁷⁸ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 896.

7.8 The nature of the shielded sites (civilian objects, single-use military objects, and dual-use installations)

i. Civilian and other protected sites

It is uncontroversial that VHSs located at purely civilian sites³⁷⁹, or otherwise protected sites like schools, churches and hospitals, could never constitute a direct, immediate military threat to the belligerent party. This is endorsed by AP I articles 51 (1) and (2)³⁸⁰. Moreover, AP I article 52(3) establishes a presumption 'in cases of doubt whether an object is normally dedicated to civilian purposes, such as a place of worship, a house or another dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used'³⁸¹. Consequently, VHSs at civilian sites will never constitute a legitimate military target, and will retain their essentially civilian status, together with its attendant immunity from attack - because they do not participate directly in hostilities. In practice, many VHSs position themselves around these specific sites, precisely because they did 'not trust the opposing party to refrain from attacking these civilian targets, so they lived in them during the conduct of hostilities in an attempt to dissuade attacks'³⁸².

ii. Military objectives

While VHSs positioned at civilian sites might be safe, the same will not be true of VHSs who position themselves at purely military objectives, like an armoury or military command centre. Moreover, it is entirely possible for belligerents to occupy an otherwise civilian structure and use it for military purposes, which will have the effect of rendering the site a military objective, for so long as their occupation and use continues³⁸³. Some jurists would take the uncompromising position that 'VHSs who, through their presence at a legitimate military target, aid the war effort and can be said to be participating directly in hostilities ... [which] effectively revokes their civilian protected status and exempts military commanders from considering his welfare further when calculating the collateral damage likely to result from an attack'³⁸⁴. On

³⁷⁹ AP I article 52(1) states that 'civilian objects are all objects which are not military objectives as defined in paragraph 2'. Paragraph 2 then goes on to define military objectives as 'objects which make a contribution to military action'.

³⁸⁰ AP I article 51:

1. 'The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances'.
2. 'The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population are prohibited'.

³⁸¹ Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* at 98.

³⁸² Parrish 'The International Legal Status of Voluntary Human Shields' at 13.

³⁸³ Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* at 98.

³⁸⁴ *Ibid.* Dunlap comes to the same conclusion when writing about Serb citizens acting as VHSs on bridges in Belgrade during the Balkan war. 'In attempting to defend an otherwise legitimate target from attack - albeit by creating a psychological conundrum for NATO - the

the other hand, others maintain that even when VHSs are located at purely military objectives, commanding officers are still obliged to factor their presence into their calculations of collateral damage³⁸⁵. The latter view is reminiscent of the approach taken towards workers in munitions factories, and in fact the situation of the VHSs has often been likened to such workers³⁸⁶, who 'contribute indirectly to the war capability of a State'³⁸⁷. While workers in munitions factories may not be targeted personally - because they retained their civilian immunity from attack - the military objectives where they work remain open to attack. This of course remains 'subject to the attacking party's obligations under IHL to assess the potential harm to civilians against the direct and concrete military advantage of any given attack, and to refrain from attack if civilian harm would appear excessive'³⁸⁸. Practice seems to suggest that war planners adhered to this latter view, rather than taking the hardline approach that VHSs not be afforded any consideration when making targeting decisions. In fact, commanding officers considered themselves under a duty to 'apply basic targeting principles to ensure a minimal loss of civilian life' when faced with VHSs in Iraq³⁸⁹. However, the fact remains that even at purely military sites, VHSs will still be civilians, albeit participating in hostilities, and thereby undermining their protected status.

iii. Dual-use installations

I suspect the greatest area for confusion regarding the targeting of VHSs, lies at neither civilian sites or purely military objectives, but rather concerns instances when VHSs position themselves at dual-use³⁹⁰ installations. VHSs

bridge occupiers lost their noncombatant immunity. In essence, they made themselves part of the bridges' defense system. As such, they were subject to attack to the same degree as any other combatant so long as they remained on the spans.' (Charles J Dunlap *Law and Military Interventions: Preserving humanitarian values in 21st Century conflicts* (29 November 2001) Prepared for the Humanitarian Challenges in Military Intervention Conference (Carr Center for Human Rights Policy, Kennedy School of Government: Harvard University) available at <http://www.duke.edu/~pfeaver/dunlap.pdf>. (accessed 27 May 2012)).

³⁸⁵ Human Rights Watch 'International Humanitarian Law Issues in a Potential War with Iraq' (20 February 2003) available at <http://www.hrw.org/background/arms/iraq0202003.htm>. (accessed 27 May 2012).

³⁸⁶ Stefan Oeter (1995) 'Methods and Means of Combat' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 163; Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 897; Human Rights Watch 'International Humanitarian Law Issues in a Potential War in Iraq'. Dinstein for one 'does not appear to share this opinion: 'these civilians enjoy no immunity while at work' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 124-5).

³⁸⁷ Human Rights Watch 'International Humanitarian Law Issues in a Potential War in Iraq'.

³⁸⁸ *Ibid.*

³⁸⁹ Daniel Schoenekase 'Targeting Decisions Regarding Human Shields' (2004) September-October *Military Review* at 29.

³⁹⁰ A prime example of the targeting of dual-use sites was illustrated in Operation Desert Storm, when the Iraqi electrical-power facilities were hit: 'while crippling Iraq's military command and control capability, destruction of these facilities shut down water-purification and sewage-treatment plants. As a result, epidemics of gastroenteritis, cholera, and typhoid broke out, leading to perhaps as many as 100,000 civilian deaths, and a doubling of the infant mortality rate' (Kenneth Rizer 'Bombing Dual-Use Targets: Legal, Ethical, and Doctrinal Perspectives' (1 May 2001) *Air & Space Power Chronicles* available at www.airpower.maxwell.af.mil/airchronicles/cc/Rizer.html. (accessed 27 May 2012)).

located at communications networks, power sources, oil refineries, transportation infrastructure and the like - which serve both the civilian population and the armed forces - pose the real problem cases. It seems intuitively right that VHSs located at dual-use sites, be afforded greater protection than those located at single-use military installations. Article 52 of AP I states that, 'in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house, or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.' There is a clear presumption in favour of protected status for sites, which may be used for military gain. I would argue that this presumption would transfer to VHSs as well, assuming them not to be participating directly in hostilities, until such time as the status of the installation can be deemed to be definitely military in nature.

In conclusion, it would appear that VHSs at any location retain their civilian status. That said, if their actions amount to direct participation in hostilities, they would lose their civilian immunity from attack for so long as they continue to participate in hostilities. VHSs at single-use military sites are exposed to greater risk of collateral damage than those positioned at purely civilian sites. The risk to VHSs located at dual-use sites will be somewhere inbetween - given that the presumption in favour of protected status for dual-use sites affords the site civilian object status, until such time as the status of the installation can be deemed to be definitely military in nature. VHSs, provided they refrain from direct participation in hostilities, are not themselves legitimate military targets, and there is no legitimate military advantage to be gained by targeting VHSs in their personal capacity, independently of the site which they shield³⁹¹. That said, the reality remains that their mere presence at a legitimate military target, has increased their vulnerability to attack.

7.9 Targeting decisions regarding VHSs

Any targeting decision in the theatre of armed conflict, has to take into the consideration the IHL principles of military necessity, distinction, humanity and proportionality. The principle of military necessity would demand that attacks are only directed at legitimate military targets³⁹². AP I article 52(2)

³⁹¹ Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 293.

³⁹² 'Legitimate military targets include: armed forces and persons who take part in the fighting; positions or installations occupied by armed forces as well as objectives that are directly contested in battle; military installations such as barracks, war ministries, munitions or fuel dumps, storage yards for vehicles, airfields, rocket launch ramps, and naval bases. Legitimate infrastructure targets include: lines and means of communication, command, and control - railway lines, roads, bridges, tunnels, and canals - that are of fundamental military importance. Legitimate communications targets include: broadcasting and television stations, and telephone and telegraph exchanges of fundamental military importance. Legitimate military-industrial targets include: factories producing arms, transport, and communications equipment for the military; metallurgical, engineering and chemicals industries whose nature or purpose is essentially military; and the storage and transport installations serving such industries. Legitimate military research targets include: experimental research centres for the development of weapons and war matériel. Legitimate energy targets include: installations providing energy mainly for national defence, such as coal and other fuels, and plants producing gas or electricity mainly for military consumption. Attacks on nuclear power stations and hydroelectric dams are generally, but not always, prohibited by the laws of war.'

defines legitimate military targets as ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage’. The principle of distinction, as codified in AP I articles 51 (4) and (5)³⁹³, demands that commanding officers distinguish between civilians and combatants, and then direct their attacks only at specific military targets. Any attack which may have an incidental effect on civilians, must satisfy the further criterion of proportionality. The principle of proportionality, spelt out in AP I articles 57(2)(a)(iii) and (b)³⁹⁴, requires commanding officers to weigh up the ‘direct military advantage’ they anticipate from an attack, against the incidental injury or damage caused to civilians. Where the loss caused to civilians would be ‘excessive in relation to the concrete and direct military advantage anticipated’, AP I directs that the attack should be halted (even if the attack has already been initiated). Lastly, the principle of humanity demands that the ‘means and methods of warfare’³⁹⁵ used are calculated to cause the minimum unnecessary suffering and to ‘minimise civilian losses’³⁹⁶. The interconnected nature of these four principles, is evident in the justifications demanded of commanding officers who face criminal prosecution for war crimes for their targeting decision. Commanding officers must show not only that the attack ‘tended toward the military defeat of the enemy’, but also that the attack could be carried out without causing ‘harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated’ (the principles of distinction and proportionality) and without violating ‘other rules of IHL’ (the principle of humanity)³⁹⁷.

I turn now to explore the issue of what effect VHSs have on targeting decisions in the theatre of armed conflict. I begin from the starting point that ‘civilians shielding a military objective exclusively with their own legal entitlement to protection against direct attack do not thereby render attacks

(David Rieff ‘Legitimate Military Targets’ (1999) *Crimes of War: What the Public Should Know* available at <http://www.crimesofwar.org>. (accessed 27 May 2012).

³⁹³ AP I article 51:

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 - (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat, which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat, the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
 - (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
 - (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’.

³⁹⁴ A similar formulation of this rule, as it pertains to the protection of the civilian population, can be found in AP I article 51(5)(b).

³⁹⁵ AP I article 57.

³⁹⁶ *Ibid.*

³⁹⁷ Rieff ‘Military Necessity’.

against the military objective illegal under IHL³⁹⁸. Their presence does, however, impact on the considerations which inform a decision to attack a target.

VHSs who are found to be 'directly participating in hostilities'

As is the case with any civilian, a VHS who is determined to be participating directly in hostilities, will lose their protection against the effects of hostilities, and can in fact be legitimately targeted (without concerns for issues of proportionality³⁹⁹). In short, this effectively relieves the 'attacking commanders of the obligation to apply the principle of distinction'⁴⁰⁰, for so long as they continue to play an active role in the hostilities. Accordingly, 'voluntary shields ... are excluded in the estimation of incidental injury when assessing proportionality'⁴⁰¹. That said, harming VHSs, 'even if the result is death, is permitted, on the condition that there is no other less harmful means' of achieving the military objective⁴⁰². VHSs, like any civilians who take an active part in hostilities, open themselves to direct targeting from the opposition acting in self-defence, while they continue to actively participate in hostilities⁴⁰³. Having said that, VHSs may be found to be participating in hostilities by their shielding activities. As Schmitt points out:

'their military contribution only emerges at the point that they are shielding the military objective; thus, they enjoy no military significance distinct from the objective itself. This being so, there is no military necessity for attacking them when they are not engaged in shielding. Furthermore, even when they are shielding a target, there is no military rationale for attacking them directly instead of, or in addition to, the actual military objective. It is the target that they shield which can be targeted'⁴⁰⁴.

Schmitt's argument is endorsed by the ICRC, who also have concluded that 'the fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not, without more, entail the loss of their protection and their

³⁹⁸ Melzer *Targeted Killings in International Law* at 346; Gasser 'Protection of the Civilian Population' at 247.

³⁹⁹ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constituent Elements' at 703; Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' at 541.

⁴⁰⁰ *Public Committee against Torture in Israel* ('PCATI') v *Government of Israel* at 60.

⁴⁰¹ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 901.

⁴⁰² *Public Committee against Torture in Israel* ('PCATI') v *Government of Israel* at 60.

⁴⁰³ AP I article 51(8).

⁴⁰⁴ Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' at 522. On this point, Schmitt correctly argues that 'children who act as voluntary shields would be an exception to this rule, for as a general matter of law they lack the mental capacity to form the intent necessary to voluntarily shield military objectives' (Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' at 522). Without the necessary voluntary intent, children must be treated as one would treat an individual compelled to act as human shield: retaining their protected civilian status and demanding a proportionality analysis.

liability to direct attack independently of the shielded objective⁴⁰⁵. Others like Al-Duaij argue that 'those who shield legal targets automatically lose immunity and turn into targeted personnel because they are considered direct participants in the hostilities'⁴⁰⁶.

VHSs deemed not to be participating directly in hostilities

There is only one way that a civilian can 'forfeit their protected status', and that is by 'direct participation in hostilities'⁴⁰⁷. Until civilians compromise their immunity from attack through their direct participation in hostilities, AP I articles 51(5)(b) and 57(2)(a)(iii) place the onus on attacking commanders to determine whether or not 'incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof' would be 'excessive in relation to the concrete and direct military advantage anticipated'.⁴⁰⁸ That said, it is a simple reality of war that one's presence (even as a civilian with full immunity) near military objectives will expose one to increased risk of 'suffering incidental death or injury during attacks against those objectives'⁴⁰⁸, and the VHS is no exception. Melzer argues that 'as long as these VHSs do not actually defend military objectives or attempt to physically hamper military operations ... they do not lose immunity from direct attack'⁴⁰⁹. However, as Haas correctly points out, 'they may lose *de facto* protection by staying too close to a military target ... like journalists embedded in military units'⁴¹⁰. Consequently, working from the position that VHSs were to be categorised as civilians, and were not found to be participating directly in hostilities, then harm to a VHS would only be condoned where a 'concrete and direct military advantage'⁴¹¹ would result from an attack, and the harm caused to the VHS is an 'unavoidable and proportionate side effect of a lawful attack upon a military objective'⁴¹². As civilians, albeit inconveniencing the opposition, VHSs 'retain their immunity from direct attack and may not be entirely discounted in applying the proportionality principle'⁴¹³. Moreover, as Schmitt concedes 'there is no difference in evaluating excessiveness as between voluntary shields and incidentally present civilians'⁴¹⁴. In fact, evidence from the Iraq and Serbian theatres of conflict endorse the conclusion that 'operational decision-makers factored VHSs into proportionality evaluations in both Serbia and Iraq'⁴¹⁵, as did their presence feature as a 'key factor in CENTCOM's

⁴⁰⁵ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 57.

⁴⁰⁶ Nada Al-Duaij 'The Volunteer Human Shields in International Humanitarian Law' at 126.

⁴⁰⁷ Schmitt 'Fault Lines in the Law of Attack' at 299.

⁴⁰⁸ The Interpretive Guide 'accepted that such civilians would be incurring an increased risk of incidental death or injury because of their voluntary presence near military objectives' (ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 57).

⁴⁰⁹ Melzer *Targeted Killings in International Law* at 346.

⁴¹⁰ Haas 'Voluntary Human Shields: Status and Protection Under International Humanitarian Law' at 210.

⁴¹¹ Gasser 'Protection of the Civilian Population' at 214.

⁴¹² *Ibid.*

⁴¹³ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 902.

⁴¹⁴ Schmitt 'Human Shields in International Humanitarian Law' at 325.

⁴¹⁵ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International

targeting process⁴¹⁶.

That said, some academics like Dinstein, maintain that VHSs 'ought to be excluded in the estimation of incidental injury when assessing proportionality', since he claims 'it is impossible to hold the attacking force liable for the fact that civilians have deliberately decided to put their lives at risk'⁴¹⁷. Others don't push the case so far, and instead argue for a discounted application of the proportionality calculation (i.e. one that is easier to satisfy) in instances where human shields are in play. VHSs are after all a fundamentally different category of civilian than those envisaged in the IHL conventions. They are clearly not wholly innocent civilians going about their daily routine, caught in the crossfire. They have, after all, deliberately chosen to place themselves in the line of fire, in an attempt to have an impact on the outcome of hostilities in a manner which is 'deliberately imprudent'⁴¹⁸. Dinstein argues that this discounting of civilian harm is even applicable where belligerents have intentionally made use of human shields - in other words where the shielding is not wholly voluntary. He says, rather pragmatically, that 'the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that ... civilian casualties will be higher than usual'⁴¹⁹. Dinstein maintains that this relaxation of the proportionality analysis is actually borne out in practice: in the words of Doswald-Beck 'the Israeli bombardment of Beirut ... resulted in high civilian casualties, but not necessarily excessively so, given the fact that military targets were placed amongst the civilian population'⁴²⁰.

However, if we are to accept the notion that VHSs are entitled to a lesser degree of protection against attack, then we place an added burden on military commanders to 'discern whether the individuals had the requisite intent to act as a shield'⁴²¹, and secondly 'whether they are acting voluntarily'⁴²², while all the time remembering that 'should doubt arise as to whether shielding is taking place, the norm would mandate a presumption in favor of non-shielding'⁴²³. This seems to be a burdensome obligation, to expect a military commander to be able to satisfy in the heat of hostilities. Before imposing these extra demands, we need to be sure that they are an accurate reflection of IHL, and I am not sure that this is in fact the case.

Humanitarian Law Obligations of States' at 329; Kathleen Knox 'Iraq: "Human Shields" Hunker Down In Baghdad' (28 February 2003) *Radio Free Europe/Radio Liberty* (Czech Republic) available at <http://www.rferl.org/content/article/1102379.html> (accessed 27 May 2012).

⁴¹⁶ Jefferson D Reynolds 'Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a moral High Ground' (2005) *Air Force Law Review* 1 at 54.

⁴¹⁷ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 153.

⁴¹⁸ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 902

⁴¹⁹ *Idem* at 897.

⁴²⁰ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 155; Louise Doswald-Beck 'The Civilian in the Crossfire' (1987) 24 *Journal of Peace Review* 251 at 257.

⁴²¹ Schmitt 'Human Shields in International Humanitarian Law' at 335.

⁴²² *Ibid.*

⁴²³ *Idem* at 334.

Those opposed to any discounted application of the proportionality test - like the ICRC⁴²⁴ - point to GC IV article 8, which states 'protected persons may never renounce ... the rights secured to them by that Convention', suggesting a degree of 'alienability of rights' in IHL⁴²⁵. Mostly, they argue that 'although a distinction based on willingness could have some relevance in a criminal case, it has no place in the conduct of hostilities as it cannot be applied on the ground'⁴²⁶. For those rejecting a discounted proportionality calculation, there is only one 'basis for excluding civilians from a proportionality analysis', and that is by actions which amount to 'direct participation' in hostilities⁴²⁷. For so long as their actions do not amount to direct participation in hostilities, VHSs enjoy full immunity from attack, and the full benefit of the proportionality calculation. In the words of Schmitt 'if all shields deserve full civilian treatment ... everyone counts and counts equally'⁴²⁸. Melzer maintains that in 'the proportionality assessment, the relevant standard of excessiveness' is flexible enough to take account of the fact that these civilians exposed themselves voluntarily to the risk of incidental injury or death'⁴²⁹. Oeter also notes that it is not clear in IHL whether 'collateral damage to civilians working in military objectives ... is of lesser weight in striking a balance with the military advantage that potential damage to "innocent" civilians' might achieve⁴³⁰. What this means, is that 'by operation of the rule of proportionality, a sufficient number of VHSs at a military objective, if not treated as direct participants, could absolutely immunise the target as a matter of law because their death or injury would be excessive in relation to the military advantage likely to result from the attack'⁴³¹.

Even when the proportionality requirements are fulfilled, belligerents are still obliged to observe the IHL precautions⁴³² in attack, and to ensure that losses to VHSs are kept to a minimum, and that VHSs are moved from the vicinity of the military objective⁴³³. Consequently, an attacker is expected to minimise the harm they cause 'by employing alternative means or methods of warfare'⁴³⁴.

⁴²⁴ ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 57.

⁴²⁵ Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 902.

⁴²⁶ *Idem* at 903.

⁴²⁷ *Ibid.*

⁴²⁸ Schmitt 'Human Shields in International Humanitarian Law' at 334.

⁴²⁹ Melzer *Targeted Killing in International Law* at 346.

⁴³⁰ Oeter 'Methods and Means of Conflict' at 187.

⁴³¹ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 732.

⁴³² Parties to a conflict are obliged to do 'everything feasible' to: 'verify that the objectives to be attacked are neither civilians nor civilian objects'; 'remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives'; 'avoid locating military objectives within or near densely populated areas'; 'take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations'; and 'avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 51).

⁴³³ AP I articles 57 and 58(a).

⁴³⁴ Schmitt 'Human Shields in International Humanitarian Law' at 325.

7.10 IHL obligations upon the captors of VHS: prosecution and detention

As IHL stands at the moment, VHSs will not enjoy primary combatant status and the consequent privilege of secondary POW status, because they are not members of the armed forces. Consequently, according to the IHL presumption of civilian status, VHSs will be categorised as civilians. It is worth noting that 'at the first ICRC meeting, however, some participants argued that civilians directly participating in hostilities 'constituted a *de facto* "intermediate" category' unprotected by either GC III or GC IV'⁴³⁵. This conclusion is not supported by IHL, which has always maintained that every individual in the theatre of war possesses a recognised primary status as either a combatant or a civilian⁴³⁶. There is no middle ground between these two statuses: if a detained combatant were denied POW status, they would automatically 'become protected persons under GC IV'⁴³⁷. As Dinstein writes 'you are either a combatant or a civilian, you cannot be both'⁴³⁸, and I would add that you cannot be neither. Assuming that VHSs are civilians, and are aliens in the territory of conflict, they fall within a narrower category of protected persons, and benefit from more 'detailed rules regarding their treatment in the hands of the enemy'⁴³⁹. Alien civilians - a rather common occurrence when considering VHSs - enjoy diplomatic protection because of diplomatic relations between their nation State and the State on whose territory they find themselves⁴⁴⁰. Over and above that, IHL protects aliens against military operations, by virtue of their civilian status, and they remain protected by GC IV articles 13-26 and enjoy the additional rights as set out in GC IV article 38⁴⁴¹.

⁴³⁵ ICRC 'First Expert Meeting on the Notion of Direct Participation in Hostilities' (2 June 2003) The Hague available at <http://www.icrc.org/eng/assets/files/other/2003-03-report-dph-2003-icrc.pdf> (accessed 27 May 2012) at 8.

⁴³⁶ Ipsen 'Combatants and Non-combatants' at 65.

⁴³⁷ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 235. 'If an individual is not entitled to the protections GC III as a POW (or of GC I or II) he or she necessarily falls within the ambit of GC IV, provided that its article 4 requirements are satisfied' (Garth Abraham "'Essential Liberty" versus "Temporary Safety": The Guantanamo Bay Internees and Combatant Status' (2004) 121 *South African Law Journal* 829 at 847).

⁴³⁸ Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 233; *Prosecutor v Delalic et al (Celebici case)* at para 271.

⁴³⁹ Lindsey Cameron 'International Humanitarian Law and the Regulation of Private Military Companies' (February 2007) Plenary Lecture given at Conference on Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide available at <http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Cameron.pdf> (accessed 27 May 2012) at 5.

⁴⁴⁰ Gasser 'Protection of the Civilian Population' at 281.

⁴⁴¹ 'With the exception of special measures authorised by the present convention, in particular by articles 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them:

1. They shall be enabled to receive the individual or collective relief that may be sent to them.
2. They shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.

While they might enjoy rights under IHL, VHSs are also obliged to respect IHL. Therefore, VHSs who are found to be playing more than a shielding role, and actively participating in hostilities, will retain their civilian status, although they are exposed to potential prosecution upon capture⁴⁴². Since VHSs are not classified as combatants, once captured, they 'will not be considered POWs⁴⁴³ and therefore would not enjoy immunity from legal proceedings under domestic law for acts committed during hostilities'⁴⁴⁴. This was the fate of 'US citizens who acted as VHSs in Iraq in 2003'⁴⁴⁵; there was even serious consideration 'given to the question of whether they might be charged with treason'⁴⁴⁶ under the domestic laws of some States. If tried for these activities, VHSs must be afforded a 'regularly constituted court respecting the generally recognised principles of regular judicial procedure'⁴⁴⁷, extended to those who are captured during armed conflict, whether or not they enjoy secondary POW status. This right is afforded even the unlawful combatant and the spy, and there is no reason why it should be denied the VHS⁴⁴⁸. While they may face domestic prosecution, they will not likely face prosecution before the ICC for their actions, because voluntary human shielding (or to put it another way 'misusing their status as a civilian') is not in itself a war crime in terms of article 8(2)(b)(xxiii)⁴⁴⁹ of the Rome Statute.

Whether they are prosecuted or not, there are a variety of obligations which rest upon captors when they have civilians in detention. The detaining power is obliged to report the identity of captured civilians to their State of

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3. They shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith.
 4. If they reside in an area particularly exposed to the dangers of war, they shall be authorised to move from that area to the same extent as the nationals of the State concerned.
 5. Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.'

⁴⁴² In terms of GC IV article 38, aliens accused of violations of the laws of war, or engaging in hostilities without the authorisation, can be criminally prosecuted, provided that all the international human rights conventions applicable to the prosecuting state are observed in respect of the proceedings brought against them (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12).

⁴⁴³ Although Parrish has argued that 'captured, authorised, VHSs should be treated as POWs' (Parrish 'The International Legal Status of Voluntary Human Shields' at 14).

⁴⁴⁴ AP I article 43(2).

⁴⁴⁵ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 324; Alfred J Sciarrino and Kenneth L Deutsch, 'Conscientious Objection to War: Heroes to Human Shields' (2003-04) *18 Brigham Young University Journal of Public Law* at 59.

⁴⁴⁶ Teninbaum 'American Volunteer Human Shields in Iraq: Free Speech or Treason?' at 139; Sciarrino and Deutsch 'Conscientious Objection to War: Heroes to Human Shields' at 105.

⁴⁴⁷ AP I article 75(4).

⁴⁴⁸ GC IV article 5(3) and AP I article 75, Gasser 'Protection of the Civilian Population' at 211.

⁴⁴⁹ The 'Elements of Crimes' which flesh out the specific legal requirements for the crimes falling within the jurisdiction of the ICC, require the perpetrator of the crime of human shielding to have 'moved or taken advantage of the presence of protected persons to shield a military objective', which does not occur in the case of VHSs (ICC 'Elements of Crimes' (2000) U.N. Doc. PCNICC/2000/1/Add.2 available at <http://www.icc-cpi.in> (accessed 27 May 2012)).

origin within two weeks⁴⁵⁰. Civilians⁴⁵¹ may only be interned in exceptional cases, where it is necessary for reasons of security⁴⁵² or as a penalty imposed on civilians⁴⁵³. Moreover, 'decisions regarding such internment shall be made according to regular procedure and subject to regular review'⁴⁵⁴, and the treatment of internees is regulated by GC IV article 79-135⁴⁵⁵, which in essence corresponds to the treatment of POWs. Whatever the final analysis might reveal, however, IHL demands that VHSs who are captured are to be treated humanely in accordance with basic fundamental guarantees of humane treatment enshrined in AP I article 75⁴⁵⁶, GC IV article 27 and common article 3 of the four Geneva Conventions⁴⁵⁷.

7.11 Conclusion

The fast pace at which the theatre of war is changing, is placing greater demands on commanding officers to make targeting decisions in instances where IHL is unable to provide a clear directive. The recent emergence of the VHS as a new actor in international armed conflicts, has highlighted another lacunae in the laws of war⁴⁵⁸, which to date have only considered the plight of the involuntary human shield.

A cursory investigation into the IHL status of VHSs, reveals that they do not fulfill even the most basic requirements⁴⁵⁹ which IHL demands of combatants, and consequently will not enjoy primary combatant status, and therefore cannot be classified even with the non-combatant members of the armed forces. The current body of IHL (expressed in 'opinion, limited judicial consideration and even more limited State practice') does little but presume that VHS retain their civilian status, until a competent tribunal dictates otherwise⁴⁶⁰. As Lyall correctly points out, 'under the current definitions,

⁴⁵⁰ GC IV article 136(2).

⁴⁵¹ In the case of a combatant who falls into enemy hands, the enemy can detain him for the duration of the conflict, without the need for any reason other than his combatant status. (Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 891).

⁴⁵² GC IV articles 41-43 and 78(1), provided the security concerns cannot be addressed by less severe measures; Gasser 'Protection of the Civilian Population' at 288; Bouchié de Belle 'Chained to Cannons or Wearing Targets on their T-shirts: Human Shields in International Humanitarian Law' at 891.

⁴⁵³ GC IV article 68.

⁴⁵⁴ GC IV articles 43 and 78(2).

⁴⁵⁵ For a comprehensive discussion of these duties, see Gasser 'Protection of the Civilian Population' at 288-292.

⁴⁵⁶ In essence, these provisions protect those in detention from 'torture, corporal punishment, [and] outrages upon personal dignity' (*Ibid*).

⁴⁵⁷ ICRC 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (26 to 30 November 2007) Official working document of the 30th International Conference of the Red Cross and Red Crescent available at <http://www.icrc.org/eng/resources/documents/misc/ihl-30-international-conference-101207.htm> (accessed 27 May 2012) at 727.

⁴⁵⁸ Schmitt 'Human Shields in International Humanitarian Law' at 338.

⁴⁵⁹ They are not members of the armed forces, subject to a command structure responsible for internal discipline; they do not distinguish themselves from the civilian population by way of a uniform or emblem; they do not carry their weapons openly; and they cannot be classified as a *levée en masse*.

⁴⁶⁰ Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' at 332.

VHSs cannot be said to make the transition from civilian to combatant⁴⁶¹.

While affording then civilian status goes some way to assisting military commanders in their targeting decision, the real crux of the debate revolves around whether it can be said that VHSs are participating directly in hostilities. This notion of direct participation is informed largely by the sites which the VHS are found shielding. VHSs at civilian locations cannot be said to be participating directly in hostilities, since the site they are shielding can never amount to a military objective. The presumption in favour of protected status for dual-use sites, should afford VHSs - located at such sites - immunity against a legitimate attack, until the status of the installation can be deemed to be definitely military in nature. VHSs located at single-use military objectives are exposing themselves to the greatest risk of harm, as a result of collateral damage. Even if it is ascertained that VHSs have participated directly in hostilities by, for example, impeding 'the visibility or accessibility of a legitimate target, then they do not lose their civilian status but compromise their civilian immunity against attack for so long as they persist in participating, but not where it poses an exclusively legal obstacle to an attack'⁴⁶². It is not considered direct participation in hostilities when VHSs 'simply causing the attacker moral pause or creating a legal barrier (through operation of the proportionality principle or precautions in attack requirements)⁴⁶³. All three prongs of the test for direct participation in hostilities (proposed by the ICRC) must be satisfied, before these civilian VHSs forfeit their civilian immunity.

Should VHSs fall into enemy hands, they will still be entitled to humane treatment and the basic fair judicial guarantees extended to civilians⁴⁶⁴. Where VHSs are found to have been participating directly in hostilities without authorisation, they might be held to account for their unauthorised actions. However, quite what offences they might be prosecuted for remains questionable - they are after all unarmed, playing a largely passive role and probably seeking more media attention than intentionally engaging with the armed forces. Commanding officers who give orders to attack sites shielded by VHSs will, nevertheless, still be called upon to justify their actions in accordance with the targeting principles of military necessity, discrimination/distinction, humanity and proportionality. Despite the hard-line approach suggested by Schmitt and others, the practice of commanding officers faced with VHSs in their cross-hairs, suggests that VHSs do enjoy a form of protected status in the theatre of war. Just how far commanding officers will be required to go in justifying such attacks, will remain to be determined by the physical location of the VHSs.

⁴⁶¹ *Idem* at 333.

⁴⁶² Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 869.

⁴⁶³ Schmitt 'Human Shields in International Humanitarian Law' at 317.

⁴⁶⁴ GC IV article 5(3) and AP I article 75; Gasser 'Protection of the Civilian Population' at 211.

CHAPTER 8

ASSESSING THE COMBATANT STATUS OF JOURNALISTS IN INTERNATIONAL ARMED CONFLICTS, IN LIGHT OF THE INTERNATIONAL HUMANITARIAN LAW NOTION OF DIRECT PARTICIPATION IN HOSTILITIES¹

8.1 Introduction

During the 1999 NATO intervention in Kosovo, NATO bombed the *Radio Televisija Srbije*'s head office in Belgrade, alleging that it was 'being used to transmit propaganda supportive of Milosevic'². As a result of 'considerable disagreement between the United States and French governments, regarding the legality and legitimacy of the target'³, the attack was repeatedly postponed. By the time NATO forces conducted the attack, some eleven days after the initial warnings to vacate the target were issued to foreign journalists using the facility, the Yugoslav 'authorities were no longer taking the threats seriously'⁴. In the process, NATO killed sixteen technicians and support staff, and injured sixteen others⁵. Human Rights Watch condemned the attack as unjustifiable⁶, and distinguished it from the lawful attack launched against the Rwandan *Radio-télévision libre des Mille Collines*, which was destroyed to prevent its further use to incite genocide⁷. The attack on the Serbian broadcaster was so controversial, that it prompted the prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) to conduct an enquiry into whether NATO's strike might constitute a war crime⁸. Four years later, U.S. cruise missiles rained down on Iraq's main television station, shutting down transmission for a few hours⁹.

¹ This chapter is an updated version of a prior article entitled: 'Journalists: Shielded from the Dangers of War in their Pursuit of the Truth' (2009) 34 *South African Yearbook of International Law* 70. These revisions have been made with the kind permission of the SAYIL editorial board.

² Jefferson D Reynolds 'Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed conflict, and the Struggle for a Moral High Ground' (2005) 56 *Air Force Law Review* 1 at 38.

³ *Idem* at 39.

⁴ *Ibid.*

⁵ Crimes of War Project 'In America's Sights: Targeting Decisions in a War with Iraq' (6 March 2003) available at <http://www.crimesofwar.org/print/onnews/iraq-print.html> (accessed 27 July 2009).

⁶ Human Rights Watch maintain that it would have been possible to disrupt communications with less cost to civilian life, had the transmitter equipment been made the target of the attack, rather than 'the building and its occupants' (Reynolds 'Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed conflict, and the Struggle for a Moral High Ground' at 38-39).

⁷ *Idem* at 39.

⁸ Shannon Bosch 'Geneva Under Siege' (2004) 37:3 *Comparative and International Law Journal of South Africa* 294.

⁹ Anthony Dworkin 'Iraqi Television: a Legitimate Target?' (27 March 2003) available at <http://www.crimesofwar.org/special/iraq/brief-tv.html> (accessed 27 July 2009).

While journalist may not be armed with weapons, their reporting of armed conflicts often 'often begets violence against journalists'¹⁰, particularly when they are documenting the perpetration of war crimes and genocide, or exposing the tactics and strategic positions of enemy forces. The UNESCO Report on The Protection of Journalists, concluded that 'journalists are exposed to danger not only in covering armed conflicts, but everywhere ... [they are] threatened, arrested, harassed, tortured, maltreated, beaten, kidnapped, imprisoned and even murdered'¹¹. Since 1992, the Committee to Protect Journalists¹², has recorded and documented 926 deaths of journalists whilst carrying out their function, with many of these deaths having occurred in situations of armed conflict¹³.

As early as 1968, the International Committee of Jurists drafted the Preliminary Draft Convention for the Protection of Journalists on Dangerous Missions (which is commonly referred to as the Montecatini Draft)¹⁴. Regretfully, the draft convention never found its way to the United Nations (U.N.) for consideration¹⁵. Pursuant to the disappearance of seventeen journalists in Cambodia in 1970, the International Professional Committee for the Safety of Journalists was tasked with issuing identity cards for journalists on dangerous missions in Southeast Asia. Journalists issued with identification cards were required to sign a statement agreeing to only use the identification card whilst on professional assignments, and not to participate in hostilities, carry weapons, or wear a uniform¹⁶. Those critical of the identification card regime point out that not only does it not necessarily prevent violence, but it can also expose journalists to targeted attacks, aimed at silencing unfavourable media reports¹⁷. This identification card regime was

¹⁰ Nathan Taback and Robin Coupland (2006) 'Security Of Journalists: Making the Case for Modelling Armed Violence as a Means to Promote Human Security' (chap 9) in John Borrie and Vanessa Martin Randin (eds) *Thinking Outside the Box in Multilateral Disarmament and Arms Control Negotiations*, United Nations Institute for Disarmament Research: Geneva at 195.

¹¹ UNESCO Report 'Protection of Journalists' (1982) New Communication Order No. 4 at 5.1.

¹² Other institutions who document the 'violent events involving journalists and media workers' include: International News Safety Institution (INSI) and Reporters Without Borders (Taback and Coupland 'Security Of Journalists: Making the Case for Modelling Armed Violence as a Means to Promote Human Security' at 195).

¹³ Available at <http://cpj.org/killed/> (last count done at 25 July 2012).

¹⁴ The Montecatini Draft proposed the establishment of an independent International Committee for the Protection of Journalists on Dangerous Missions Under the U.N. banner. The committee was tasked with the job of issuing official identification cards to all journalists. Under the Montecatini Draft it was envisaged that journalists proceeding on a dangerous mission were supposed to inform the committee, and wear a recognisable emblem which served to distinguish them as journalists (Dylan Howard 'Remaking the Pen Mightier than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists' (2002) 30 *Georgia Journal of International and Comparative Law* 505 at 514-515).

¹⁵ Amit Mukherjee 'The Internationalisation of Journalists' "Rights": An Historical Analysis' (1995) 87:4 *Journal of International Law and Practice* 87 at 101. For more on the history behind the failed attempts to secure special protections and status for journalists, see: Howard 'Remaking the Pen Mightier than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists'.

¹⁶ Howard 'Remaking the Pen Mightier than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists' at 515.

¹⁷ *Idem* at 524. As was the case in January 1999, when the 'Revolutionary United Front entered Freetown, Sierra Leone with a target list of journalists and hunted down four journalists' (*Ibid*).

never successfully expanded to other regions, before the plan was abandoned in 1975¹⁸.

During the same time period, the U.N. General Assembly adopted a resolution¹⁹ on the protection of journalists engaged in dangerous missions. Drawing on provisions in the Geneva Conventions, the resolution mandated the Human Rights Commission to prepare a draft international agreement on the protection of journalists²⁰. Pursuant to that, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts²¹ recommended in 1973 that a new article (article 79) be included in the Additional Protocol to the Geneva Conventions.

In the end, all attempts during the 1970s and 1980s, by the 'Soviet Union, Eastern European allies and the countries of the Third World' to clothe journalists with a specific status or some form of 'protective licensing', were opposed by the West²². Consequently, what we are left with, is a protection regime where journalists are not afforded any distinct recognition in the form of a specialised convention.

Not only are journalist exposed to very high levels of risk when they report on armed conflicts, but they are also viewed as a strategic tool. Belligerents are acutely aware that 'controlling the way war is represented has acquired the same strategic importance as the ability to disrupt the enemies' communications'²³. During WWI 'the war ministries assigned officials to the various newspapers as a means of keeping reporting under strict control'²⁴. Since then, belligerents in some countries have kept a tight reign on the media's 'output'²⁵, imposing strict censorship, intimidation²⁶, detention, prosecution, torture, and even execution²⁷ on those journalists who do not toe the official line²⁸. In States like Chechnya, 'journalists are banned from the theatre of operations ... and murdered if they defy the prohibition'²⁹.

The 1991 Gulf War saw the introduction of the 'pool system'³⁰, in which journalists were organised 'into small groups', and afforded limited access to the front lines at the military's discretion, although often 'no access was given to the actual fighting'³¹. These journalists then 'shared the information

¹⁸ *Idem* at 515.

¹⁹ See G.A. Res. 2673 (1970) U.N. GAOR 25th Session Supp. No. 28 at 78 U.N. Doc. A/8028.

²⁰ Howard 'Remaking the Pen Mightier than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists' at 516.

²¹ G.A. Res. 3008 (1972) U.N. GAOR 27th Session.

²² Lyombe Eko 'Bombs and Bombast in the NATO/Yugoslav War 1999: The Attack on the Radio Television Serbia and the Laws of War' (2002) *Communications and the Law* 1 at 38.

²³ Arnaud Mercier 'War and Media: Constancy and Convulsion' (2005) 87:860 *International Review of the Red Cross* 649 at 649.

²⁴ *Idem* at 650.

²⁵ *Idem* at 649.

²⁶ When the premises of Al-Jazeera and Abu Dhabi TV were targeted by the U.S. in 2003, these 'incidents were described as intended to intimidate and punish journalists who dared criticise the U.S. invasion' (*Idem* at 650).

²⁷ *Idem* at 649.

²⁸ *Idem* at 650.

²⁹ *Idem* at 649.

³⁰ Christiane Eilders 'Media Under Fire: Fact and Fiction in Conditions of War' (2005) 87:860 *International Review of the Red Cross* 639 at 643.

³¹ *Ibid.*

gathered with their colleagues left behind³². All this was done on the 'pretext of ensuring the journalists' safety, and preventing the information-gathering from hindering the operation under way³³. For many it was clear that the real goal was to 'limit the journalists' access to the front as far as possible'³⁴.

In Iraq, in 2003, the media refused to be part of this 'sham information' system, and forced the U.S. military to devise a new scheme of accrediting journalists and embedding them within combat units³⁵. Once again the intention was to maintain some control over what journalists reported³⁶. For this 'privilege', journalists were subject to 'fairly restrictive rules, including an absolute prohibition on anything that could make it possible to locate the troops'³⁷. Not surprisingly, 'Iraq has cost the highest number of journalists' lives in any conflict so far'³⁸. Interestingly, 'by dint of rubbing shoulders with the soldiers, living with them, and owing one's safety to them, the situation was ripe for journalists to end up sharing the point of view of their hosts, in keeping with the "Stockholm syndrome"³⁹. What was initially instigated by the press in order to permit greater journalistic freedom, resulted in journalism rich with 'patriotism, empathy and self-censorship'⁴⁰. In the end, the 'embedded journalist' became 'the instrument of a vast public relations strategy'⁴¹. Furthermore, in still other instances (as was the tragic case in the internal armed conflict in Rwanda), war is 'waged thanks to the media ... by means of direct propaganda', as was the case of *Radio-télévision libre des Mille Collines*⁴².

The reality remains that journalists have a 'peculiar propensity to seek out situations of acute danger'⁴³ in which the rules of international humanitarian law (IHL) are already strained. In doing so, not only are 'media professionals more and more at risk of being directly targeted in violation of IHL', but 'by far the greatest danger they face is that of deliberate acts of violence against them'⁴⁴. To this end, there have been questions raised as to the IHL status of

³² Mercier 'War and Media: Constancy and Convulsion' at 657.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Eilders 'Media Under Fire: Fact and Fiction in Conditions of War' at 643.

³⁷ Mercier 'War and Media: Constancy and Convulsion' at 657.

³⁸ Roland Huguenin-Benjamin 'Can Public Communication Protect Victims?' (2005) 87:860 *International Review of the Red Cross* 661 at 663.

³⁹ Mercier 'War and Media: Constancy and Convulsion' at 657.

⁴⁰ *Ibid.*

⁴¹ *Idem* at 658.

⁴² Operating as 'a well-oiled propaganda machine', it ...'aggravated existing tensions and called on people to stand ready, then to take up arms, and when the time came for genocide it coordinated the work of the killers, informing them for example of common graves that had been dug but not yet filled and urging them not to spare children, broadcasting arguments day after day to justify the bloodshed and congratulating the butchers on the results so far achieved. On 2 July 1994, the following announcement was made: "Friends, we can be proud! They have been exterminated. My friends, let us rejoice. God is just!" (*Idem* at 651).

⁴³ Fritz Kalshoven and Lisbeth Zegveld (2001) *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (3rd ed) International Committee for the Red Cross: Geneva at 131.

⁴⁴ ICRC 'How does International Humanitarian Law Protect Journalists in Armed-conflict Situations' (27 July 2010) available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/protection-journalists-interviews-270710> (accessed 14 July 2012).

journalists, and whether journalists need a special regime of protection under IHL. Much of the debate around the protections afforded journalists under IHL, hinges on the determination of whether the actions of journalists amount to direct participation in the hostilities. This chapter seeks to explore these questions by exploring the:

- Categorisation of journalists under IHL;
- Existing legal regimes applicable to journalists under IHL;
- Primary IHL status of journalists (both those embedded in the military and those reporting without accompanying the armed forces);
- Impact that a journalist's primary status and presence has upon targeting decisions;
- The notion of direct participation in hostilities and its impact upon journalists; and
- Legal consequences which result when journalists elect to participate directly in hostilities.

8.2 Understanding the term 'journalist' under IHL

Before explaining the existing legal regime applicable to journalists under IHL, it is important to note that within the broader category 'journalist', IHL differentiates three further sub-classifications: military journalists, war correspondents, and 'journalists who neither form part of, nor accompany the armed forces'⁴⁵. Each of the sub-classifications enjoys different treatment under IHL - which impacts on their primary status, protections under IHL, and their treatment if captured.

i. Military journalists⁴⁶

These are essentially 'communication personnel who form part of the armed forces' and work 'in the information services of the armed forces'⁴⁷.

ii. War correspondents

These are 'representatives of the media ... who are formally accredited to the armed forces'⁴⁸, and who 'accompany the armed forces without being members of the armed forces'⁴⁹. They get a special mention in GC III article 4A(4), under the category of civilians who are 'persons who accompany the

⁴⁵ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 94.

⁴⁶ Since my focus throughout all the chapters is on the status of a variety of non-State actors, I will not focus much further attention on this category, since they are essentially State actors.

⁴⁷ Rikke Ishøy (2008) *Handbook on the Practical Use of International Humanitarian Law* Danish Red Cross: Kobenhavn (revised edition) at 93.

⁴⁸ Hans-Peter Gasser (2008) 'Protection of the Civilian Population' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 257; GC III article 4A(4).

⁴⁹ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 94; Knut Dörmann 'International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts' Legal article (1 December 2007) available at <http://www.icrc.org/eng/resources/documents/article/other/media-protection-article-.htm> (accessed 1 August 2012).

armed forces without actually being members thereof'. 'Not each and every journalist who reports from the conflict zone falls within this category'⁵⁰. In order to enjoy the protection of the military unit to which they are accredited, war correspondents are obliged to stay within their assigned military unit, and are answerable to the unit's commander⁵¹. In order to call oneself a 'war correspondent', 'a journalist must get the necessary authorisation, namely, to be accredited as such'⁵². Proof of this accreditation needs to be furnished in the form of a special identity card (based on the template found in Annex IV A to GC III) - 'which confirms their status'⁵³.

In recent international armed conflicts (in particular in the 2003 Iraqi conflict), some belligerents began to make use of the term 'embedded journalists'. This terminology 'does not occur in any provision of IHL' ... and 'it is not clearly defined'⁵⁴. That said, the ICRC has concluded that 'embedded journalist' is a modern day reference to what IHL has traditionally called 'war correspondents'⁵⁵. The process of 'embedding' merely replaces what was always understood as official accreditation⁵⁶. It does not amount to 'induction into the armed forces'⁵⁷.

iii. 'Journalists engaged in dangerous professional missions'⁵⁸

These are effectively the balance of the journalists who 'neither form part of nor accompany the armed forces'⁵⁹.

8.3 Journalists under IHL

i. 1863 Lieber Code

As early as 1863 we find that 'special provisions were made to protect newspaper reporters who were captured during the course of war'⁶⁰. According to API article 50, 'editors, or reporters of journals ... if captured, may be made prisoners of war (POWs), and be detained as such'⁶¹.

ii. Hague Law

In 1899 and 1907 The Hague Convention IV on Land Warfare, adopted the Lieber Code approach to protected journalists in article 13, which states that:

⁵⁰ Yoram Dinstein (2010) *The Conduct of Hostilities Under the Law of International Armed Conflict* (2nd ed) Cambridge University Press: Cambridge at 167.

⁵¹ Dörmann 'International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts'.

⁵² Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 167.

⁵³ Gasser (1995) 'Protection of the Civilian Population' at 228.

⁵⁴ ICRC 'How does International Humanitarian Law Protect Journalists in Armed-conflict Situations'.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 167.

⁵⁸ Gasser (2008) 'Protection of the Civilian Population' at 256-257.

⁵⁹ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 94.

⁶⁰ Amit Mukherjee 'Protection of Journalists Under International Humanitarian Law' (1995) 17 *Communications and the Law* 27 at 28.

⁶¹ *Idem* at 29.

'persons who follow the armed forces without directly belonging thereto, such as newspaper correspondents and reporters ... who fall into the enemy's hands, and whom the latter thinks expedient to detain, are entitled to be treated as POW, provided they are in possession of a certificate from the military authorities of the army which they were accompanying'⁶².

iii. Geneva Conventions (GC I-IV)

Under Geneva law, the Lieber Code position was once again reproduced in article 81 of the 1929 Geneva Prisoners-of-War Convention⁶³. Later, in 1949, the III Geneva Convention ... re-iterated most of the Lieber Code position in article 4A(4)⁶⁴. There was one 'important modification'⁶⁵ made to the Lieber Code position - it made allowances for the fact that journalists might lose their identification cards in the theatre of conflict, and consequently GC III only requires that journalists 'establish that a card had been issued', or that they were authorised to accompany the armed forces⁶⁶ in order for them to be able to claim POW status⁶⁷. Moreover, any journalist, regardless of their nationality, could claim the protections afforded under GC III, provided one of the belligerent parties had issued them with the required identification card, and they need not be a national of the issuing State⁶⁸.

Up to this point, 'non-accredited journalists and their equipment' enjoyed no special status under IHL⁶⁹. They were subject to the protections afforded ordinary civilians by virtue of the 'presumption of civilian status which exists in IHL'. Consequently, it was simply presumed that journalists who did not enjoy official accreditation from the armed forces (irrespective of their nationality⁷⁰), were presumed to have civilian status⁷¹. The difficulty with treating non-embedded journalists as civilians, is that this regime offers no special protection against the types of 'punitive acts'⁷² which journalists face at the

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ GC III equates war correspondents with 'civilian members of military aircraft crews and other non uniformed participants in the greater military enterprise' (William A Orme 'Protection of Journalists' (1999) in Roy Gutman and David Rieff (eds) *Crimes of War Project: The Book*, available at <http://www.crimesofwar.org/thebook/journalists-protection.html> (accessed 1 August 2010).

⁶⁵ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 29.

⁶⁶ Hans-Peter Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions' (1983) 232 *International Review of the Red Cross* 3-18 available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/review-1983-p3> (accessed 26 March 2009).

⁶⁷ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 29.

⁶⁸ *Ibid.*

⁶⁹ Alexandre Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' (2004) 86:853 *International Review of the Red Cross* 37 at 38.

⁷⁰ The protection afforded civilians is not conditional upon their specific nationality, so a journalist, 'be he a national of a State involved in the conflict or a national of a neutral State, is protected' (Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions').

⁷¹ GC IV article 99; Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 38.

⁷² Including 'detention, torture, and harassment' (Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 31).

hands of governmental agents and the armed forces', whilst reporting in situations of armed conflict. As Mukherjee spells out:

'the provisions of the 1949 Geneva Conventions were found inadequate because (1) journalists were not protected against the physical dangers of war, (2) protection granted to journalists only applied to the period of detention, (i.e. to the period following capture), and (3) only journalists accredited to the military forces (i.e. war correspondents) were protected'⁷³.

iv. Additional Protocol's (AP I and AP II)

In 1977, two Additional Protocols were added to the four Geneva Conventions of 1949. AP I article 79, which deals with the issue of journalists, attempts to address some of the shortcomings in the GCs.

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in article 4 (A) (4) of the Third Convention.
3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the Journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist'.

What we can glean from this provision, is that it is aimed at those journalists who 'without being accredited to the armed forces as war correspondents, are engaged in dangerous professional missions in areas of armed conflict'⁷⁴. These journalists enjoy primary IHL civilian status, with the attendant civilian protections, provided they do not compromise their civilian status⁷⁵ (by, for example, participating directly in hostilities, 'spying, smuggling weapons and other actions'⁷⁶.) The provision also notes that the provision will not prejudice the special POW privilege which war correspondents enjoy if captured (a privilege usually reserved solely for combatants).

Once again we see the repetition of the identification requirement which was introduced under GC III. 'Although API article 79 did not alter the civilian status of journalists, it did mandate the implementation of an identity card program'⁷⁷. The identification card may be provided by the State of which the

⁷³ *Ibid.*

⁷⁴ Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 141.

⁷⁵ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 167.

⁷⁶ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 94.

⁷⁷ Howard 'Remaking the Pen Mightier than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists' at 517.

journalist is a national, the State where the journalist is employed, or the State where the journalist's employing news corporation is located⁷⁸. 'The identity card reproduced in Annex II of the protocol is only a model for the guidance of national authorities who have the task of issuing such cards'⁷⁹. Possessing a journalist's identification card merely 'creates a presumption in his or her favor' that they are 'not a spy or a saboteur but, rather a respectable person doing a respectable job'⁸⁰. Possession of the identity card is not, however, a legal requirement⁸¹, it is 'up the individual journalist whether they choose to obtain such identification'⁸². 'If a journalist does not have it with him or her in a war zone, the authorities cannot treat him or her unfavorably because of that'⁸³.

v. Customary international law

According to the ICRC study of customary international law, 'civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities'⁸⁴. This finding is based on 'official statements and reported State practice'⁸⁵ (as evidenced by numerous military manuals) and the fact that there were no reservations made to AP I article 79⁸⁶.

The UN has condemned 'deliberate attacks on journalists'⁸⁷, and on numerous occasions the U.N. General Assembly and Commission on Human Rights has reminded States to ensure that journalists are respected and protected, and not subjected to intimidation, 'acts of reprisal, abductions and other acts of violence'⁸⁸.

8.4 The primary IHL status of journalists, and the legal consequences which flow from their status

IHL is founded upon the principle that 'every individual found in the theatre of war possesses a recognised primary status, as either a combatant or a

⁷⁸ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 94; GC III article 4A(4); GC III annex IV; AP I article 79; and AP I annex II.

⁷⁹ Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 141.

⁸⁰ *Ibid.*

⁸¹ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 37.

⁸² Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* at 142; Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions'. The criticisms levelled at the identity card proposal are that in many instances identification might in fact be counterproductive, as was the tragic case of four journalists hunted down in Freetown in 1999 (Howard 'Remaking the Pen Mightier than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists' at 525).

⁸³ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 37; Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions'.

⁸⁴ Jean-Marie Henckaerts and Louise Doswald-Beck (2005) *Customary International Humanitarian Law* Volume I: Rules Cambridge University Press at rule 34.

⁸⁵ *Idem* at 115.

⁸⁶ *Ibid.*

⁸⁷ *Idem* at 116.

⁸⁸ *Ibid.*

civilian⁸⁹. It is this primary status that determines the protections the individual enjoys under IHL, including whether or not they are granted secondary status as a prisoner of war (POW)⁹⁰. Moreover, it is one's primary status (as either combatant or civilian) that dictates whether one might participate directly in hostilities, and the IHL obligations upon one's captors in so far as prosecuting detainees for their actions⁹¹.

i. Journalists with combatant status⁹²

The label 'combatant' is given to all members of the States 'armed forces', as well as 'all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates ... and subject to an internal disciplinary system'⁹³. Put another way, to enjoy combatant status, an individual needs to show that they are either a member of the State's armed forces⁹⁴, or a member of a volunteer corps or militia that satisfy the requirements for combatant status set out in the 1907 HRs⁹⁵, and developed through GC III⁹⁶ and the AP I⁹⁷.

Generally speaking, it is the State's armed forces⁹⁸ which are granted combatant status and are authorised to participate directly in hostilities, subject to the rules of war⁹⁹. Having said that, there are within the ranks of these armed forces' non-combatant service personnel like 'quartermasters, members of the legal services and other non-fighting personnel'¹⁰⁰ (such as

⁸⁹ Kurt Ipsen (1995) 'Combatants and Non-combatants' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 65.

⁹⁰ POW status is afforded to all who fall within the categories listed in HR article 3(2), GC III articles 4A(1-3) and (6), and AP I articles 43 and 44(1). Ipsen (1995) 'Combatants and Non-combatants' at 65.

⁹¹ For example, a civilian who 'participates directly in hostilities might face criminal prosecution for their actions, while combatants are not prosecuted for merely participating in hostilities - provided they observe the rules of war' (Ipsen (1995) 'Combatants and Non-combatants' at 81, 65 and 93).

⁹² As explained earlier on in this chapter, I will not focus on this category any more than to explain how they differ from civilian journalists, since the focus of this dissertation is on non-State actors.

⁹³ AP I article 43.

⁹⁴ GC III article 4A(1).

⁹⁵ 1907 Annex to the Convention IV Respecting the Laws and Customs of War on Land, and its Regulations Respecting the Laws and Customs of War on Land, available at <http://www.icrc.org/ihl.nsf>. (accessed 12 May 2012) at articles 1 and 2.

⁹⁶ GC III article 4(A)(2); ICRC 'Commentary on GC III: article 4' available at <http://www.icrc.org/ihl.nsf/COM/375-590007?OpenDocument> (accessed 12 May 2012).

⁹⁷ AP I article 43(1) reiterates the principle set out in article 1(a) of the HR IV, and AP I article 44 states that:

'combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising, 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.'

⁹⁸ Ipsen (1995) 'Combatants and Non-combatants' at 66-67.

⁹⁹ Failure to observe the law of war will expose combatants to prosecution before a military tribunal (Idem at 68).

¹⁰⁰ Idem at 82.

medical and religious personnel)¹⁰¹, who are denied authorisation¹⁰² to 'use a weapon or a weapons system'¹⁰³. These 'non-combatant'¹⁰⁴ members of the armed forces enjoy special protections as a result of this limitation on their actions¹⁰⁵. Their status as members of the armed forces, albeit non-combatant members, guarantees their secondary status as POWs upon capture¹⁰⁶. As 'members of the armed forces', albeit non-combatant members, military journalists 'have combatant status'¹⁰⁷. Consequently, all 'journalists who opt to work for the information services of the armed forces become combatants'¹⁰⁸.

ii. Journalists with civilian status

With the exception of those journalists who work for the armed forces' information department, all other journalists in the theatre of war have historically been classified as civilians under IHL. Some authors go so far as to say that they are necessarily 'non-combatants' who enjoy 'unambiguous status as civilians'¹⁰⁹. While they may all enjoy primary civilian status, there are subtle differences which impact on the way they are viewed in terms of IHL, based upon whether they are embedded (or accompany the armed forces), or elect not to accompany the armed forces.

Civilian journalists with POW status upon capture

Those journalists who are accredited to the armed forces, or to put it another way - who are embedded¹¹⁰ in the armed forces, are referred to under IHL as 'war correspondents'. While they might carry out their reporting from within the ranks of the armed forces, they nevertheless are, and remain, civilians¹¹¹, since they are not integrated into the armed forces like their colleagues in the

¹⁰¹ HR article 3.

¹⁰² Often this is done by way of national legislation.

¹⁰³ AP I article 43(2).

¹⁰⁴ HR article 3.

¹⁰⁵ GC I articles 24, 26 and 27.

¹⁰⁶ Ishøy *Handbook on the Practical Use of International Humanitarian Law* at 94.

¹⁰⁷ Gasser (2008) 'Protection of the Civilian Population' at 257.

¹⁰⁸ Alex Obote Odora 'Criminal Responsibility of Journalists Under International Criminal Law: The ICTR Experience' (2004) 73 *Nordic Journal of International Law* 307 at 313.

¹⁰⁹ Taback and Coupland 'Security of Journalists: Making the Case for Modeling Armed Violence as a Means to Promote Human Security' at 195.

¹¹⁰ Some academics, like Fisher, argue that it is possible for a journalist to be embedded without fulfilling the requirements for full accreditation. According to the ICRC, the act of embedding amounts to accreditation and the term embedding is a modern day reference to the activities traditionally carried out by a war correspondent (Horst Fisher (2008) 'The Protection of Prisoners of War' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 372).

¹¹¹ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 167; Gasser (2008) 'Protection of the Civilian Population' at 256-257; Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 35; Dale Stephens and Angeline Lewis 'The Targeting of Civilian Contractors in Armed Conflict' (2006) 9 *Yearbook of International Humanitarian Law* 25 at 34.

military information units¹¹². They are not deprived of civilian status, despite their affiliation with the armed forces¹¹³.

These journalists 'work on their own responsibility'¹¹⁴ under their editor or an agency, and 'are permitted to carry out all those activities in the area of operations which normally form part'¹¹⁵ of their job, (including: 'looking around, taking notes, making visual and audio recordings')¹¹⁶. These normal journalistic activities 'may not be considered hostile acts justifying military action against the person'¹¹⁷. As civilians, it is imperative that war correspondents do 'not under any circumstances take a direct part in hostilities'¹¹⁸.

Embedded journalists are treated much like 'civilian contractors'¹¹⁹ who accompany the armed forces. Traditionally, civilian contractors who provided the necessary specialised expertise which the armed forces might be lacking, were not armed, were not permitted to participate directly in hostilities, and were issued with an identity card confirming their function¹²⁰. Like embedded journalists, these civilian contractors enjoy primary civilian status, despite their close association with the armed forces¹²¹.

What is unique about war correspondents and civilian contractors - as opposed to other civilians - is that despite their civilian status, they are afforded POW status (pursuant to GC III art 4(A(4)) should they be injured or captured by the enemy armed forces¹²². This is unusual, in that traditionally POW status was reserved for combatants. In order to claim this privilege, they do need to produce the identity card issued by the armed forces which they are accompanying¹²³.

These war correspondents can only be detained when 'imperative reasons of security' demand their detention. If they are captured by the opposition, they enjoy the 'same treatment as members of the regular armed

¹¹² Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions'; Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 39.

¹¹³ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 167; Gasser (2008) 'Protection of the Civilian Population' at 256-257; Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 35.

¹¹⁴ Gasser (2008) 'Protection of the Civilian Population' at 257.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ HR IV article 13; GC III article 4A(4) and AP I article 50(1). These might include civilian members of military aircraft crews; war correspondents; supply and reconstruction contractors; and those providing services for the welfare of the armed forces (Ipsen (1995) 'Combatants and Non-combatants' at 95).

¹²⁰ GC III Annex IV A. It is accepted that when the Geneva Convention drafters included the requirement of an identity card for those 'accompanying the armed forces', it was agreed that 'possession of one was a supplementary safeguard for the person concerned, but not an indispensable prerequisite for being granted POW status.' (Emanuela-Chiara Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88:863 *International Review of the Red Cross* 525 at 537).

¹²¹ Ipsen (1995) 'Combatants and Non-combatants' at 95.

¹²² Gasser (2008) 'Protection of the Civilian Population' at 256-257; ICRC 'How does International Humanitarian Law Protect Journalists in Armed-conflict Situations'.

¹²³ Ipsen (1995) 'Combatants and Non-combatants' at 95.

forces¹²⁴, including 'internment in POW camps'¹²⁵, 'respect for their persons and their honor'¹²⁶, the 'right not to respond to interrogation'¹²⁷, 'contact with their families'¹²⁸, the right 'to be visited by representatives of the protecting power or the ICRC'¹²⁹, and importantly the right to be 'repatriated, at the latest, when fighting ceases'¹³⁰ - unless they are seriously injured in which case they 'must be repatriated immediately and unconditionally'¹³¹.

While they are treated as POWs, at no time do they lose their civilian status¹³². Essentially, 'war correspondents accredited to the armed forces' are entitled to 'the status of persons accompanying the armed force without being members thereof'¹³³. Some argue that it is more correct to say that 'they are to be treated as POW without actually having POW status'¹³⁴. As such, embedded journalists will have access to the myriad of privileges that are afforded POWs, and which are not normally afforded ordinary civilian detainees. In this one way embedded journalists are better off than their unaccredited counterparts.

Civilian journalists without POW status upon capture

There remain journalists who report on hostilities, in the theatre of war, without being accredited or embedded in the State's armed forces. They have come to be known as 'journalists engaged in dangerous professional missions'¹³⁵, and like their embedded colleagues they too are treated as civilians by IHL¹³⁶. Although AP I states that these journalists should be *considered* as civilians, academics argue that in fact:

'they should not merely be *considered as* a civilian, he or she *is* a civilian. There can, therefore, be no doubt on this topic. Journalists who undoubtedly are civilians do not lose this status by entering a battleground for professional purposes' ... AP I 'article 79 does not protect journalists *qua* journalists, but only as civilians'¹³⁷.

These 'non-embedded journalists' are encouraged by IHL to obtain an identity card (modelled after the draft provided by the Protocol) to 'attest to their profession as journalists'¹³⁸, although they enjoy no special status in IHL, and

¹²⁴ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 35.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ 'Although their notebooks and film might legally be confiscated by military personnel' (Orme 'Protection of Journalists').

¹²⁸ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 35.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Gasser (2008) 'Protection of the Civilian Population' at 257.

¹³³ Odora 'Criminal Responsibility of Journalists Under International Criminal Law: The ICTR Experience' at 313.

¹³⁴ Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 39; Ipsen (1995) 'Combatants and Non-combatants' at 95.

¹³⁵ Gasser (2008) 'Protection of the Civilian Population' at 256-257.

¹³⁶ *Ibid.*

¹³⁷ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 35.

¹³⁸ *Ibid.*

will always be presumed to retain their civilian¹³⁹ status. This is an usual requirement, since civilians are not obliged to carry any form of identification, or wear any symbols verifying their civilian status¹⁴⁰. That said, the fact that these journalists are working in the theatre of hostilities, often after other civilians have been evacuated, can potentially lead to confusion as to their status. However, as Mukherjee points out, this identification does not 'create a civilian status'¹⁴¹.

Provided they do nothing to compromise their inherent civilian's status (i.e. by participating directly in hostilities), they enjoy full civilian protection from hostilities¹⁴². In short 'they and their possessions'¹⁴³ are to be respected¹⁴⁴ and shielded from attack¹⁴⁵. As is true of any civilians, 'intentionally directing an attack' against journalists 'amounts to a war crime under the Rome statute of the ICC'¹⁴⁶. That said, as is the case with any civilian, they are entitled to 'possess small arms for self-defense in case of attacks'¹⁴⁷ by non-combatants. They can, however, not 'use fire arms against combatants even if they are in danger of being taken captive'¹⁴⁸.

By classifying journalists as civilians, 'States agree to let them do their job (take photographs, shoot films, record information or take notes) without this constituting a reason for attacking them or depriving them of their rights as civilians'¹⁴⁹. Although classifying journalists as civilians¹⁵⁰ ensures them a wide range of humane protections afforded civilians under the GCs, 'they fail to address the particular difficulties facing journalists, who are typically more directly involved with the conflict than are ordinary civilians'¹⁵¹.

As civilians, if these journalists fall into enemy hands, they remain entitled to all the protections granted civilians¹⁵² (either under AP I article 45 or on the basis of GC IV, the law in force before 1977¹⁵³). If they are 'arrested in their own country (in territory occupied by the enemy)¹⁵⁴ they 'must be detained in that occupied territory and not transferred to the territory of the

¹³⁹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 115-118.

¹⁴⁰ Gasser (1995) 'Protection of the civilian population' at 210; GC IV article 27(1).

¹⁴¹ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 35

¹⁴² *Ibid*; Gasser (2008) 'Protection of the Civilian Population' at 275.

¹⁴³ AP I article 52.

¹⁴⁴ GC I article 27(1). This means that they are 'entitled to respect for their persons, their honour, their family rights, their religious convictions, their manners and customs' (GC IV article 27(1), and their property (HR article 46(2)).

¹⁴⁵ AP I article 51(2). Attacks which result in death or serious injury to civilians are considered a grave breach of AP I, and can be prosecuted as war crimes (AP I article 85(3)(a) and (e)); ICRC 'Covering War and Disaster' (18 December 2007) available at <http://icrc.org/web/eng/siteeng0.nnsf/htmlall/media-ihl-report-261107/> (accessed 14 July 2012).

¹⁴⁶ ICRC 'How does International Humanitarian Law Protect Journalists in Armed-conflict Situations'.

¹⁴⁷ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 35.

¹⁴⁸ *Ibid*.

¹⁴⁹ ICRC 'Covering War and Disaster'.

¹⁵⁰ Howard 'Remaking the Pen Mightier than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists' at 512.

¹⁵¹ *Ibid*.

¹⁵² Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 35.

¹⁵³ Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions'.

¹⁵⁴ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 37.

occupying power'¹⁵⁵. If 'a journalist [is] captured in enemy territory', they may be 'arrested, detained or interned for actions related to the armed conflict'¹⁵⁶, or 'for imperative reasons of security'¹⁵⁷. Moreover, 'civilian journalists and their crews must be informed promptly of the reasons why these measures have been taken'¹⁵⁸, subjected to a 'penal inquiry'¹⁵⁹, 'or released as soon as the reasons or circumstances justifying the detention have abated'¹⁶⁰. On the other hand, 'journalists who are citizens of a non-belligerent State that has normal diplomatic relations with the State that has captured them, are covered by normal peacetime law; that is to say, they are not "protected persons" under the Geneva Conventions of 1949'¹⁶¹. 'They may be detained only if there are sufficient charges against them. If not, they must be released'¹⁶². In particular, there are precise rules aimed at ensuring that detainees are treated humanely and afforded all the necessary legal guarantees, if they are to be tried for penal offences¹⁶³. As with other detainees, journalists enjoy the right to contact their relatives and their diplomatic or consular representatives¹⁶⁴. They are, however, not extended the same POW privileges which are granted to their embedded colleagues.

8.5 Targeting decisions in international armed conflicts where journalists are implicated

All targeting decisions taken in the theatre of war are required to withstand the testing of three related principles: distinction, military necessity and proportionality. Added to these three principles is the further requirement that, when civilian objects are targeted, there must be advanced warning so that civilians can be evacuated from these facilities. So too when civilian journalists are in the firing line, commanding officers will be required to justify their orders on the basis of satisfying these four requirements.

i. Distinction

'Distinction' is shorthand for the notion that civilians and civilian objects are to be distinguishable from military objects and personnel, in accordance with the strict IHL prohibition against attacking civilian targets. The principle is neatly summed up in AP I as follows: 'parties are required at all times to distinguish between the civilian population and combatants, and between civilian

¹⁵⁵ *Ibid.*

¹⁵⁶ Dörmann 'International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts'.

¹⁵⁷ Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions'; AP I article 51(2). Gasser 'Protection of the Civilian Population' at 212.

¹⁵⁸ Dörmann 'International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts'.

¹⁵⁹ Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions'; Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 37.

¹⁶⁰ Dörmann 'International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts'; Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 37.

¹⁶¹ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 37.

¹⁶² *Ibid.*

¹⁶³ Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions'.

¹⁶⁴ *Ibid.*

objectives and military objectives and, are only entitled to direct their operations against military objectives¹⁶⁵. IHL defines 'military objectives' as those sites or objects that 'make an effective contribution to military action,' and whose destruction offers 'a definite military advantage in the circumstances ruling at the time'¹⁶⁶. The principle of distinction forms the foundation upon which many IHL rules are built. It is the principle of distinction which demands that combatants wear an identifying mark and carry their weapons openly¹⁶⁷. Likewise, it dictates that attacking and defending forces must not locate military objectives in areas populated by civilians¹⁶⁸, and orders the evacuation of civilians from the vicinity of military objectives¹⁶⁹. Lastly, it is the principle of distinction which prohibits the use of weapons which might endanger civilians indiscriminately¹⁷⁰.

ii. Military necessity

The notion of military necessity follows on from the rejection of the practice of 'total warfare'¹⁷¹, and in short requires that all acts of warfare are to be motivated only by absolute military necessity¹⁷². The principle of military necessity dictates that the only legitimate goal in armed conflict is to overpower the enemy armed forces demands, consequently the use of weapons that cause unnecessary suffering or superfluous injury, and the targeting of objects which are not 'military objectives'¹⁷³, would fall foul of the requirement of military necessity¹⁷⁴. This principle is summed up in AP I¹⁷⁵ as follows: 'only those objects which by their nature, location¹⁷⁶, purpose or use¹⁷⁷ make an effective contribution to military action¹⁷⁸, and whose total or

¹⁶⁵ AP I article 48. Despite being enshrined in AP I, this principle constitutes an 'ancient and established rule of customary law and not a new principle created by recent conventional law' (Stefan Oeter (1995) 'Methods and Means of Combat' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 113).

¹⁶⁶ AP I article 55(2); Crimes of War Project 'In America's Sights: Targeting Decisions in a War with Iraq'.

¹⁶⁷ Kenneth Anderson 'Who Owns the Rules of War?' (24 April 2003) available at <http://www.crimesofwar.org/special/Iraq/news-iraq6.html> (accessed 29 May 2009).

¹⁶⁸ GC IV article 28.

¹⁶⁹ AP I articles 57 and 58.

¹⁷⁰ AP I articles 51(4) and (5); Ipsen (1995) 'Combatants and Non-combatants' at 54.

¹⁷¹ Christopher Greenwood (1995) 'Historic Development and Legal Basis' in *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 12.

¹⁷² HR article 22; AP I article 35(1).

¹⁷³ Traditionally, this included all buildings normally used by the armed forces such as barracks, staff headquarters, and communications centres (Human Rights Watch 'The War in Iraq and International Humanitarian Law: Frequently Asked Questions' (7 April 2003) available at <http://www.hrwatch.org/campaigns/iraq/ihlfaq.htm>. (accessed 12 August 2009).

¹⁷⁴ Oeter (1995) 'Means and Methods of Combat' at 106 and 119.

¹⁷⁵ While GC IV article 18 uses the term 'military objective', it does not define it.

¹⁷⁶ For example: 'bridges or other constructions that are not inherently military in nature, but have military importance in providing enemy forces a means of arriving at, leaving from, or supplying the battlefield', make an effective contribution to military action (Human Rights Watch 'The War in Iraq and International Humanitarian Law: Frequently Asked Questions').

¹⁷⁷ "Purpose" refers to the intended future use of a building, while "use" refers to the present function of a building. Where a building might be used to lodge military personnel or serve as a field headquarters, but there are doubts about the current use or immediate purpose of a building, it must be presumed to be civilian' (*Ibid*).

¹⁷⁸ This is an objective criterion.

partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage¹⁷⁹ may justifiably satisfy the requirements of military necessity when attacked'. This definition of a military objective, as set out in AP I article 52, is widely regarded as having achieved customary status, and consequently is binding on even those States which have not signed up to AP I¹⁸⁰.

iii. Proportionality

The third principle, of proportionality, attempts to strike a balance between the competing concerns of humanity and military necessity. It can be summed up as follows: in all decisions regarding the means and methods of warfare, the damage caused to the adversary must be proportionate to the military advantage sought¹⁸¹. Any attack that has a manifestly disproportionate collateral impact on the civilian population, facilities necessary for their survival, the environment, and cultural heritage sites - will fail to satisfy the requirement of proportionality and will be deemed illegitimate¹⁸². API, articles 57(2)(a)(iii) and 51(5)(b), stipulate that where incidental loss to civilian lives or objects will result, and such loss will 'be excessive in relation to the concrete and direct military advantage anticipated' - the attack must not be carried out¹⁸³. Even if the adversary uses the civilian presence at a dual-use target to shield an otherwise military objective from attack, article 51(8) of AP I expressly states that this violation of IHL does not exempt the attacker from his legal obligations vis-à-vis the civilians¹⁸⁴.

iv. Advance warning

The rule of effective¹⁸⁵ and advanced warning, in instances when attacks potentially have an impact on the civilian population, found expression in the 1863 Lieber Code¹⁸⁶. Since then, this rule has been endorsed in a myriad of IHL treaties¹⁸⁷, and can, based on relatively consistent State practice¹⁸⁸, be

¹⁷⁹ This enquiry is a subjective one (Oeter (1995) 'Means and Methods of Warfare' at 157). It is not legitimate to launch an attack that offers only potential or indeterminate advantages (AP I article 52(2)).

¹⁸⁰ Anthony Dworkin 'The Iraq War in Retrospect' (14 September 2003) available at <http://www.crimesofwar.org/print/onnews/iraq33.html> (accessed 15 August 2009). Peter Rowe 'Kosovo 1999: The Air Campaign' (2000) 82:837 *International Review of the Red Cross* at 159.

¹⁸¹ Oeter (1995) 'Means and Methods of Warfare' at 112.

¹⁸² *Idem* at 119.

¹⁸³ Anthony PV Rogers (1996) *Law on the Battlefield* Manchester University Press: Manchester at 57.

¹⁸⁴ Oeter (1995) 'Means and Methods of Warfare' at 180.

¹⁸⁵ 'The rule set down in API article 57(2)(c) does not require that the warning be provided to the authorities concerned. A direct warning to the population (for example by leaflets dropped from the air, radio messages and loudspeaker announcements), asking civilians to stay away from certain zones or types of facilities is deemed effective' (Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 54).

¹⁸⁶ Instruction for the Government of Armies of the United States in the Field, prepared by Francis Lieber and proclaimed by President Lincoln as General Order No. 100 on 24 April 1863, at article 19.

¹⁸⁷ The Project of an International Declaration concerning the Laws and Customs of War, Brussels (27 August 1874) article 16; The Laws of War on Land, adopted by the Institute of

said to have crystallised into a principle of customary law. The main purpose of the rule is to give civilians the opportunity to evacuate the area of a planned attack¹⁸⁹. Actual implementation of the rule is hampered by its wording, which allows for 'concerns of military necessity' (as seen through the eyes of the reasonable military commander)¹⁹⁰ to sometimes trump the need to give advance warning¹⁹¹. The obligation is then further diluted by the fact that where 'the element of surprise is a condition of the success of an attack'¹⁹², or where there is no point in providing a warning because it would be counterproductive from a military point of view to do so¹⁹³, the requirement of advanced warning can be dispensed with. Once effective advance warning has been given, journalists who choose to remain in the theatre of war - despite forewarning of an attack - might form part of acceptable collateral damage.

- v. The principles of distinction, military necessity, proportionality and advanced warning, and their impact on targeting decisions involving journalists

If the cumulative effect of these four principles is to restrict military operations to proportionate attacks on legitimate military objectives - which satisfy the requirements of military necessity and advanced warning - then the question which begs asking is whether a civilian broadcaster and its journalists can ever be categorised as a military objective, or be subject to an attack which

International Law (9 September 1880) article 13; 1907 HR article 26; The 1907 Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War article 6; GC IV article 19; AP I article 57(2)(c); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the 1980 Convention on Certain Conventional Weapons) article 5(2); Protocol II to the 1980 Convention on Certain Conventional Weapons (as amended on 3 May 1996) articles 3(11) and 6.

¹⁸⁸ The duty of advanced warning was implemented notably during the Spanish Civil War (1936-1939), the Second World War (1939-1945), the Iraq-Iran conflict (1980-1989), the Falklands War (1982), the Israeli operation 'Peace in Galilee' (1982), the Gulf War (1991), and the civil war in Rwanda (1993). For further details, see Alexandre Balguy-Gallois (doctoral dissertation) *Droit International et Protection de L'individu dans les Situations de Troubles Intérieurs and de Tensions Internes*, thesis (2003) Université Paris I Panthéon-Sorbonne: Paris at 449-452.

¹⁸⁹ Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 52.

¹⁹⁰ ICTY Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (8 June 2000), available at <http://www.icty.org/sid/10052> (accessed 1 August 2012) at para 50.

¹⁹¹ AP I article 57(2)(c) requires that advance warning be given 'unless circumstances do not permit' (Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 52). So, for example, the NATO representatives chose not to give specific advance warning before bombing the RTS headquarters on 23 April 1999, allegedly so as not to risk the pilot's lives.

¹⁹² Lieber Code article 19; U.K. Manual of Military Law para 291; Canadian Military Manual, para 29; U.S. Army Field Manual para 43.

¹⁹³ According to Doswald-Beck, 'the possibility of warning and how this could be done must be guided by common sense which will inevitably include the safety of the attacker.' (Louise Doswald-Beck (1989) 'The Value of the 1977 Geneva Protocols for the Protection of Civilians' in Michael Meyer (ed) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* The Chameleon Press Ltd: London at 170 fn 72).

would be proportionate and justifiable in terms of the requirements of military necessity. Next we must ask whether the conclusion reached would be any different if those journalists were embedded within the ranks of the armed forces.

Civilian broadcasting facilities: the dual-use dilemma

While civilian sites are generally immune from attack, the risk remains that even a primarily civilian site may have dual uses¹⁹⁴. Such dual-use sites may qualify as a 'legitimate military target where they contribute, in part, to concrete military aims' and their destruction or neutralisation 'in the circumstances ruling at the time offers a definite military advantage'¹⁹⁵. The spirit and letter of AP I re-iterates that it is lawful to attack a dual-use object, provided the criteria set down in AP I article 52 (2) are met. Having said that, if there is any doubt, the IHL presumption operates in favour of preserving the civilian status of the site¹⁹⁶.

Interestingly, 'means of communication' are specifically singled out as targetable dual-use sites, precisely because they can contribute to the military action¹⁹⁷. In the English text of The Hague Air Warfare rules, 'lines of communications' are categorised as a military objective¹⁹⁸. Notably in the German text, there is particular reference to 'radio stations and other news media'¹⁹⁹ qualifying as military objectives. There are similar indications in the Convention for the Protection of Cultural Property in the Event of Armed Conflict - that broadcasting stations are in fact legitimate military targets²⁰⁰. Moreover, the International Committee for the Red Cross (ICRC) Draft Rules of 1956, list under the category of military objectives: 'broadcasting and television stations'²⁰¹.

It seems therefore safe to conclude that IHL recognises that television and radio stations can make a 'contribution to military action when they form

¹⁹⁴ Examples of dual-use sites include 'political sites (like government ministries) that are not a direct part of the military chain of command, the personal assets of the leadership, electrical and water supplies, oil refineries, transport networks, industry, computer systems, and communication systems' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 32).

¹⁹⁵ Rogers *Law on the Battlefield* at 37; Human Rights Watch 'The War in Iraq and International Humanitarian Law: Frequently Asked Questions',

¹⁹⁶ Additional Protocol I article 52(3) specifies that where 'it is unclear whether a particular civilian target is used for military purposes it shall be presumed not to be so used', this principle is regarded as having achieved customary international law status. Rogers *Law on the Battlefield* at 35.

¹⁹⁷ Oeter (1995) 'Means and Methods of Warfare' at 164.

¹⁹⁸ Rogers *Law on the Battlefield* 29 and 37.

¹⁹⁹ Ingrid Detter de Lupis (1987) *The Law of War* Cambridge University Press: Cambridge at 236.

²⁰⁰ Article 8(1)(a) states that 'refuges for cultural property are to be situated an adequate distance from, amongst other things, broadcasting stations', suggesting that broadcasting stations might in fact be legitimate military targets (Rogers *Law on the Battlefield* at 32 and 37).

²⁰¹ ICRC (1956) *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War* (List of Categories of Military Objectives), available at <http://www.icrc.org/ihl.nsf/0/8001130e7d3fbfbcc125641e004ad313?OpenDocument> (accessed 1 August 2012) at article 7(2).

part of the network of command, control and communication²⁰², and consequently might be legitimate targets under certain limited conditions. Interestingly, this was the conclusion which the ICTY review committee reached after the NATO bombing of *Radio Televisija Srbije* in 1999. The Committee's conclusion was based on the finding that *Radio Televisija Srbije's* 'installations were indeed being used as radio transmitters and relays for the armed and special police forces of the Federal Republic of Yugoslavia'²⁰³, thereby categorising them as legitimate military targets. When the cruise missile attack on the Iraqi Television station was confirmed on Wednesday 26 March 2003, the U.S. Pentagon's spokesperson maintained that their 'intention was to damage the regime's command and control capability'²⁰⁴, while the British Defence Secretary announced 'that the targets were part of the military command and control structures', and that they were treated 'as other parts of the communications system that allowed the military to operate in and around Baghdad'²⁰⁵. Similarly, if Al-Jazeera's Kabul premises contained offices used by the Taliban and Al-Qaeda, then they were a legitimate target for bombing on 12 November 2002²⁰⁶.

The difficulty with determining whether a site is really being used for military purposes, is that in modern industrial societies, just about any aspect of the economic or social infrastructure could conceivably contribute to the war effort²⁰⁷. The added complication, when the status of broadcasting sites is under consideration, is that often they are targeted so as to silence damaging propaganda. Anthony Dworkin notes that 'there is no consensus about where to draw the line between military communication and propaganda, particularly when Saddam Hussein is shown on television in military uniform, exhorting his supporters to rise up and "slit the throats" of U.S. troops'²⁰⁸. It is unclear whether honest reporting by the media of embarrassing violations committed by the enemy, is sufficient to label the broadcaster an integral part of the military communications' apparatus. Unfortunately the line between military communication (which would make the broadcaster a valid target for attack) and propaganda is a fine one, and the spin doctors know this. Moreover, it is almost impossible to assess whether they are being targeted for their military contribution, 'or because of their propaganda value in undermining the morale of enemy civilians, or turning the population against the regime'²⁰⁹.

This then begs the question: does the production of damaging propaganda by a civilian enterprise make it a military object contributing to military action?²¹⁰ While inhibiting the enemies propaganda machine may

²⁰² Dworkin 'Iraqi Television: a Legitimate Target?'

²⁰³ ICTY Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at paras 55, 75 and 76.

²⁰⁴ Dworkin 'Iraqi Television: a Legitimate Target?'

²⁰⁵ *Ibid.* Looking past the official line, and exploring the nature and timing of the attack, may well tell the story of propagandist reprisals.

²⁰⁶ Reporters Without Borders (2002) *Annual Report* available at www.rsf.org/rubrique.php3?id_rubrique=144 (accessed 1 August 2012).

²⁰⁷ According to Sarah Sewall (Director of a programme on national security and human rights at Harvard University) 'the United States military can make a strong case within its interpretation of IHL that you attack pretty much anything' (Crimes of War Project 'In America's Sights: Targeting Decisions in a War with Iraq').

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ Oeter (1995) 'Means and Methods of Warfare' at 169.

demoralise the 'local population, and undermine the government's political support, neither purpose offers the concrete and direct military advantage' necessary under IHL to make civilian broadcast facilities a legitimate military target'²¹¹. To this end, the British defence doctrine stipulates that 'the morale of the enemy's civilian population is not a legitimate target'²¹². Human Rights Watch concluded that 'attacks on civilian TV or radio stations are prohibited if they are designed primarily to undermine civilian morale or to psychologically harass the civilian population'²¹³. These opinions are supported by a closer reading of AP I article 52, which 'specifically precludes propaganda as the sole justification for a military attack against the media'²¹⁴. Meyerowitz also supports this conclusion, stating 'that attacks launched solely for the purposes of breaking the enemy civilian population's determination to fight are prohibited, as are attacks of a purely political purpose, whether to demonstrate military strength, or to intimidate the political leadership of the adversary'²¹⁵.

Despite the well reasoned support for the position that propaganda broadcasting by the media is not sufficient to make it a legitimate military target, this position is not unanimously held. The official U.S. Air Force position is that the 'morale of the civilian population may, in itself, be a legitimate target since it weakens the will to fight and thereby offers a military advantage'²¹⁶. During the U.S. air campaign in Afghanistan after 9/11, the U.S. attacked a radio station controlled by the Taliban on the basis that it was a propaganda vehicle for the Taliban leadership²¹⁷. Amnesty International has criticised the U.S. position regarding the attainment of a definite military advantage, particularly where the transmission was only interrupted for a mere three hours, as was the case in June 1999 when NATO bombed *Radio Televisija Srbija*²¹⁸. The ICTY committee tasked with investigating the incident concluded unequivocally that neither the media nor the morale of the population constituted 'a legitimate target merely because they spread propaganda, even though that activity constitutes support for the war effort'²¹⁹.

²¹¹ *Ibid.*

²¹² Anthony PV Rogers 'Zero Casualty Warfare' (2000) 82:837 *International Review of the Red Cross* at 177.

²¹³ Human Rights Watch 'The War in Iraq and International Humanitarian Law: Frequently Asked Questions'. AP I article 51(2) expressly precludes *attacks* that are designed to spread terror amongst the civilian population.'

²¹⁴ Oeter (1995) 'Means and Methods of Warfare' at 158

²¹⁵ *Ibid.*

²¹⁶ Air Force Doctrine (1997) Document 1: Air Force Basic Doctrine AFDD-1; Amnesty International 'Iraq: Respecting International Humanitarian Law' (2003) available at <http://web.amnesty.org/library/print/ENGMDE14041200> (accessed 1 August 2012).

²¹⁷ United States Department of Defence 'News Transcript: Secretary Rumsfeld Interview with Al-Jazeera' (16 October 2001) available at http://www.defenselink.mil/news/Oct2001/t10172001_t1016sd.html (accessed 1 August 2009).

²¹⁸ Amnesty International 'Federal Republic of Yugoslavia (FRY) / NATO: "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force' (5 June 2000) available at <http://www.amnesty.org/en/library/info/EUR70/018/2000/en> (accessed 1 August 2012) at 44.

²¹⁹ ICTY (2000) Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia at paras 47, 55, 74 and 76. The ICTY committee nevertheless considered that NATO's 'targeting of the RTS

This view is reiterated in 1996 in the British Defence Doctrine²²⁰, and again in 1999 in Volker Kröning's submission to the NATO Parliamentary Assembly²²¹. Having said that, it must be recognised that some forms of propaganda might well lead to the media being made a legitimate target for attack. For instance, 'propaganda that incites people to commit grave breaches of IHL, or acts of genocide or violence'²²² does amount to a direct participation in hostilities, and accordingly suspends the protection that is ordinarily afforded the civilian media²²³. In the words of the ICTY committee: '[i]f the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective'²²⁴.

In conclusion, unless civilian broadcast facilities are used for 'military purposes or to incite people to commit grave breaches of IHL, acts of genocide or acts of violence'²²⁵, they remain immune from attack, even if they are broadcasting propaganda. Having said that, even when involved in any of these illegal acts, it is still incumbent upon commanding officers to limit 'civilian casualties and damage to civilian objects'²²⁶, by observing the requirements of military necessity, proportionality, distinction and effective advance warning.

Civilian journalists (not accredited to the armed forces)

Provided civilian journalists (who do not accompany the armed forces) do not take part in the hostilities, they retain their civilian immunity against attack. Furthermore, even if attacks on the broadcasting facilities where these journalists work, have been designated a 'legitimate military objective', because of their use by the military, any subsequent targeting must first be assessed to establish whether the incidental loss caused to civilian life is not excessive or disproportionate in relation to the 'concrete and direct military

building to inflict damages on its propaganda machine was an incidental (albeit complementary) aim of its primary goal of disabling the C3 network' (*Idem* at para 55 and 76).

²²⁰ British Defence Doctrine(1996) (JWP 0-01) 'Targeting [...] the morale of an enemy's civilian population is not a legitimate target' (Rogers 'Zero Casualty Warfare' at 177).

²²¹ NATO Parliamentary Committee Assembly Reports 'Kosovo and international humanitarian law' (November 1999) Civilian Affairs Committee 45th annual session Volker Kröning (Germany), Special Rapporteur Amsterdam at 9 (para 18).

²²² ICTY (2000) Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia at paras 47, 55 and 76. For a concurring point of view, see the Canadian Office of the Judge Advocate General (2004) 'Law of Armed Conflict at the Operational and Tactical Level: Psychological Operations' (B-GJ-005-104/FP-021) '...not all forms of propaganda are lawful. Propaganda which would incite illegal acts of warfare, as for example killing civilians, killing or wounding by treachery or the use of poison or poisonous weapons, is prohibited' (at 7-4); Human Rights Watch 'The War in Iraq and International Humanitarian Law: Frequently Asked Questions'.

²²³ *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* ICTR Judgment and sentence (3 December 2003) ICTR-99-52-T and *Prosecutor v Georges Ruggiu* ICTR Decision (1 June 2000) ICTR-97-32-I.

²²⁴ ICTY (2000) Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia at para 55.

²²⁵ Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 56.

²²⁶ *Ibid.*

advantage anticipated²²⁷. This assessment is particularly revealing where broadcasters are only off air for a short period of time, making the military advantage minimal, and the resultant civilian casualties relatively excessive²²⁸. In the aftermath of the NATO bombing of the RTS, the ICTY committee was asked to evaluate the proportionality of the civilian casualties as measured against the anticipated military advantage achieved by disabling the station's transmissions. The committee concluded 'that the collateral damages, while high, were not disproportionate'²²⁹. Other observers concluded that the principle of proportionality was not satisfied, and that the human death toll (sixteen deaths in this incident) 'was too high when weighed against the limited advantage obtained by the attack'²³⁰. This is an extremely difficult balancing act, particularly in modern, industrialised societies where civilian populations depend heavily on dual-use infrastructure²³¹.

Furthermore, in every attack, precautions must be taken to ensure that civilian losses are kept to a minimum, civilians are warned of imminent attacks, and where feasible removed from the vicinity of the military objective²³². When the U.S. bombed the Bagdad offices of Al-Jazeera and Abu Dhabi TV on 8 April 2003 – killing one journalist while injuring another, the attack was carried out without any prior warning of the imminent attack²³³. Consequently, this attack can be said to fall foul of the legal requirements established under IHL. As for the NATO strike against *Radio Televisija Srbije*, doubts were voiced by Amnesty International as to whether NATO had upheld the obligation to give advance warning of the strike to the civilian journalists at work in the buildings. NATO maintained that advance warning was given, in that the 'President of CNN, Western journalists working at *Radio Televisija Srbije*'s headquarters, and the Yugoslav officials²³⁴ were made aware of the potential for an impending strike²³⁵. However, according to *Radio Televisija Srbije*'s employees and the representatives of the Yugoslav government, they no longer viewed the warnings seriously because of the time lapse after the warnings had been issued²³⁶. In the end, the ICTY committee investigating

²²⁷ AP I article 51(b). Incidental harm caused to civilians and civilian objects is only lawful when it is an 'unavoidable and proportionate side effect of lawful attacks on military objectives' (Gasser (1995) 'Protection of the Civilian Population' above at 214).

²²⁸ I would submit that in both Kosovo and Iraq, the decisions to target civilian television broadcasters failed to satisfy the principle of proportionality, and could not be said to offer a definite military advantage.

²²⁹ ICTY (2000) Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia at paras 77 and 78.

²³⁰ Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 49.

²³¹ Human Rights Watch 'The War in Iraq and International Humanitarian Law: Frequently Asked Questions'; Additional Protocol I article 51(5)(b); Rogers *Law on the Battlefield* at 34.

²³² AP I article 57 and 58(a).

²³³ Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 51.

²³⁴ *Idem* at 54.

²³⁵ Amnesty International 'Federal Republic of Yugoslavia (FRY) / NATO: "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force' at 43-44.

²³⁶ *Ibid*; Human Rights Watch 'The War in Iraq and International Humanitarian Law: Frequently Asked Questions'.

the matter concluded that ‘the advance warning given by NATO may have been sufficient under the circumstances’²³⁷.

In conclusion, provided civilian journalists do nothing to compromise their inherent civilian status (i.e. by participating directly in hostilities), they enjoy full civilian protection from hostilities²³⁸. Consequently, they may not be ‘the object of an attack or a terror campaign’²³⁹, and care must be taken when attacks directed at legitimate military objects implicate these journalists, and their possessions must be respected unless they are ‘used for military purposes’²⁴⁰.

War correspondents

As civilians, these war correspondents cannot be targeted, despite the fact that the members of the armed forces, whom they accompany, do constitute a legitimate military target. That said, ‘war correspondents can only be spared if they are clearly recognisable as civilian’, which is not possible ‘if journalists wear uniform-like clothing or ride on a military vehicle’²⁴¹. Moreover, ‘if they are close to a military target or if they accompany a military unit on patrol, they accept the risk of becoming victims of (lawful)military operations’²⁴². In reality, the close relationship between the embedded war correspondent and the unit to which they are affiliated, is often what places them squarely in harms way during armed conflicts. The presence of one or two civilian war correspondents is not going to warrant calling off an attack upon those armed forces, on the grounds of distinction, proportionality, military necessity, and advanced warning.

Military journalists

As for those journalists who are officially incorporated into the armed forces’ information services, as members of the armed forces, they are precluded from enjoying the protections afforded ordinary civilians against the dangers inherent in the theatre of war²⁴³. Even as non-combatant members of the armed forces, they are not protected by a prohibition against attack (as is the case with civilians), and they remain essentially part of a legitimate ‘military objective’ as defined in AP I article 52(2). With the exception of the religious and medical personnel²⁴⁴ (who enjoy special protections under IHL), all other

²³⁷ ICTY (2000) Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia at para. 77.

²³⁸ Mukherjee ‘Protection of Journalists Under International Humanitarian Law’ at 35; Gasser (1995) ‘Protection of the Civilian Population’ at 228.

²³⁹ Mukherjee ‘Protection of Journalists Under International Humanitarian Law’ at 35; ICRC ‘Covering War and Disaster’.

²⁴⁰ Mukherjee ‘Protection of Journalists Under International Humanitarian Law’ at 35.

²⁴¹ Gasser (2008) ‘Protection of the Civilian Population’ at 257.

²⁴² *Ibid.*

²⁴³ AP I article 51(1); Ipsen (1995) ‘Combatants and Non-combatants’ at 84.

²⁴⁴ Medical and religious personnel wear the uniform of the armed forces, albeit with distinctive emblems denoting their religious or medical function. Although they are also not authorised to participate directly in hostilities, they are not classed with traditional non-combatants. These medical and religious personnel enjoy ‘special primary status under Geneva law’ (Ipsen (1995) ‘Combatants and Non-combatants’ at 89). In situations of armed conflict, ‘they are to be “respected and protected” and can never form part of the military

non-combatants contribute to the achievement of a military advantage, and are part of a military objective, and open 'to attack without special considerations or collateral damage calculations'²⁴⁵. Since non-combatants can be targeted in an attack, they are entitled to defend themselves, and these defensive actions do not amount to unauthorised direct participation in hostilities²⁴⁶.

8.6 The activities of journalists in light of the notion of direct participation in hostilities

The immunity against hostilities that attaches to civilian status is based on the 'fundamental principle of the laws of war, that those who do not participate in the hostilities shall not be attacked'²⁴⁷. According to the ICRC's study into customary IHL, the principle that civilians lose their immunity from prosecution when they participate in hostilities, is seen as a 'valuable reaffirmation of an existing rule of customary international law'²⁴⁸. For these reasons, the protections afforded journalists (as civilians) under AP I²⁴⁹, operates for so long as these journalists refrain from any individual, direct participation in hostilities.

Given that the legal consequences which follow from a finding that a civilian has participated directly in hostilities are serious, there is a presumption²⁵⁰ in IHL which favours protective civilian status²⁵¹ in all assessments as to whether an individual has directly participated in hostilities. In other words, 'in case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not'²⁵² amount to direct participation, and any 'intended attack must be

objective' as do other non-combatants (Ipsen (1995) 'Combatants and Non-combatants' at 89ff). For further material on religious personnel, see Walter Rabus (1995) 'Religious Personnel' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford.

²⁴⁵ Ipsen (1995) 'Combatants and Non-combatants' at 85.

²⁴⁶ GC I article 22(1); GC II article 35(1) and AP I article 13(2)(a); Ipsen (1995) 'Combatants and Non-combatants' at 91; ICRC 'Interpretive Guide on the Notion of Direct Participation in Hostilities Under IHL' (*Interpretive Guide*) (2009) available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609> (accessed 7 August 2011) at 62.

²⁴⁷ Michael Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *International Law and Politics* 697 at 715.

²⁴⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23, 117 and rule 6).

²⁴⁹ Article 79(2), read together with article 51(3).

²⁵⁰ 'Schmitt believes that '[g]ray areas should be interpreted liberally, i.e., in favor of finding direct participation', although Melzer points out that this inversion of the presumption 'finds no support in State practice and jurisprudence' (Nils Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 831 at 876).

²⁵¹ 'In case of doubt, the person must be presumed to be protected against direct attack' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 74 and 76).

²⁵² *Idem* at 75.

suspended²⁵³. That said, it is possible that a civilian's actions 'poses a grave threat to public security, law and order, without clearly amounting to direct participation in hostilities', and in such instances 'the regular law enforcement mechanisms as well as the legal regime applicable to individual self defence will prevail'²⁵⁴.

The phrase 'direct participation in hostilities' has a very specific meaning in the realm of IHL, and refers in short to 'combat-related activities'²⁵⁵ that would normally be undertaken only by members of the armed forces²⁵⁶. Although the phrase 'direct participation in hostilities' can be found in many IHL provisions²⁵⁷, none the four Geneva Conventions or either of the two Additional Protocols provide any clear definition of what actions might amount to 'direct participation in hostilities'²⁵⁸. At most, studies reveal that an 'assessment of direct participation has to be made on a case-by-case basis', without actually explaining what amounts to direct participation²⁵⁹. Some States military manuals 'give several examples of acts constituting direct participation in hostilities, such as serving as guards, intelligence agents, lookouts on behalf of military forces²⁶⁰ ... spies or couriers'²⁶¹. That said, the ICRC's study into customary international law, confirms that 'a precise definition of the term "direct participation in hostilities" does not exist'²⁶². This leaves States having to interpret 'the notion of direct participation in hostilities ... in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL'²⁶³.

Given the realities of contemporary warfare, where non-State actors are challenging the once clearly defined distinction between combatants and civilians²⁶⁴, the need for clarification of the concept of direct participation in hostilities is long overdue. In response to this need, the ICRC convened five meetings of forty-plus legal experts, drawn from 'academic, military, governmental, and non- governmental circles', between 2003 and 2008. The resultant discussions informed the ICRC's Interpretive Guide²⁶⁵, which was

²⁵³ *Idem* at 74.

²⁵⁴ *Idem* at 76.

²⁵⁵ *Idem* at 45.

²⁵⁶ Anthony Peter Vernon Rogers 'Unequal Combat and the Law of War' (2004) 7 *Yearbook of International Humanitarian Law* 3 at 19.

²⁵⁷ GC common article 3; AP I article 51(3), 43(2), 67(1)(e) and AP II article 13(3). Sometimes the phrase 'taking no active part in the hostilities' is used and it refers to the 'same quality and degree of individual participation in hostilities' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23).

²⁵⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

²⁵⁹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 22.

²⁶⁰ *Ibid.*

²⁶¹ *Idem* at 22-23.

²⁶² *Idem* at 22.

²⁶³ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 41.

²⁶⁴ Ryan Goodman and Derek Jinks 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International humanitarian Law: An Introduction to the Forum' (2010) 42 *International Law and Politics* 637 at 637.

²⁶⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 9.

intended to offer assistance²⁶⁶ in interpreting the term 'direct participation in hostilities'²⁶⁷.

i. Specific hostile acts which amount to direct participation in hostilities.

'In order to qualify as direct participation in hostilities, the specific hostile act must meet three cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)²⁶⁸.

I turn now to explore these criteria a bit further, in light of the role that journalists play in the theatre of war.

Threshold of harm requirement

The first criterion, which is referred to as the 'threshold of harm' determination, requires that harm:

a) of a specifically military nature²⁶⁹, or²⁷⁰

²⁶⁶ It must also be stated that the Interpretive Guide is not legally binding, as 'a legally binding interpretation of IHL can only be formulated by a competent judicial organ or, collectively, by the States themselves' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 10). What the Interpretive Guide proposes, is 'ten recommendations' supported by commentary (William J Fenrick 'ICRC Guidance on Direct Participation in Hostilities' (2009) 12 *Yearbook of International Humanitarian Law* 287 at 288). However, the ICRC hoped that their recommendations would have 'substantial persuasive effect' (Fenrick 'ICRC Guidance on Direct Participation in Hostilities' at 300) 'for States, non-State actors, practitioners, and academics alike' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 10). Some argue that the guidance 'may even be viewed as a secondary source of international law ... analogous to writings of the "most highly qualified publicists"' (Damien Van der Toorn "'Direct Participation in Hostilities": A Legal and Practical Evaluation of the ICRC Guidance' (2009) available at http://works.bepress.com/damien_van_der_toorn/1 (accessed 14 July 2012) at 22).

²⁶⁷ Even prior to the first meeting of the experts, it was apparent that there were very divergent opinions on how one should interpret this concept of direct participation in hostilities. It was not surprising that 'key features of the Guidance have proven highly controversial' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 698).

²⁶⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47.

²⁶⁹ The term 'military harm should be interpreted as encompassing not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any

b) harm (by inflicting death, injury or destruction²⁷¹) of a protected person or object²⁷²,

must be reasonably expected to result from a journalist's actions, before the journalist can be said to be participating directly in hostilities²⁷³. Or to put it another way, in order for a journalist to lose their immunity from direct attack, 'they must either harm the enemy's military operations or capacity, or they must use means and methods of warfare directly against protected persons or objects'²⁷⁴. All that is required is the 'objective likelihood'²⁷⁵ that the act will result in such harm', not necessarily the actual 'materialisation of harm'²⁷⁶.

In short, if a journalist was found committing 'acts of violence against human and material enemy forces', or causing 'physical or functional damage to military objects, operations or capacity'²⁷⁷, this would satisfy the threshold of harm requirement for a finding of 'direct participation in hostilities'²⁷⁸. Also possible, but less likely, is if journalists are found to have inflicted injury on a protected person or object. If we examine the activities which journalists are likely to engage in, the following might satisfy the threshold of harm requirement: where journalists, by their civilian presence restrict or disturb military 'deployments, logistics and communications'²⁷⁹ by 'voluntarily and deliberately positioning themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cross the threshold of harm required for a qualification as direct participation'²⁸⁰. Similarly, when journalists by their civilian presence exercise any form of control over 'military personnel, objects and territory, to the detriment of the adversary', this also reaches the required level of harm²⁸¹. Of particular relevance to journalists is the ICRC's interpretation that 'electronic interference with military computer networks could also suffice, whether through computer network attacks or

consequence adversely affecting the military operations or military capacity of a party to the conflict' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47). It only applies to objects which 'contribute militarily' and not to civilian objects (even if they may sometimes contribute to one belligerent's success in the conflict) (Schmitt 'Deconstructing direct participation in hostilities: The constitutive elements' at 717). So, for example, political, economic and psychological contributions might play a role in a military victory, but alone they are not considered military objects (*Ibid*).

²⁷⁰ The test is framed in the alternative 'that is, the harm contemplated may either adversely affect the enemy, or harm protected persons or objects' (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 713).

²⁷¹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47.

²⁷² 'In the absence of such military harm, however, a specific act must be likely to cause at least death, injury, or destruction' (*Idem* at 49).

²⁷³ *Idem* at 47.

²⁷⁴ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 862.

²⁷⁵ In other words, 'harm which may reasonably be expected to result from an act in the prevailing circumstances' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 47).

²⁷⁶ *Idem* at 33.

²⁷⁷ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 48.

²⁷⁸ *Idem* at 47.

²⁷⁹ *Idem* at 48.

²⁸⁰ *Idem* at 56.

²⁸¹ *Idem* at 48.

exploitation²⁸², as well as 'wiretapping the adversary's high command or transmitting tactical targeting information for an attack'²⁸³. In short, journalists must be careful that when gathering information they do not 'interfere with military deployments, wiretap military command centres or disclose any tactical targeting information which might be used for an attack'²⁸⁴, or be used as lookouts whilst reporting on hostilities. While the aforementioned activities might compromise a journalist's civilian protection, their refusing 'to engage in actions that would positively affect one of the parties, as in the case of a civilian who refuses to provide information'²⁸⁵, will not amount to direct participation in hostilities.

Once an action has reached the required threshold of harm, it will only amount to direct participation in hostilities if the action 'additionally satisfies the requirements of direct causation and belligerent nexus'²⁸⁶.

The direct causation requirement

The second requirement of the three criteria for a finding of 'direct participation in hostilities', is termed the 'direct causation' test. Much controversy has surrounded questions around whether 'general war effort'²⁸⁷, and activities aimed at sustaining war²⁸⁸, would satisfy the threshold criteria and amount to direct participation in hostilities²⁸⁹. It is certainly true that war-sustaining activities are indispensable to the war effort, which in effect does harm the adversary. However, in order to avoid depriving much of the civilian population of their protected status, there must be 'a sufficiently close causal relation between the act and the resulting harm', for it to amount to direct participation in hostilities²⁹⁰. According to the ICRC's Interpretive Guide, 'direct causation should be understood as meaning that the harm in question must be brought about in one causal step'²⁹¹. Where a specific act does not

²⁸² This includes 'the ability to gain access to information hosted on information systems and the ability to make use of the system itself' (*Ibid*).

²⁸³ *Ibid*.

²⁸⁴ *Ibid*.

²⁸⁵ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 719; ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 49.

²⁸⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 50.

²⁸⁷ This includes all activities 'objectively contributing to the military defeat of the adversary', for example 'design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations' (*Idem* at 53).

²⁸⁸ This would additionally include 'political, economic or media activities supporting the general war effort' (*Ibid* at 53).

²⁸⁹ *Idem* at 52.

²⁹⁰ *Idem* at 53.

²⁹¹ *Idem* at 54-55. Schmitt is critical of the 'one causal step' requirement, because it excludes from the parameters of direct participation, a range of 'capacity-building activities' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 865-867). Schmitt proposed that 'it is necessary to ... extend participation as far up and downstream as there is a causal link' (*Ibid*). Melzer warns that Schmitt's approach is 'extremely permissive' and that 'essentially any act connected with the resulting harm through

'on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm'²⁹². So, for example, where journalists are involved in the gathering²⁹³ of 'intelligence on the army'²⁹⁴ in 'enemy- controlled territory'²⁹⁵; the transmission of 'tactical intelligence to attacking forces'²⁹⁶ for immediate use²⁹⁷; or simply 'the identification and marking of targets'²⁹⁸ - their actions will have the required direct causation to amount to direct participation in hostilities.

On the other hand, their temporal or geographic proximity cannot on its own, without direct causation, amount to a finding of direct participation in hostilities²⁹⁹. So, where journalists are acting as 'voluntary human shields'³⁰⁰; 'providing an adversary with supplies and services'³⁰¹; 'participating in activities in support of the war or military effort'³⁰²; or 'expressing sympathy for the cause of one of the parties to the conflict'³⁰³ - these activities do not amount to direct participation in hostilities.

The belligerent nexus requirement

In short, the belligerent nexus requirement, requires that 'an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and³⁰⁴ to the detriment of another'³⁰⁵. In other

a causal link would automatically qualify as "direct" participation in hostilities', no matter how far removed the act may be from the final harm caused (*Idem* at 867).

²⁹² ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

²⁹³ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 867. This activity is said to 'constitute a preparatory measure integral to the subsequent tactical operation which, in turn, is designed to harm the enemy in "one causal step"' (John Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' (2005) 57 *Air Force Law Review* 155 at 177-8).

²⁹⁴ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 708.

²⁹⁵ *Ibid.*

²⁹⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

²⁹⁷ Kenneth Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' (2010) 42 *International Law and Politics* 641 at 707.

²⁹⁸ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 55.

²⁹⁹ *Ibid.*

³⁰⁰ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 865

³⁰¹ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 728.

³⁰² Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707. These activities must be distinguished from 'support activities, such as provision of supplies and services ... which do not amount to taking a direct part in hostilities' (Rogers 'Unequal Combat and the Law of War' at 19).

³⁰³ Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' at 707.

³⁰⁴ Schmitt is in favour of formulating the belligerent nexus test in the alternative, to read 'in support of a party to the conflict or to the detriment of another' (Schmitt 'Deconstructing Direct

words, ‘in order to amount to direct participation in hostilities, an act must not only be objectively likely to inflict harm that meets the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another’³⁰⁶. Consequently, if journalists are found causing harm in individual self-defence or defence of others, while that will meet the required threshold of harm, it fails to meet the belligerent nexus test, and the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities³⁰⁷. Moreover, were a journalist to be ‘totally unaware of the role they are playing in the conduct of hostilities’, or ‘when they are completely deprived of their physical freedom of action’³⁰⁸ ... these activities do not amount to direct participation in hostilities, ‘despite the belligerent nexus of the military operation in which they are being instrumentalised’³⁰⁹. So, for example, if a journalist were found to be involved in the ‘preparatory collection of tactical intelligence’³¹⁰, this activity would meet the belligerent nexus test. On the other hand, were journalists to be providing ‘financial or political support of armed individuals’³¹¹, this would fail to rise to the level required of the belligerent nexus test.

ii. Conclusions on the role of civilian journalists and the notion of direct participation in hostilities

Non-embedded civilian journalists

Non-embedded civilian journalists do not forfeit their IHL civilian status merely ‘by entering an area of armed conflict on a professional mission, even if they are accompanying the armed forces ... provided that they do not undertake any action which could jeopardise their civilian status’³¹². According to the ICRC, ‘civilian journalists engaged in professional missions in areas of armed

Participation in Hostilities: The Constitutive Elements’ at 736). Melzer cautions against a ‘disjunctive reading of the two elements’ for the reasons that it can give rise to situations where it would be permissible to respond with military force against criminal elements who had no connection to the armed conflict (Melzer “Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ at 873).

³⁰⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 58.

³⁰⁶ *Ibid.*

³⁰⁷ As a general rule, ‘harm caused (a) in individual self-defence or defence of others against violence prohibited under IHL, (b) in exercising power or authority over persons or territory, (c) as part of civil unrest against such authority, or (d) during inter-civilian violence lacks the belligerent nexus required for a qualification as direct participation in hostilities’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 62-64; Van der Toorn “Direct Participation in Hostilities”: A Legal and Practical Evaluation of the ICRC Guidance’ at 19).

³⁰⁸ For example ‘when they are involuntary human shields physically coerced into providing cover in close combat’ (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 60).

³⁰⁹ *Ibid.*

³¹⁰ Gary Solis (2010) *The Law of Armed Conflict: International Humanitarian Law in War* Cambridge University Press: New York at 204-5.

³¹¹ *Ibid.*

³¹² Dörmann ‘International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts’.

conflict must be respected and protected as long as they are not taking a direct part in hostilities. State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts³¹³. By categorising journalists as civilians, States implicitly agree that 'being on the spot'³¹⁴, 'taking photographs, shooting films, recording information, taking notes', 'conducting interviews'³¹⁵, and 'transmitting their information and materials to the public via the media, can never amount to unlawful direct participation in hostilities'³¹⁶. Since the adoption of AP I, journalists have been cautioned that the privileges extended to them under the four GCs might be forfeited 'if their clothing too closely resembles that of combat personnel'³¹⁷. While journalists do not lose their right to protection as a civilian, they do act at their own risk, and may lose 'de facto' protection if they stay too close to a military unit³¹⁸ or approach a military target in respect of which the proportionality rule would permit an attack with minor collateral damage³¹⁹. In this way, while their actions might not amount to 'direct participation in hostilities', their location may 'expose them to an increased risk of incidental death or Injury'³²⁰.

On the other hand, it is suggested that any acts, not traditionally associated with the role of a journalist, which make a 'direct and effective contribution to the military action', will give rise to the withdrawal of protection³²¹. Moreover, broadcasting the strategic positions of enemy forces might well amount to direct participation in hostilities.

Embedded journalists/war correspondents

The situation of embedded journalists/war correspondents is more complicated, because of their close affiliation to the armed forces. Embedded journalists who are accredited to the armed forces, are afforded a special IHL status (provided for in GC III article 4A(4)) as individuals 'who follow the armed forces without actually being members thereof'. These embedded journalists are essentially civilian non-combatants³²². Having said that, the fact that embedded journalists accompany the armed forces, increases the risk that they might be targeted as part of a legitimate military objective. Because of this increased risk of falling into enemy hands, they carry an identification card which affords them POW status upon capture.

³¹³ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* rule 34.

³¹⁴ Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 36.

³¹⁵ *Ibid.*

³¹⁶ Dörmann 'International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts'.

³¹⁷ Orme 'Protection of Journalists'.

³¹⁸ Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions'.

³¹⁹ *Ibid.*; AP I article 51(5)(b); Dörmann 'International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts'; Mukherjee 'Protection of Journalists Under International Humanitarian Law' at 36.

³²⁰ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 16.

³²¹ Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 40.

³²² This category is dealt with further below.

8.7 The temporal scope of the loss of civilian immunity and the legal consequences for journalists found participating directly in hostilities

Once a civilian journalist carries out a 'specific hostile act'³²³ which amounts to direct participation in hostilities, their actions compromise their civilian immunity from attack. While they never lose their primary civilian status³²⁴, IHL condones the temporary suspension of their civilian 'protection against direct attack'³²⁵, for so long as the civilian engages in direct participation in hostilities³²⁶. As the ICRC commentary on AP I article 51(3) explains: 'the immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts'. Thus a civilian who takes part in an armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities³²⁷. The notion that civilian immunity from attack can be suspended, 'for such time as' they participate in hostilities, is widely recognised as constituting customary international law³²⁸.

While the 'for such time' criterion might reflect customary international law, its practical implementation has not been without controversy. For the

³²³ The ICRC's commentary on AP I article 51(3) 'takes a narrow interpretation of the phrase "direct participation in hostilities", requiring an act that causes "actual harm" to the equipment or personnel of the opposing military forces' (Eric Talbot Jensen (2011) 'Direct Participation in Hostilities' in William Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* Columbia (Studies in Terrorism and Irregular Warfare) Columbia University Press: New York at 2002-11).

³²⁴ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 70; Gasser (1995) 'Protection of the Civilian Population' at 211.

³²⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 65 and 70. It is worth stating, at the outset, that the Interpretive Guide makes it explicit that the document only speaks to the notion of direct participation in hostilities, in so far as it impacts on decisions regarding 'targeting and military attacks', and it does not propose to deal with the issue of 'detention or combatant immunity' (Goodman and Jinks 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum' at 638). Until the civilian is performing functions which amount to direct participation in hostilities, all actions which amount to 'the use of force against him or her must comply with the standards of law enforcement or individual self-defence' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 70).

³²⁶ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 70; The ICRC Commentary on AP I article 51(3) 'allows that this would include "preparation for combat and the return from combat", but then adds "once he ceases to participate, the civilian regains his right to the protection Under this section ... and he may no longer be attacked"' (Jensen (2011) 'Direct Participation in Hostilities' at 2003-12).

³²⁷ AP I article 51(8); Jensen (2011) 'Direct Participation in Hostilities' at 1995-2003.

³²⁸ Boothby, in his criticism of the concept, points to the U.S. and Israel as evidence that the 'for such time as' requirement is not uncontroversially accepted as having crystallised into customary international law. However, even after citing these examples, Boothby himself concedes that 'the Israeli High Court's express recognition that "all of the parts of article 51(3) of The First Protocol express customary international law."' (Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 885). In short, 'Boothby's doubt as to the customary nature of the phrase "unless and for such time" remains unsubstantiated' (*Idem* at 886).

most part, the controversy lies in the fact that when such a civilian is no longer engaged in direct participation (and consequently no longer poses a threat to the opposition), they reclaim their full civilian immunity³²⁹ from direct targeting - giving rise to the what is called the 'revolving door' of civilian protection³³⁰. The net effect of the 'for such time as' requirement, is that 'civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities'³³¹. The temporary suspension of a civilian's immunity from direct targeting, is only afforded civilians who participate in hostilities in a 'spontaneous, unorganised or sporadic basis'³³².

The concept of direct participation in hostilities, includes not only the obvious individual armed activities, but also the 'unarmed activities adversely affecting the enemy'³³³. Moreover, owing to the 'the collective nature and complexity of contemporary military operations', direct participation in hostilities must be understood to include those activities which only result in the cause of harm 'in conjunction with other acts'³³⁴. According to the ICRC's Interpretive Guide, the scope of the 'for such time' window will also include 'measures preparatory to the execution of a specific act' ... 'as well as the deployment to and the return from the location of its execution'³³⁵. What the Guide does stipulate, however, is that these preparatory measures must be linked to 'specific hostile acts'³³⁶ of direct participation, before they amount to direct participation in hostilities³³⁷. These preparations for a specific hostile act are to be distinguished from preparatory activities which merely establish 'the general capacity to carry out hostile acts' (which do not amount to direct participation in hostilities)³³⁸. Preparations which are part of a generalised

³²⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71.

³³⁰ *Idem* at 70.

³³¹ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 883.

³³² ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 71.

³³³ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 882. Uncontroversially, the 'execution phase of a specific act', which satisfies the three-pronged test for direct participation in hostilities, will fall within the 'for such time' category, and amount to a temporary loss of immunity from attack (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 65).

³³⁴ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 882.

³³⁵ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 65.

³³⁶ Bill Boothby "'And For Such Time As": The Time Dimensions to Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 741 at 750; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 880).

³³⁷ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 881 and 882-883.

³³⁸ *Idem* at 881. Examples of such general reparations include 'the purchase, smuggling, production, and hiding of weapons'. 'However, a civilian who is a general supporter of an organised armed group without being a member of it, and who smuggles weapons to a

'campaign of unspecified operations'³³⁹, or general 'capacity building to undertake military activity', do not fall within the scope of the activities for which civilian immunity can be forfeited. Where the specific act requires 'prior geographic deployment', that preparatory deployment 'already constitutes an integral part of the act in question', and results in the loss of civilian immunity³⁴⁰. For an activity to amount to a deployment which will compromise civilian immunity, 'the deploying individual' ... must undertake a physical displacement' with the aim of carrying out the specific act³⁴¹. Civilian immunity is only restored 'once the individual in question has physically separated from the operation, for example by laying down, storing or hiding the weapons or other equipment used, and resuming activities distinct from that operation'³⁴².

It is worth noting that when journalists regain full civilian immunity from attack, they may nevertheless still face 'prosecution for violations of domestic and international law they may have committed'³⁴³. The mere fact that they participated in hostilities without the requisite 'combatant privilege', exposes them to potential prosecution - even if during their participation they observed the laws of war regarding the means and methods of warfare³⁴⁴.

Civilian³⁴⁵ journalist found participating directly in hostilities

Not only does a civilian journalist lose their immunity against the unfortunate consequences of hostilities when they choose to participate directly in hostilities, but they can in fact be legitimately targeted³⁴⁶ by the opposition forces acting in self-defence, for the duration of their participation in the hostilities³⁴⁷. If journalists are found to be participating directly in hostilities, they do not on account of that acquire combatant status - they remain civilians, albeit participating illegally in hostilities³⁴⁸. Moreover, once captured, they can furthermore face prosecution for their unauthorised participation in

fighter's position and conceals them there without taking any other active role in the hostilities, may be regarded as not participating in the hostilities' (Boothby 'And For Such Time As': The Time Dimensions to Direct Participation in Hostilities' at 747).

³³⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 66.

³⁴⁰ *Idem* at 67. For an activity to amount to a deployment which will compromise the civilian immunity, 'the deploying individual'... must 'undertake a physical displacement' with the aim of carrying out the specific act (*Ibid*).

³⁴¹ *Ibid*.

³⁴² *Ibid*.

³⁴³ *Idem* 83.

³⁴⁴ Nils Melzer (2009) *Targeted Killing in International Law* Oxford University Press: Oxford at 329.

³⁴⁵ The restrictions against direct participation in hostilities is aimed at civilians, and consequently I will not deal with military journalists in this section, since, as members of the armed forces, they are categorised as combatants.

³⁴⁶ Having said that, combatants are still obliged to observe the principle of proportionality; shield other civilians from attack; and keep to a minimum any resultant civilian losses (Gasser (1995) 'Protection of the Civilian Population' at 211; Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 703).

³⁴⁷ AP I article 51(8); ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

³⁴⁸ Gasser (1995) 'Protection of the Civilian Population' at 233.

hostilities³⁴⁹, although they should still be treated humanely as civilians, and afforded the 'regular and fair judicial guarantees extended to civilians'³⁵⁰.

Embedded journalist found participating directly in hostilities

As for embedded journalists, the comments above regarding civilian journalists are also applicable to them. That said, they have the added complication that if they infiltrate the opposition's territory, they might be suspected of spying, particularly if they 'overstep their role and the limits of their professional mandate'³⁵¹. If they are captured whilst disguising themselves as anything other than war correspondents, and using that disguise to gain a military advantage for the unit to which they are associated, they can face prosecution on grounds of spying. This might be true, particularly in instances when embedded journalists report back to the commanding officer (of the unit to which they are attached) on the opposition's position, military capacity, or other information which might be used to gain a military advantage. By acting as spies for the armed forces, embedded journalists may forfeit the otherwise civilian privileges that they enjoy. In particular, they may be tried for perfidy if captured by the opposition, because they disguised themselves as regular civilians, and something other than embedded journalists.

8.8 Conclusions

The work of the press during international armed conflicts will always involve risks, which journalists often choose to take. The law cannot always protect them from the consequences of their own free decisions, or from the dangers they themselves seek to face³⁵². What the law can do is to offer them a particular IHL status, which will bring with it obligations which will have to be observed by the belligerent parties.

As a profession, journalists and their equipment enjoy no special professional status in IHL. Those journalists who opt to work for the military's information services, will be classified as non-combatant members of the armed forces. All other journalists, both those embedded in the armed forces, and those who do not accompany the armed forces, will always be presumed to retain their civilian status in international armed conflicts³⁵³. Embedded journalists enjoy the benefits afforded POWs upon capture, because they are grouped with 'persons accompanying the armed forces without actually being members thereof'.

³⁴⁹ ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 12.

³⁵⁰ GC IV article 5(3) and AP I article 75; Gasser (1995) 'Protection of the Civilian Population' at 211.

³⁵¹ Dörmann 'International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts'.

³⁵² Gasser 'The Protection of Journalists Engaged in Dangerous Professional Missions'.

³⁵³ 'While journalists are not specifically mentioned in any treaty applicable to non-international armed conflicts, they are considered to be civilians' and as a consequence, benefit from the full protection granted by law to civilians, in both international and non-international armed conflicts' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 115-118).

With regard to targeting decisions, where journalists are implicated, only those decisions which result in proportionate attacks on legitimate military objectives which satisfy the requirements of military necessity and advanced warning, will be defensible under IHL. IHL is clear that civilian broadcasting operations can in some instances be classified as military objectives, particularly when they are dual-use sites being utilised for both civilian and military purposes. For the remainder, unless the media are used for 'military purposes or to incite people to commit grave breaches of IHL, acts of genocide or acts of violence'³⁵⁴, they remain immune from attack - even if they are broadcasting propaganda. Having said that, even when involved in any of these illegal acts, it is still incumbent upon commanding officers to limit 'civilian casualties and damage to civilian objects'³⁵⁵, by observing the requirements of military necessity, proportionality, distinction and effective advance warning. The risk which embedded journalists run is that they may lose their '*de facto* civilian protection if they stay too close to a military unit or approach a military target'³⁵⁶ in respect of which the proportionality rule would permit an attack. They also run the risk of being categorised as spies if captured, while disguising themselves as anything other than war correspondents, and using that disguise to gain a military advantage for the unit to which they are associated.

All civilian journalists will enjoy immunity from direct attack and the general humane protections afforded civilians, provided they refrain from participating directly in hostilities. Any acts not traditionally associated with the role of a journalist - which meet the three criteria of threshold of harm, direct causation and belligerent nexus - will give rise to the temporary withdrawal of protection. In particular, journalists who act as lookouts, or gather intelligence in enemy-controlled territory, which assists the opposition in the identification and marking of military targets - will be considered to be participating in hostilities. If civilian journalists are found to be participating directly in hostilities, they do not acquire combatant status, but they can temporarily compromise their civilian immunity against attack for so long as they persist in their participation in the hostilities. Should they fall into enemy hands after such participation, they may be held to account and prosecuted for their unauthorised actions. However, at all times they will have to be treated humanely and afforded the fair judicial guarantees normally extended to civilians.

Sadly, the risks which journalists face in situations of armed conflict often make them the topic of news headlines, rather than their author.

³⁵⁴ Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' at 56.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

CHAPTER 9

ASSESSING THE COMBATANT STATUS OF RELIEF WORKERS IN INTERNATIONAL ARMED CONFLICTS, IN LIGHT OF THE INTERNATIONAL HUMANITARIAN LAW NOTION OF DIRECT PARTICIPATION IN HOSTILITIES¹

9.1 Introduction

On 19 August 2003, a suicide bomber drove a truck into the 'undefended, quintessentially soft target' of the United Nation's (U.N.) Baghdad headquarters, housing international aid workers and their offices². The explosion killed twenty-three relief workers³. Only nine weeks later on 27 October 2003, suicide bombers targeted the ICRC's Baghdad headquarters, killing thirty-five relief workers and wounding two hundred more⁴. More recently, in the early hours of 31 May 2010, an Israeli military operation⁵ targeted two vessels⁶, staffed with six hundred civilians (allegedly neutral relief workers) from thirty-two nation states, bearing educational, medical and construction materials aimed at ending the Israeli blockade around Gaza. The world watched in amazement as media reports showed civilians fending off blackclad Israeli forces as they rappelled onto the vessels. Before taking full control of the vessels and the cargo, the Israeli forces killed ten civilians and injured thirty others⁷.

¹ This chapter is an updated version of a published article entitled 'Relief Workers: the Hazards of Offering Humanitarian Assistance in the Theatre of War' (2010) 35 *South African Yearbook of International Law* 56. The revision of this published piece has been made with the kind permission of the *SAYIL* editorial board.

² Kenneth Anderson 'Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts' (2004) Spring *Harvard Human Rights Journal* 41 at 45.

³ Felicity Barringer 'Questions About the Role of World Agencies in Hot Spots' (20 August 2003) *New York Times* at A9. One month later a second suicide bomber detonated a bomb outside the U.N. headquarters in Baghdad on 22 September 2003, killing himself and another civilian and wounding nineteen others. (Ian Fisher 'Suicide Attacker Who Struck at U.N. Carried Two Bombs' (23 September 2003) *New York Times* at A13).

⁴ Dexter Filkins and Alex Berenson 'Suicide Bombers in Baghdad Kill at Least 34' (28 October 2003) *New York Times* at A1; Rajiv Chandrasekaran 'Car Bombs Kill at Least 35 in Baghdad; Red Cross, 3 Police Stations Hit, Killing 1 American; Foreign Fighters Blamed' (28 October 2003) *Washington Post* at A1.

⁵ Supported by Israeli naval ships and helicopters. There are competing views as to how to classify the conflict between Israel and the Palestinians. One view, endorsed by Antonio Cassese and the Israeli Supreme Court in the Targeted Killings case (HCJ 769/02 (11 December 2005) is that 'the entire conflict, including during December 2008 - January 2009 in the Gaza Strip, is an international armed conflict' (Rule of Law in Armed Conflicts Projects available at http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=113 (accessed 21 May 2013).

⁶ The Turkish-registered *Mavi Marmara* and the Greek-registered *Sfendonii*.

⁷ U.N. SC 'Security Council Condemns Acts Resulting in Civilian Deaths During Israeli Operation Against Gaza-bound Aid Convoy, Calls for Investigation, In Presidential Statement' (June 2010)

When neutral and impartial relief workers are targeted in these ways, the response is often one of sheer disbelief. The words of the Deputy Secretary-General of the U.N., Malloch Brown, convey this sentiment: 'we do this out of vocation. We are apolitical why us?'⁸. Sadly, these incidents reveal that not only are relief workers exposed to collateral damage in the theatre of armed conflict, but they are now also viewed as 'potential political targets'⁹.

Prior to the 1990s 'the ICRC was virtually alone in working in active conflict zones'¹⁰. Other relief workers¹¹ 'remained largely at the periphery, working in government-held territories or in neighbouring countries where conflict-affected populations sought asylum as refugees'¹². The end of the Cold War saw 'a more interventionist approach'... [aimed at reaching] 'populations on all sides of a conflict'¹³. Post Cold War, relief workers from all parts of the world began 'to work within wars, not simply around them'¹⁴.

Regrettably, studies show that in recent years the 'deliberate targeting of civilians, large scale population displacement, grave violations of international humanitarian law ... and restrictions on humanitarian access to civilians'¹⁵, have increasingly been a feature of international armed conflicts. Together with the increased demand that this has placed on the need for humanitarian relief, has come a dramatic increase¹⁶ in the deliberate targeting¹⁷ of relief workers. In a study undertaken by the Humanitarian Policy Group (HPG) in 2008, it was found

SC 9940. For a complete discussion of this incident in light of IHL see Shannon Bosch 'Israel Attacks an "Aid" Flotilla Bound for Gaza: A Dark Day for International Law' (2010) 35:2 *Journal for Juridical Science* 1.

⁸ Barringer 'Questions About the Role of World Agencies in Hot Spots'.

⁹ Stoddard, Harmer and Haver 'Providing Aid in Insecure Environments: Trends in Policy and Operations' at 4.

¹⁰ *Idem* at 20.

¹¹ Including those affiliated to the U.N. and those belonging to international NGO's (*Ibid*).

¹² *Idem* at 21.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ Rebecca Barber 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' (2009) 91:874 *International Review of the Red Cross* 371 at 372.

¹⁶ During the period 1997-2006 'there were 408 reported acts of major violence against aid workers ... involving 941 victims and resulting in 434 fatalities' (Stoddard, Harmer and Haver 'Providing Aid in Insecure Environments: Trends in Policy and Operations' at 1). In the three-year period between 2002-2005, the statistics reveal that violent acts directed at aid workers were double those from the four year period preceding 2002 (*Ibid*; ICRC 'Protecting the Protectors' (28 January 1998) *Official statement* available at

<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JP2C> (accessed at 28 November 2010) at 1).

Those mandated by the U.N. appear to be the most susceptible, consequently other NGO's have started to paint their traditionally white utility vehicles 'yellow, pink, anything as long as it has no military connotations' in the hopes that they will not be associated with the U.N. relief workers (Kate Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' (2007) 89:865 *International Review of the Red Cross* at 125).

¹⁷ Barber 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' at 372.

that relatively¹⁸ speaking, the rates of attacks directed at aid workers had increased by sixty-one percent¹⁹.

This alarming increase in attacks targeting relief workers, is challenging the longstanding international humanitarian law (IHL) position that neutral relief organisations, be they U.N. official agencies or private humanitarian agencies (such as the ICRC), were immune from attack²⁰. It seems that the 'protected status'²¹ they once enjoyed under IHL is not only insufficient to protect them against acts of violence, but they in fact appear to be 'especially vulnerable for a variety of reasons beyond their control'²².

Given the 'resources at their disposal, humanitarian agencies make particularly tempting targets'²³. Belligerents see 'humanitarian assistance as something to control, reap or deny'²⁴. In failed states they are particularly vulnerable to being hijacked for their supplies. So, for example, in Bosnia 'aid commodities were treated as spoils of war', making the relief workers targets for attack²⁵. Moreover, they are often 'especially vulnerable'²⁶ and 'soft targets'²⁷, given that they are unarmed and in some case operate without a security detail. Their presence at the frontline of armed conflict, and their interactions with the civilian population, often make them 'inconvenient witnesses'²⁸ to 'instances of war crimes and genocide'²⁹, - witnesses whom the belligerents would rather silence.

¹⁸ In other words the 'number of attacks per aid workers in the field'.

¹⁹ According to Barber 'the average annual number of attacks in 2008 was almost three times higher than the annual average for the preceding nine years' (Barber 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' at 373). Moreover, 'cases in which the ICRC has been deliberately targeted have increased steadily, from three percent to twenty percent' (ICRC 'Protecting the Protectors'); 'In 2003 alone, seventy-six [non UN] humanitarian workers were killed by hostile action' (Peter Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' in Victoria Wheeler and Adele Harmer (eds) *Resetting the Rules of Engagement: Trends and Issues in Military-Humanitarian Relations* (2006) 22 HPG Report at 6).

²⁰ Provided they acted with impartiality in offering humanitarian assistance, the persons, property and missions of relief workers were immune from targeting in the theatre of operations (Anderson 'Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts' at 42; Jean-Marie Henckaerts and Louise Doswald-Beck (2005) *Customary International Humanitarian Law* Volume I: Rules Cambridge University Press: Cambridge at rules 31 and 32).

²¹ Stoddard, Harmer and Haver 'Providing Aid in Insecure Environments: Trends in Policy and Operations' at 23.

²² *Ibid.*

²³ ICRC 'Protecting the Protectors'.

²⁴ Christopher Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism' (2008) 39 *Security Dialogue* 363 available at <http://www.cociscampagnapace.it/materiali/SPEARIN2008.pdf> (accessed 24 August 2012).

²⁵ Stoddard, Harmer and Haver 'Providing Aid in Insecure Environments: Trends in Policy and Operations' at 23.

²⁶ *Idem* at 1.

²⁷ Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism'.

²⁸ ICRC 'Protecting the Protectors'.

²⁹ *Ibid.*

This reality is especially true given the ‘culture of impunity’ which thrives in a ‘failed state’³⁰ environment as was the case in Afghanistan. Sometimes, as in the case of the Israeli raid upon the ‘aid’ flotilla bound for Gaza, those targeting so called ‘relief workers’, question their claims of neutrality and their right to enjoy the IHL protections afforded humanitarian relief³¹. In other instances, relief workers are targeted ‘because of the larger values and foreign presence they represent’³². Increasingly, relief workers are identified with a ‘Western pursuit’³³, and ‘an attack on the humanitarian enterprise may simply be viewed as a strike against one of the ‘tools’ of the enemy’³⁴. This is particularly true when states are funding the relief work and thereby pushing their own political agenda in the conflict. Several prominent relief organisations place ‘considerable reliance upon State funding’³⁵, while others go to great lengths to ‘maintain a degree of financial independence from State sources’³⁶. Furthermore, as relief workers are more often than not drawn from foreign states, they are often seen by belligerents as useful for their hostage potential, and their capacity to draw the world’s attention to the belligerents’ cause.

When Colin Powell famously announced that ‘international NGOs in Afghanistan were ‘force multipliers’³⁷ in the war on terror’, he unwittingly ‘politicised their role’, endorsed ‘perceptions of partiality’, and undermined their claims to ‘neutrality’³⁸. With integration between relief workers and the armed forces comes the ‘perception of complicity and association’³⁹. When relief workers are forces operating with the blessing of the military force on the

³⁰ Stoddard, Harmer and Haver ‘Providing Aid in Insecure Environments: Trends in Policy and Operations’ at 23.

³¹ SC Resolution 9940 (2010) available at <http://www.un.org/News/Press/docs/2010/sc9940.doc.htm> (accessed 4 September 2012).

³² ‘Islamists Kill Aid Workers Because they are Part of the Infidel Project’; Spearin ‘Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism’.

³³ Stoddard, Harmer and Haver ‘Providing Aid in Insecure Environments: Trends in Policy and Operations’ at 21.

³⁴ *Idem* at 23.

³⁵ Save the Children U.S.A., International Rescue Committee, and CARE U.S.A. receive between sixty-one to eighty-three percent of its funding from government sources (Spearin ‘Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism’).

³⁶ Oxfam (Great Britain) limits to twenty-five percent, the funding it receives from the British government, and ‘*Médecins Sans Frontières* (MSF) generally receives only thirty percent of its funding from government sources, and has rules in place to prevent this amount from going beyond fifty percent’ (Spearin ‘Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism’).

³⁷ Raj Rana ‘Contemporary Challenges in the Civil-military Relationship: Complementarity or Incompatibility?’ (2004) 86:855 *International Review of the Red Cross* 565 at 567.

³⁸ Stoddard, Harmer and Haver ‘Providing Aid in Insecure Environments: Trends in Policy and Operations’ at 23.

³⁹ Spearin ‘Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism’.

ground⁴⁰, and when 'multinational armed forces assume roles that go beyond providing security or engaging in combat'⁴¹, this kind of military affiliation blurs the distinction between the combatant and non-combatant⁴². The conflict in Iraq and Afghanistan mark a high water mark⁴³ for the dilemma faced when the 'armed forces are increasingly active in roles typically filled by civilians'⁴⁴. When this happens in armed conflicts, 'the impression is created that humanitarian organisations and their personnel are merely tools within integrated approaches to conflict management'⁴⁵ and 'nation-building agendas'⁴⁶. The more military, political and humanitarian agendas are integrated, the 'greater the difficulties faced by genuine 'humanitarian, neutral and independent'⁴⁷ relief workers, who are viewed with suspicion, placed in 'uncomfortable situations'⁴⁸, and exposed to greater risk of being directly targeted⁴⁹. In the end, this state of affairs 'threatens the integrity of the humanitarian's ethical principles of neutrality and impartiality'⁵⁰ - if not directly, then at least potentially in the eyes of various indigenous actors in theatre'⁵¹. When the relief worker is helped by my enemy, or 'helps my enemy,

⁴⁰ As was the case when 'humanitarian actors followed the NATO-led ground forces into Kosovo' (Rana 'Contemporary Challenges in the Civil-military Relationship: Complementarity or Incompatibility?' at 566).

⁴¹ *Idem* at 856. 'In one moment in time our service members will be feeding and clothing displaced refugees - providing humanitarian assistance. In the next moment, they will be holding two warring tribes apart — peacekeeping. Finally, they will be fighting a highly lethal mid-intensity battle. All in the same day, all within three city blocks' (*Idem* at 577). Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism'.

⁴² 'From the tentative attempts of the 1990s to conduct humanitarian activities, armed forces have now moved on to consider such tasks as their mainstream responsibilities in all contexts' (Rana 'Contemporary Challenges in the Civil-military Relationship: Complementarity or Incompatibility?' at 568). Admittedly the 'the concept of civil-military cooperation' is not new, during the Vietnam War 'Special Forces personnel were deployed alongside USAID civilian representatives in a hearts and minds campaign to provide development assistance while waging a counter-insurgency campaign' (*Idem* at 573). In 2001, the ICRC adopted 'Guidelines for Civil-Military Relations (CMR), for multinational military missions engaging in humanitarian activities or deployed under a humanitarian mandate, while potentially becoming an active participant in hostilities' (*Idem* at 566 - 570). I will not focus any further on the issue of the military providing humanitarian relief, since my focus is on relief workers and how affiliations with the military complicate their claim to neutrality and independence.

⁴³ *Idem* at 856.

⁴⁴ *Ibid.*

⁴⁵ *Idem* at 856 and 566.

⁴⁶ *Ibid.*

⁴⁷ ICRC 'Protecting the Protectors'.

⁴⁸ Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism'.

⁴⁹ Rana 'Contemporary Challenges in the Civil-military Relationship: Complementarity or Incompatibility?' at 586.

⁵⁰ *Idem* at 582.

⁵¹ Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism'.

he becomes my enemy too'⁵². 'If you are perceived as an enemy, the danger you face automatically increases'⁵³.

By definition, relief workers are required to offer humanitarian assistance without favouring any particular party to a conflict. Determining exactly what constitutes favouring one belligerent party, is proving more taxing, particularly when the civilian population of one of the belligerent parties might be more severely affected by the conflict, and consequently more in need of relief assistance. In such instances, it is easy for belligerents to accuse relief workers - who are merely seeking access to vulnerable civilians - of favouring one party in the conflict. Similarly, when relief workers are involved in rebuilding economic or social infrastructure, and reconnecting severed amenities (such as electricity and water supplies), there is the potential to argue that relief workers are inadvertently aiding the opposition forces, along with the intended civilian beneficiaries. Moreover, it is not unheard of for relief workers to find themselves (whether purposely or coincidentally) at dual-use sites like electricity and water supplies, effectively shielding these sites from military targeting, much like voluntary human shields⁵⁴.

Their presence in the theatre of hostilities, while permitted by IHL, hinders military deployments and complicates targeting assessments. Consequently, in modern conflicts it is often difficult to distinguish genuinely neutral humanitarian assistance from disguised assistance to belligerent parties.

In this chapter I explain the legal status of relief workers under IHL while they are deployed in the theatre of international armed conflicts. In undertaking this investigation, I begin with a brief definition of a relief worker. I then turn to examine the existing IHL regime applicable to relief workers and the unsuccessful attempts at granting relief workers special protection by virtue of international treaty law. Following that, I examine the legal implications and limitations that default civilian status might have for relief workers, and the complications which follow when relief workers make use of private military and security contractors (PMSCs) to provide security in the theatre of armed conflict. The issue of whether the actions of relief workers might in fact amount to direct participation in hostilities, and what consequences might flow from this possible conclusion, in light of the ICRC's Interpretive Guide on direct participation in hostilities, is then explored. Lastly, I look at the obligations upon those who hold relief workers in detention.

⁵² ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations' (19 January 1998) available at <http://www.icrc.org/eng/resources/documents/misc/57jp85.htm> (accessed 29 August 2012).

⁵³ ICRC 'Protecting the Protectors'.

⁵⁴ For more on the role of voluntary human shields in armed conflict see Shannon Bosch 'Voluntary Human Shields: Status-less in the Cross Hairs?' (2007) 40:3 *Comparative and International Law Journal of South Africa* at 322.

9.2 Defining ‘relief workers’

Since the mid-twentieth century the face of humanitarian assistance has undergone a remarkable transformation⁵⁵. At the end of the Cold War, humanitarian non-governmental organisations (NGOs) became the prominent actors in the field of relief work. These private, non-state entities⁵⁶ were driven by the motivation to act with neutrality and impartiality, independently of states⁵⁷ and their ulterior motives and interventionist agendas⁵⁸.

How one determines what actions amount to humanitarian assistance, has been the topic for much debate under IHL. The meaning of exactly what can be said to amount to relief work or humanitarian assistance, ‘has become elusive, as a new set of actors has claimed it as part of a new, more interventionist international order’⁵⁹. The International Court of Justice (ICJ) faced this controversial issue in *Nicaragua v. United States of America*⁶⁰ when it had to determine whether the actions on the part of the U.S.A. amounted to humanitarian assistance or unlawful intervention in Nicaragua’s State sovereignty. In canvassing the issue, the court defined ‘humanitarian assistance’ as aid that is given ‘without discrimination to all in need ... to prevent suffering ... and to protect life and health and ensure respect for the human being’⁶¹.

Not surprisingly, we find that the quintessential humanitarian organisation - the ICRC – describes its mandate as follows: ‘to impartially protect and assist victims of conflict, without any discrimination as to nationality, race, religious beliefs, class or political opinions’⁶². Many relief organisations:

‘contend that preserving the humanitarian ethic ... serves to maintain and protect their personnel in the field. Not being linked to other actors, especially those that are armed or who have a political agenda, and concentrating solely on handling the plight of the needy allows NGOs

⁵⁵ Philippe Ryfman ‘Non-governmental Organisations: An Indispensable Player of Humanitarian Aid’ (2007) 89:865 *International Review of the Red Cross* 21 at 22.

⁵⁶ *Id* at 24-25.

⁵⁷ Spearin ‘Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism’.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*) Judgment (1986) *ICJ Rep* at para 243.

⁶¹ *Ibid*. Mackintosh ‘Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law’ at 116. The Institute of International Law in its ‘Humanitarian Assistance’ Resolution of the 16th Commission (2003) defines humanitarian assistance more extensively as including ‘all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfilment of the essential needs of the victims of disasters’ (article 1) (Kate Mackintosh ‘Reclaiming Protection as a Humanitarian Goal: Fodder for the Faint-Hearted Aid-Worker’ 2010 1 *International Humanitarian Legal Studies* 382–396 at 393).

⁶² Rana ‘Contemporary Challenges in the Civil-military Relationship: Complementarity or Incompatibility?’ at 581; Jennifer White ‘IEEPA’S Override Authority: Potential for a Violation of the Geneva Conventions’ Right to Access for Humanitarian Organisations?’ (2006) 104 *Michigan Law Review* 2019 at 2029.

greater access... their very weakness seemingly makes their presence more acceptable'⁶³.

What is troubling, however, is that relief workers often remain in the theatre of hostilities, so as to assist the most vulnerable, and yet they have no special IHL status (like that afforded medical and religious personnel)⁶⁴. While IHL demands that they act with neutrality - as will be explained in what follows - that very requirement often places them outside the scope of the IHL provisions aimed at protecting civilians found in the theatre of operations⁶⁵. Similarly, pursuing those who violate the protections extended to relief workers, is also constricted by international criminal law. So, for example, under the Statute of the International Criminal Court (ICC), 'war crimes can only be committed against protected persons fulfilling the nationality requirement'⁶⁶; that is, persons who are from nation states that are involved in the conflict. As far as independent relief workers go, they are effectively excluded from the protections afforded by the ICC Statute, unless their nation State is party to the conflict⁶⁷. Even more disturbing is the growing perception amongst belligerents that relief workers are, by their so-called humanitarian actions, actually participating in hostilities, and therefore subject to direct targeting for their direct participation in hostilities.

9.3 Existing international law provisions aimed at protecting relief workers

Relief workers operate to fulfil a legitimate international law mandate to provide victims of international armed conflict with 'humanitarian assistance' (in the form of food, medicines and medical equipment). While this obligation should usually be shouldered by the territorial State or the occupying power⁶⁸, the reality is such that it is often left to 'impartial humanitarian relief operations'⁶⁹ who step in with the 'explicit, implicit or at least tacit agreement of the warring factions'⁷⁰.

⁶³ Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism'.

⁶⁴ Walter Rabus 'Protection of the Wounded, Sick and Shipwrecked' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* (1995) Oxford University Press: Oxford at 308; Walter Rabus 'Religious Personnel' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* (1995) Oxford University Press: Oxford at 369.

⁶⁵ Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 129.

⁶⁶ Rome Statute of the International Criminal Court (UN doc. S/25704) 2187 *U.N. Treaty Series* 3 also available at <http://untreaty.un.org/cod/icc/statute/romeofra.htm> (accessed 14 July 2012) at article 8; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 31.

⁶⁷ Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 121.

⁶⁸ 'Parties to a conflict and/or occupying powers have the obligation to ensure that the civilian population under their control is adequately provided with food, medical supplies, clothing, bedding, means of shelter and other items essential to its survival' (Rana 'Contemporary Challenges in the Civil-military Relationship: Complementarity or Incompatibility?' at 573).

⁶⁹ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'.

⁷⁰ According to the ICRC, a 'failure to obtain the necessary consent will render the humanitarian action unauthorised and potentially in violation on IHL' (*Ibid*).

There are some protections provided for those providing relief assistance in times of international armed conflict in both IHL⁷¹, human rights treaty law and international criminal law⁷². While the ‘fundamental responsibility for the security of aid personnel lies with the host State’⁷³, the reality is that this simply does not happen in situations of failed States, who lack the capacity and political will to provide such security for relief workers at the height of an international armed conflict⁷⁴.

i. IHL provisions

Geneva law

The Geneva conventions state categorically that the civilian population is entitled to receive humanitarian relief⁷⁵. The necessary corollary to this is that under Geneva law, States are obliged to permit (despite blockade conditions⁷⁶) the ‘free passage of all consignments of medical and hospital stores ... essential foodstuffs, clothing and tonics’⁷⁷. These consignments are, however, not only limited in their substance, but also in their intended beneficiaries. The medical consignments can only be intended for the civilian population, and the food and clothing is further limited to ‘children under fifteen, expectant mothers and maternity cases’⁷⁸. In order to ensure that both the civilian’s right to receive aid and the relief worker’s right to enjoy free passage to provide the permitted aid, Geneva law ‘requires that all States guarantee the protection of relief supplies intended for occupied territories’⁷⁹. Where the detaining or occupying power ‘cannot provide the necessary humanitarian assistance’ ‘to persons not of their nationality but within their effective control’ they ‘shall request or shall accept ... the offer of the services of a humanitarian organisation ... to assume the humanitarian functions performed by the protecting powers’, and unconditionally cooperate so as to ‘facilitate the relief schemes of third parties’ when the

⁷¹ The focus of this piece will be on the IHL protections.

⁷² Barber ‘Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law’ at 381.

⁷³ Not only is this principle of host state responsibility ‘embodied in IHL’ but it has also been ‘reaffirmed in several U.N. resolutions’ [and] ... ‘formally adopted by seventy-nine state signatories to the Convention on the Safety of United Nations and Associated Personnel’ (Stoddard, Harmer and Haver ‘Providing Aid in Insecure Environments: Trends in Policy and Operations’ at 4).

⁷⁴ *Ibid.*

⁷⁵ 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) of 12 August 1949 (1950) 75 *U.N. Treaty Series* 287 at article 30(1); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 199.

⁷⁶ ICRC ‘Respect For and Protection of the Personnel of Humanitarian Organisations’.

⁷⁷ GC IV article 23.

⁷⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 194; GCIV article 23; Yoram Dinstein (2004) *The Conduct of Hostilities Under the Law of International Armed Conflict* Cambridge University Press: Cambridge at 226.

⁷⁹ GC IV article 59; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 110. ‘Unfortunately no similar obligation exists outside of occupied territories’ (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 226).

occupying power is unable to meet these demands⁸⁰. 'In short, occupying powers must not only consent to, but must seek out and actively facilitate humanitarian assistance'⁸¹. Moreover, across all four of the Geneva Conventions one finds a common provision (expressed in article 3) that IHL acknowledges the right of 'impartial humanitarian bodies like for example the ICRC, 'to offer its services to the parties to the conflict'⁸².

Additional Protocol I also states explicitly that where the civilian population is 'not adequately provided with [food and supplies essential to survival] ... relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be⁸³ undertaken, subject to the agreement of the parties concerned in such relief actions'⁸⁴. In the words of the ICRC, 'offers of assistance fulfilling these conditions shall not be regarded either as interference in the armed conflict or as hostile acts'⁸⁵. Once again we see that relief work not only requires the 'approval of the party in whose territory that relief is being carried out'⁸⁶, but that States are obliged to facilitate their access⁸⁷ to the civilians in need⁸⁸ and that 'only in the case of imperative military necessity may the activities of relief personnel be limited or their movements temporarily restricted'⁸⁹. In short, 'relief operations must not be allowed to interfere with military operations, lest the safety of humanitarian relief personnel be endangered'⁹⁰. While the party from which consent is required, is permitted under IHL to 'exercise control over the relief action'⁹¹, it is prohibited from refusing the required consent on 'arbitrary grounds'⁹². Once again States are obliged to facilitate those authorised⁹³ to provide humanitarian assistance (including 'transportation, administration and distribution of relief consignments'⁹⁴) and

⁸⁰ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'; GC IV article 55 and 59.

⁸¹ Barber 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' at 384.

⁸² ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'.

⁸³ Barber 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' at 383.

⁸⁴ *Ibid*; API article 69; ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'.

⁸⁵ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'.

⁸⁶ Barber 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' at 383; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 196; API article 71(1) 'participation of such personnel in relief action is subject to the approval of the Party in whose territory they carry out their duties' (Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 166).

⁸⁷ API article 71(3); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 200.

⁸⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 199.

⁸⁹ Barber 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' at 383; ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'.

⁹⁰ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 202.

⁹¹ *Idem* at 197.

⁹² *Ibid*.

⁹³ *Idem* at 109.

⁹⁴ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 166.

ensure that relief personnel are 'respected and protected'⁹⁵. Relief workers for their part, are entitled to this assistance, provided they do not exceed their mission⁹⁶.

What is novel about the provisions in the Additional Protocol is that they expand the previously limited entitlement to relief assistance, 'to the whole population and not only to vulnerable segments'⁹⁷. Also new to AP I is the broadened obligation upon all States (not just those States party to the conflict), 'to provide rapid and unimpeded passage of all relief consignments, equipment and personnel', including by States not party to AP I⁹⁸.

Customary IHL

The ICRC study undertaken to assess the customary law status of the provisions found in IHL treaties, confirmed that many of these provisions pertaining to humanitarian assistance, have risen to the level of customary IHL.

The study endorsed the position that 'humanitarian relief personnel must be respected and protected'⁹⁹ against attack, 'harassment, intimidation and arbitrary detention'¹⁰⁰. This position is reiterated in the 'military manuals of many States'¹⁰¹, 'supported by official statements and reported practice'¹⁰², and several states (even those states not party to AP I¹⁰³) make it an offence under domestic legislation 'to attack humanitarian relief personnel'¹⁰⁴. The study affirms that, not only are the personnel themselves to be respected, but the 'objects'¹⁰⁵ used for humanitarian relief operations must [also] be respected and protected'¹⁰⁶ against destruction, misappropriation and looting¹⁰⁷ according to State practice¹⁰⁸, official

⁹⁵ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'; API article 71(2).

⁹⁶ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations' API article 71(4) 'relief personnel must not exceed the terms of their mission'.

⁹⁷ Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* at 227.

⁹⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 194 and 198; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1979) 1125 *U.N. Treaty Series* 1391 article 70(2).

⁹⁹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 31. It is a necessary 'corollary of the prohibition of starvation' (*Idem* at rule 53), 'as well as the rule that the wounded and sick must be collected and cared for' (*Idem* at 109-110).

¹⁰⁰ *Idem* at 108.

¹⁰¹ *Idem* at 106.

¹⁰² *Ibid.*

¹⁰³ *Idem* at rule 31.

¹⁰⁴ *Idem* at 106.

¹⁰⁵ *Idem* at 111. 'Objects involved in a humanitarian relief operation are, in principle, civilian objects and as such enjoy protection from attack' (*Idem* at rule 7).

¹⁰⁶ *Idem* at rule 32.

¹⁰⁷ *Idem* at 111.

¹⁰⁸ *Idem* at 109. 'This rule is a corollary of the prohibition against starvation (rule 53)¹⁰⁸ ... because the safety and security of humanitarian relief objects are an indispensable condition for the delivery of humanitarian relief to civilian populations in need threatened with starvation. This rule is also a corollary of the prohibition on deliberately impeding the delivery of humanitarian relief

statements¹⁰⁹ and resolutions of international organisations¹¹⁰. Both States and international organisations have been quick to condemn instances of ‘alleged violations of these rules’¹¹¹.

The study further maintains that ‘the parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’¹¹² as a matter of customary IHL. Rule 56 goes on to state that as a corollary to Rule 55¹¹³, ‘the parties to the conflict must ensure the freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions’, and that only ‘imperative military necessity’ might result in ‘their movements being temporarily restricted’¹¹⁴. The study revealed this rule was evidenced by military manuals¹¹⁵, ‘state practice’¹¹⁶ and repeatedly reiterated statements and resolutions¹¹⁷ by the ‘U.N. Security Council’¹¹⁸, U.N. General Assembly and the U.N. Commission on Human Rights¹¹⁹. Moreover, ‘violations of these rules have been condemned’¹²⁰ and on the whole, ‘no official contrary practice was found’¹²¹.

As for the treaty law provision requiring that organisations seek out the authorisation of the State before commencing their humanitarian operation, the study revealed that ‘most practice does not mention the requirement...but [that] it is self-evident that a party to the conflict cannot be required to ensure the freedom of movement of an organisation it has not authorised’¹²². In this regard the study made special mention of the ICRC and the special recognition that they enjoy in the theatre of armed conflicts and their entitlement to be ‘respected at all times’¹²³.

Across both the treaty law provisions and the customary law expressions of many of these provisions, the fundamental motivator is that to refuse access to

(rule 55) because any attack on, destruction or pillage of relief objects inherently amounts to an impediment of humanitarian relief’ (*Ibid*).

¹⁰⁹ *Idem* at 110.

¹¹⁰ *Ibid*.

¹¹¹ *Idem* at 107 and 111.

¹¹² *Idem* at 193 and rule 55

¹¹³ *Idem* at 200.

¹¹⁴ *Ibid*.

¹¹⁵ *Idem* at 194-195.

¹¹⁶ *Idem* at 194.

¹¹⁷ *Idem* at 201.

¹¹⁸ *Idem* at 194-195, SC Resolutions 1261(1999) and 1265 (1999) available at <http://www.un.org/Docs/scres/1999/sc99.htm> (accessed 4 September 2012); and SC Resolution 1296 (2000) available at <http://www.un.org/Docs/scres/2000/sc2000.htm> (accessed 4 September 2012).

¹¹⁹ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 198.

¹²⁰ *Idem* at 201 and 195.

¹²¹ *Idem* at 201.

¹²² *Ibid*.

¹²³ *Idem* at 202.

humanitarian assistance, 'would risk causing starvation or otherwise threaten the survival of a civilian population'¹²⁴.

Soft law

Many U.N. resolutions and declarations speak to the importance which the international community attaches to the principles that relief workers are to be given 'access to the victims of armed conflicts' and, that in carrying out their mandate, these relief workers are to be respected and protected¹²⁵. The U.N. Security Council has 'on several occasions demanded that the necessary conditions be created for the unimpeded distribution of humanitarian supplies, urged the parties to cooperate with humanitarian organisations in allowing relief to be delivered in complete security and demanded that the parties to the conflict take the necessary steps to guarantee the safety of the personnel responsible for delivering humanitarian aid'¹²⁶. In some instances the U.N. Security Council has even 'authorised forces participating in U.N. military operations or certain Member States "to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations"¹²⁷. In 1991 the General Assembly published the 'Guiding Principles on Humanitarian Assistance' which 'emphasise that "states in proximity to emergencies are urged to participate closely with the affected countries in international efforts, with a view to facilitating, to the extent possible, the transit of humanitarian assistance"¹²⁸.

There are also a number of international declarations like the 1969 ICRC Declaration of Principles for International Humanitarian Relief of the Civilian Population in Disaster Situations¹²⁹, which reiterates the importance of these IHL principles. Furthermore, within the U.N.¹³⁰ there have been several initiatives 'to

¹²⁴ Barber 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' at 372.

¹²⁵ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'. U.N. GA A/RES 51/195 (Afghanistan) U.N. GA Resolution 59/211 on the Safety and Security of Humanitarian Personnel and the Protection of U.N. Personnel (2004); General Assembly Optional Protocol 60/123 (2006)

¹²⁶ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'. SC resolution 1296 (2000) 'called upon all parties to armed conflict ...to ensure the safety and security and freedom of movement of humanitarian relief personnel' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 109). SC Resolution 1502 (2003), 'which condemned all forms of violence against those participating in humanitarian operations and urged states to ensure that crimes against such personnel did not go unpunished' (Stoddard, Harmer and Haver 'Providing Aid in Insecure Environments: Trends in Policy and Operations' at 34); Security Council Presidential Statement on the Protection of U.N. Personnel in Conflict Zones (2000); Safety and Security of United Nations Personnel – Report of the Secretary-General (October 2000).

¹²⁷ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'. SC Resolution 794/1992 (concerning Somalia).

¹²⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 199.

¹²⁹ Resolution XXVI, XXIst International Conference of the Red Cross (Istanbul, 1969).

¹³⁰ Under the auspices of the UNDSS, IASC and in 1988 the U.N. established the first Security Coordination Office (UNSECOORD) which 'devised a UN-wide security management system, in which all agencies were obliged to follow the same basic rules and procedures' (Stoddard,

sensitise member states to security issues¹³¹ faced by relief workers, and foster 'collaboration between the U.N., NGOs and inter-governmental organisations'¹³², in order to ensure the safety of humanitarian personnel.

In 1994 the ICRC published its *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations in Disaster Relief*¹³³ and in 1999 the ICRC produced its safety and security guidelines – entitled 'Staying Alive'¹³⁴, aimed at minimising the negative effects on field security of humanitarian organisations¹³⁵.

ii. International criminal law

There is also a range of treaty provisions which criminalise inhumane treatment of workers catering to the needs of non-military personnel in the field of international criminal law. For instance, the ICC Statute lists as a war crime 'willfully impeding relief supplies as provided for under the Geneva Conventions'¹³⁶, and 'intentionally directing attacks against personnel involved in humanitarian assistance missions ... in international armed conflicts as long as such persons are entitled to the protections given to civilians under IHL'¹³⁷. Similarly, it is a 'crime against humanity' when attacks on relief workers are 'intended to impede humanitarian activity'¹³⁸.

Harmer and Haver 'Providing Aid in Insecure Environments: Trends in Policy and Operations' at 22).

¹³¹ Which dealt with guidelines on 'security management checklists, templates for security plans, telecoms handbooks, vehicle safety and security measures and guidelines for surviving abductions and hostage situations' (*Ibid*).

¹³² IASMN (2006) 'Saving Lives Together: A Framework for Improving Security Arrangements Among IGOs, NGOs and U.N. in the Field, to Better Reflect its Purpose and Intent' available at: www.humanitarianinfo.org/ (accessed 16 October 2012); Stoddard, Harmer and Haver 'Providing Aid in Insecure Environments: Trends in Policy and Operations'.

¹³³ Admittedly the code has not been without its own controversies. At the heart of much of the resistance to the code is the debate around whether relief workers should be engaging in development work, for fear that this necessarily conflicts with the principle of neutrality.

¹³⁴ Stoddard, Harmer and Haver 'Providing Aid in Insecure Environments: Trends in Policy and Operations' at 22.

¹³⁵ ICRC 'Protecting the Protectors'.

¹³⁶ Rome Statute at article 8.2.b (xxv) which reads: 'intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions'. While this is also prohibited by API, although not classified in either as a war crime. The ICRC customary law study confirms this provision as having achieved customary international law status, applicable in all conflicts (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 53).

¹³⁷ From the wording of the rule it is clear that 'members of the armed forces delivering humanitarian aid are not covered by this rule' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 105); Rome Statute article 8(2)(b)(iii).

¹³⁸ Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 121. Furthermore where such interference is intended to 'deliberately inflict conditions of life on a group which are calculated physically to destroy it in whole or in part', this would constitute genocide (Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 122).

In short, IHL (both treaty-based and customary) has many 'robust' provisions aimed at protecting the relief worker in international armed conflicts¹³⁹. That said, 'IHL, however, has been increasingly flouted, and the environments in which aid agencies work today, bear little resemblance to the experiences of war upon which IHL was originally conceived'¹⁴⁰.

9.4 IHL and relief workers: the consequences and limitations of default civilian status

All persons who find themselves in situations of international armed conflict are classified by IHL as either combatants or civilians¹⁴¹, and the latter is the default position 'in case of any doubt as to a person's IHL status'¹⁴². The chief benefit, to those enjoying civilian status in situations of armed conflict, is that IHL stipulates that civilians and their possessions are to be respected¹⁴³ by the warring parties, and are immune from attack¹⁴⁴. This complete immunity from attack flows from the understanding that no legitimate military purpose can be served by targeting those that play no direct part in the hostilities. Consequently, with the sole exception of the 'levée en masse', civilians (and therefore relief workers) are not authorised to participate directly in hostilities¹⁴⁵.

At first glance it would seem that these limitations should not serve as a stumbling block to relief workers, since they are after all, by definition, required to act with impartiality and neutrality. In fact it seems almost impossible that anyone mandated to 'prevent suffering ... and to protect life and health and ensure

¹³⁹ Barber 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' at 382.

¹⁴⁰ Stoddard, Harmer and Haver 'Providing Aid in Insecure Environments: Trends in Policy and Operations' at 1.

¹⁴¹ A civilian is defined as 'any person who is not a combatant' (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 5).

¹⁴² AP I article 50(1); Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 117.

¹⁴³ This means that 'they are entitled to respect for their persons, their honour, their family rights, their religious convictions, their manners and customs and their property' (1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) of 12 August 1949 (1950) 75 *U.N. Treaty Series* 31 at article 27; The Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (HR) of 18 October 1907 (1910) 9 Cd *U.K. Treaty Series* 5030 at article 46; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at Part I; Hans-Peter Gasser 'Protection of the Civilian Population' in Dieter Fleck (ed) (1995) *The Handbook of Humanitarian Law in Armed Conflict*. Oxford University Press: Oxford at 210.

¹⁴⁴ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* rule 1; AP I article 52.

¹⁴⁵ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 6; Gasser 'Protection of the Civilian Population' at 210. The corollary, of course, is that once civilians do play a direct part in hostilities they lose their immunity from direct targeting and the consequent privileges which attach to their civilian status (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 6; AP I article 51(3). Moreover, for so long as they continue to actively participate in hostilities, they open themselves up to a defensive response from the armed forces (*Ibid*).

respect for the human being¹⁴⁶ could ever be found to be participating in hostilities. Surely participation in hostilities necessarily involves favouring one of the belligerent parties, which would in turn result in the revocation of their mandate as to provide humanitarian assistance.

Unfortunately, as I will explain further, the way IHL protects those with civilian status, fails to provide the specific protections which relief workers need in situations of international armed conflict. Assuming that the 'very general protection afforded to the civilian population'¹⁴⁷ will be sufficient to cover the personnel of humanitarian organisations, does not account to the fact that 'this form of protection, though real, is not well defined'¹⁴⁸ and not particularly sensitive to the special need of relief workers. So, for example, Geneva Convention IV (which pertains to the protection of civilians in times of war) discriminates between civilians on the basis of their nationality. While GC IV offers special protections to enemy nationals¹⁴⁹, the dilemma for relief workers was that they very often are nationals of a neutral State, and consequently do not fall within the ambit of the protections afforded by GC IV¹⁵⁰. Ironically, if relief workers were nationals of one of the belligerent parties they would be able to access the protections contained in GC IV¹⁵¹, although one would be entitled to question whether their impartiality might be compromised by their link to one of the belligerent parties. It seems historically that in terms of IHL, the truly neutral relief worker, emanating from a State which is not party to the hostilities, is not only without any special IHL status but is also not protected by the provisions in GC IV¹⁵².

When the first Additional Protocol to the Geneva Conventions (AP I) was

¹⁴⁶ *Nicaragua v United States of America* at par. 243.

¹⁴⁷ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'.

¹⁴⁸ *Ibid.*

¹⁴⁹ That is 'persons ... who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.' The rationale behind the restrictions placed on those claiming the protections afforded civilians under GC IV is that 'only nationals of the enemy states, or those whose state has no diplomatic representation on the territory, need supplementary international protection. Others can be protected through the usual interstate channels' (Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 118).

¹⁵⁰ GC IV article 4. While part II of GC IV applies 'to the whole population of the countries in conflict', there are no specific provisions in part II aimed at protecting relief workers over and above the more generalised provisions which ensure protection for vulnerable groups.

¹⁵¹ Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 118. This nationality-based right to protection has been expanded through international jurisprudence to include 'persons whose allegiance lies with a party to the conflict' (*Prosecutor v Dusko Tadic* ICTY Judgment (Appeals Chamber) (15 July 1999) ICTY IT-94-1-A at para 166: '[N]ot only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test').

¹⁵² Having said that, GC IV does make a special exemption for the rare instance when the civilian relief worker hails from a 'state of nationality which has no diplomatic representation in the country of the mission'. In these exceptional instances the relief worker enjoys the protections afforded 'civilians' under GC IV, although the likelihood of this situation arising in practice is slim.

drafted, specific reference was made to 'relief workers' in article 71¹⁵³ in a bid to rectify the unsatisfactory position which existed under GC IV. In AP I article 71, irrespective of nationality, all personnel carrying out relief work¹⁵⁴, with the approval of the State on whose territory they are carrying out these duties, are to be respected and protected. The crystallisation of AP I article 71 into customary IHL relieves relief workers of having to satisfy the demanding nationality requirements which existed under GC IV. It does however still require relief workers to show that they are carrying out their mission with the approval of the territorial state, which is no mean feat when the most dire humanitarian needs often occurs in failed states.

For those relief workers who are fortunate enough to be able to show the consent of the territorial state, there remains an important limitation which flows from their IHL status as civilians: they must refrain from anything which might be perceived as direct participation in hostilities. The difficulty for relief workers lies in the fact that, unlike ordinary civilians, relief workers often choose to remain in the theatre of hostilities, working along with the medical and religious personnel of the armed forces, offering humanitarian assistance with no more than the ordinary protections which IHL offers civilians¹⁵⁵. As will be seen in the following analysis, this proximity to the theatre of hostilities has fuelled speculation that relief workers might be in violation of the restrictions placed upon their direct participation in hostilities. Speculation aside, this proximity to hostilities does place relief workers at greater risk¹⁵⁶ in that, much like journalists, they may lose 'de facto' protection if they stay too close to a military unit¹⁵⁷ or approach a military target. In these instances it is entirely possible that they might be considered acceptable collateral damage¹⁵⁸ in achieving a particular military advantage¹⁵⁹.

Unfortunately all this leaves relief workers in the unenviable situation that, while they enjoy protection under IHL as civilians, they are especially vulnerable, in that their occupation places them squarely in harm's way. Since IHL restricts military operations to proportionate¹⁶⁰ attacks on legitimate military objectives¹⁶¹,

¹⁵³ Under Part IV entitled: 'Civilian population'.

¹⁵⁴ Particular mention is made of transportation and the distribution of relief consignments as constituting such relief work.

¹⁵⁵ Gasser 'Protection of the Civilian Population' at 210.

¹⁵⁶ Even the ICRC concedes that the 'fact remains that humanitarian personnel working in a war situation must be prepared to face certain risks' (ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations').

¹⁵⁷ Gasser 'Protection of the Civilian Population' at 428.

¹⁵⁸ *Ibid*; AP I article 51(5)(b); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 14.

¹⁵⁹ Incidental harm caused to civilians and civilian objects is only lawful when it is an 'unavoidable and proportionate side effect of lawful attacks on military objectives' (AP I article 51(b)); Gasser 'Protection of the Civilian Population' at 214; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 14.

¹⁶⁰ AP I articles 57(2)(a)(iii) and 51(5)(b); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 14; Stefan Oeter 'Methods and Means of Warfare' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* (1995) Oxford University Press: Oxford at 106, 119 and 180; Anthony PV Rogers *Law on the Battlefield* (1996) Manchester University Press: Manchester at 57.

which satisfy the requirements of military necessity¹⁶² and advance warning¹⁶³, the question that begs asking is whether relief workers can ever be categorised as a military objective, or subject to an attack which would be proportionate and justifiable in terms of the requirements of military necessity¹⁶⁴. The answer to this question must depend on the conclusion reached regarding claims that the actions of relief workers might amount to direct participation in hostilities. If the actions of relief workers do constitute direct participation in hostilities, then not only would attacks which implicate them be justifiable in terms of the IHL requirements of distinction, military necessity, proportionality and advance warning, but IHL in fact permits belligerents to respond defensively for so long as civilians partake in hostilities¹⁶⁵.

9.5 Relief workers: a case for special status?

While classifying relief workers as civilians is the simple answer to the question as to the IHL status of relief workers, it is an altogether unsatisfactory response given the particular risks that they face in international armed conflicts. It is especially disappointing when one appreciates that IHL does choose to recognise certain categories of individuals as enjoying special recognition and privileges in situations of armed conflict. For example, medical and religious personnel (despite being 'uniformed members of a state's armed forces'¹⁶⁶) are nevertheless not classified as combatants or civilians. They are afforded special privileges, immunity and access in the theatre of hostilities, because of the non-combatant role that they play in seeing to the humanitarian needs of the troops¹⁶⁷. This leads one to ask: if there is a longstanding customary¹⁶⁸ and treaty¹⁶⁹ IHL obligation upon states to permit relief workers access to the theatre of operations, in order to provide food, medical supplies, and articles necessary to preserve life¹⁷⁰, and if those 'relief operations can only be carried out if the security of the humanitarian personnel involved is guaranteed'¹⁷¹, why then

¹⁶¹ IHL defines 'military objectives' as those sites or objects that 'make an effective contribution to military action,' the destruction of which offers 'a definite military advantage' in the circumstances ruling at the time (AP I article 52(2)).

¹⁶² Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 50; HR article 22; AP I article 35(1); Oeter 'Methods and Means of Warfare' at 106 and 119.

¹⁶³ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 20.

¹⁶⁴ For a fuller discussion on the concepts of distinction, proportionality, military necessity and advance warning in the context of relief workers deployed in African armed conflicts see Shannon Bosch 'Relief Workers in African Conflict Zones: Neutrals, Targets or Unlawful Participants?' (2010)19:3 *African Security Review* at 78.

¹⁶⁵ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 6.

¹⁶⁶ Rabus 'Protection of the Wounded, Sick and Shipwrecked' at 308; Rabus 'Religious Personnel' at 369.

¹⁶⁷ *Idem*.

¹⁶⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rules 31; 32 and 55.

¹⁶⁹ GC IV articles 23 and 59; AP I articles 70(2), 70(4) and 71.

¹⁷⁰ White 'IEEPA'S Override Authority: Potential for a Violation of the Geneva Conventions' Right to Access for Humanitarian Organisations?' at 2020.

¹⁷¹ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'.

should relief workers not enjoy special IHL status (distinct from that afforded the civilian population in general) as well?¹⁷²

The U.N. Convention on the Safety of U.N. and Associated Personnel

After 'considerable losses of U.N. personnel [were] suffered ...in the early 1990s' the U.N. General Assembly responded in 1996 by the adoption of the Convention on the Safety of U.N. and Associated Personnel¹⁷³. The scope of application of the convention is limited to United Nations and 'associated personnel,' (i.e. 'staff of non-governmental organisations associated with U.N. operations under a special agreement')¹⁷⁴ who operate under United Nations control¹⁷⁵. The Convention stipulates that 'U.N. and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate'¹⁷⁶. Furthermore, it obliges States to 'take all appropriate measures to ensure the safety of the personnel in question'¹⁷⁷.

In an attempt to extend the application of the Convention, an Optional Protocol to the Convention was adopted on 8 December 2005¹⁷⁸. The original convention applied only to U.N. operations 'to maintain or restore international peace and security and those declared by either the Security Council or the General Assembly ... to constitute an exceptional safety risk'¹⁷⁹. The Optional Protocol extends the ambit of the application of the Convention to 'U.N. operations to deliver humanitarian, political or development assistance in peace building and to emergency humanitarian assistance operations'¹⁸⁰. Notably, article 7(3) of the Convention allows relief workers to 'call on member states to use military intervention to ensure their safety'¹⁸¹.

¹⁷² Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 122.

¹⁷³ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'. The Convention was adopted by the U.N. General Assembly on 9 December 1994 and entered into force on 15 January 1999.

¹⁷⁴ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'. 'Relief workers who are deployed under an agreement with the Secretary-General of the United Nations or with a specialised agency or with the International Atomic Energy Agency, to carry out activities in support of the fulfilment of the mandate of a United Nations operation' (article 1(b)(iii); Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 123).

¹⁷⁵ Article 1(c); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 105.

¹⁷⁶ ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'.

¹⁷⁷ *Ibid.*

¹⁷⁸ Available at <http://untreaty.un.org/cod/avl/ha/csunap/csunap.html> (accessed 28 November 2010); the protocol has not yet entered into force (ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations').

¹⁷⁹ Article 1(c)(ii).

¹⁸⁰ Preamble.

¹⁸¹ This permits a party to the Convention to cooperate in the implementation of the Convention's provisions, 'particularly in any case where the host State is unable to take the required measures' (Adam Roberts 'Humanitarian Issues and Agencies as Triggers for International Military Action' (2000) 839 *International Review of the Red Cross* 683).

It was provisions like those expressed in article 7(3) of the Convention that have posed ethical difficulties for humanitarian organisations like the ICRC, whose efficacy is strongly tied to their ability to act with complete neutrality and impartiality¹⁸². Moreover, the use of armed escorts (as provided for by article 7) might increase the risk of relief workers being mistaken for the armed group accompanying them, ‘paradoxically increasing their vulnerability to attack’ rather than providing legal protection¹⁸³. Furthermore, there is a perception among relief workers that any association with the U.N. not only undermines their independence, but might in fact serve to increase the risks that they face in the theatre of war¹⁸⁴. Since the increased level of threat to U.N. mandated relief workers, other non-U.N. humanitarian NGOs now regard it as ‘downright dangerous’ to be associated in any way with any U.N. endeavours¹⁸⁵. As a consequence of this, other NGO’s have started to paint their traditionally white utility vehicles ‘yellow, pink, anything as long as it has no military connotations’ in the hopes that they will not be associated with U.N. relief workers¹⁸⁶. Thus, many relief NGO’s feel their safety is highly dependent on their ability to distance themselves from any perceived association with the U.N.¹⁸⁷ Even the ICRC, the quintessential independent and neutral relief organisation, have rejected the application of the U.N. Convention on the Safety of United Nations and Associated Personnel to their ICRC personnel. The Protocol does not, however, alter the fact that the Convention (and its Optional Protocol) only applies to ‘associated personnel’, thereby offering no special protective status to those relief workers who shun any association with the United Nations.

Symbol of humanitarianism

While the ICRC personnel rely on the special protections afforded by the Geneva Conventions and their Additional Protocols¹⁸⁸, and make use of the Red Cross/Red Crescent emblem in order to distinguish their staff as being entitled to this protective regime, other humanitarian organisations are not in principle permitted to use the ‘protective identifying sign, like the Red Cross/Red Crescent emblem¹⁸⁹. Similarly, they are also not eligible to the special protections which the ICRC enjoys under the GC and AP I. Moreover, at present there is no

¹⁸² When the 1994 Convention was being negotiated the ICRC maintained that it did not want ICRC personnel to be protected under the U.N. Convention ‘partly because ICRC personnel already have international legal protection deriving from the 1949 Geneva Conventions, and partly because the ICRC’s role as neutral humanitarian intermediary might be jeopardised if the ICRC were perceived as closely linked with the United Nations’ (Roberts ‘Humanitarian Issues and Agencies as Triggers for International Military Action’ at 684).

¹⁸³ Mackintosh “Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law’ at 121.

¹⁸⁴ *Idem* at 124.

¹⁸⁵ *Idem* at 125.

¹⁸⁶ *Ibid* at 125. Merlin paints their cars yellow and *Medecins Sans Frontieres* (MSF) painted its cars with a wide pink stripe.

¹⁸⁷ *Ibid*.

¹⁸⁸ ICRC ‘Respect For and Protection of the Personnel of Humanitarian Organisations’.

¹⁸⁹ *Ibid*.

equivalent for relief workers to the press card held by journalists. There have been moves from within the ranks of relief organisations to claim a special protected status without tying it to U.N. affiliations. *Médecins sans Frontières* (MSF) has proposed a 'symbol of humanitarianism'¹⁹⁰, 'which would be used to identify relief workers based purely on the neutral humanitarian character of their work'¹⁹¹.

While these recent developments are encouraging, 'the problem of the identification of the plethora of non-governmental organisations present in conflict situations ...remains unresolved'¹⁹². States are obliged to grant relief workers access to meet the humanitarian needs which arise in situations of armed conflict, and yet, despite their vocational vulnerability, they remain heavily reliant on the provisions prohibiting attacks against civilians to ensure their safety. It is noteworthy that in 2003, following a litany of U.N. resolutions¹⁹³, a Security Council resolution 'exhorted states and warring parties to ensure the safety of humanitarian personnel and U.N. and associated personnel'¹⁹⁴. Some have argued that the wording of the resolution suggests that independent humanitarian relief workers are a separate recognised group, perhaps 'leaving the door open to finding a solution to appropriate legal protection, not based on political control or U.N. association'¹⁹⁵.

9.6 Private military and security contractors (PMSCs) ensuring the safety of relief workers

Both the ICRC and many relief organisations operate from the starting point that 'humanitarian workers should be unarmed'¹⁹⁶, because that will alleviate the risk that relief workers are 'perceived as a threat to any armed faction or criminals'¹⁹⁷. Moreover, it has been suggested that their use of weapons and armed escorts might undermine the perception of their ethical claim to impartiality and complete neutrality¹⁹⁸. Instead, they have relied upon the acceptance of the local

¹⁹⁰ Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 124.

¹⁹¹ Fabrice Weissman 'Military Humanitarianism: A Deadly Confusion' (2003) 4 *MSF Activity Report*; Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 124.

¹⁹² ICRC 'Respect For and Protection of the Personnel of Humanitarian Organisations'.

¹⁹³ A/RES/52/167; A/RES/53/87; A/RES/54/192; A/RES/55/175; A/RES/56/217; A/RES/57/155; A/RES/58/122; A/RES/59/211; A/RES/60/123; A/RES/61/133. The resulting reports of the Secretary-General can be found at A/53/501; A/55/494; A/56/384; A/56/469; A/57/300; A/59/332; A/60/223 and A/61/463 available at <http://www.un.org/en/ga/65/resolutions.shtml> (accessed on 28 November 2010).

¹⁹⁴ S/RES/1502 (2003) available at <http://www.un.org/Docs/sc/> (accessed on 28 November 2010).

¹⁹⁵ Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 124.

¹⁹⁶ Kjell Bjork and Richard Jones 'Overcoming Dilemmas Created by the 21st Century Mercenaries: Conceptualising the Use of Private Security Companies in Iraq' *Reconstructing Post-Saddam Iraq: A Quixotic Beginning to the 'Global Democratic Revolution'* (2005) 26:4/5 *Third World Quarterly* 777 at 785.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*; Rana 'Contemporary Challenges in the Civil-military Relationship: Complementarity or

communities to ensure their safety and access to those in need. While the ICRC 'employs armed guards to protect its premises against criminal activity'¹⁹⁹, the organisation has stated that they 'have no intention - except in certain rare cases - of using armed escorts to protect our work itself. We remain convinced, as I have pointed out, that a clear distinction must be maintained between humanitarian operations and military operations - for security reasons!²⁰⁰ Having said that, when the ICRC adopted its recommended Code of Conduct in 1994, intended to guide the actions of those undertaking humanitarian operations, no mention was made of the use of armaments²⁰¹. In terms of IHL, relief workers (as is the case with all non-combatants or civilians), are entitled to be armed for their own personal self-defence²⁰².

Singer points out that 'while neutrality is a guiding principle, it is offering less and less protection'²⁰³ and 'death is becoming a significant occupational hazard'²⁰⁴. Not surprisingly, recent 'international armed conflicts in Iraq and Afghanistan have seen an increasing number [of relief workers] ... choosing to arm themselves'²⁰⁵ and PMSCs are increasingly being contracted as a 'matter of routine'²⁰⁶ to 'provide security to humanitarian NGOs'²⁰⁷ and 'this project has accrued some success'²⁰⁸. Despite warnings in the U.N. 2004 guidelines that 'PMSCs are also themselves increasingly seen as targets'²⁰⁹, both the U.N.

Incompatibility?' at 859.

¹⁹⁹ For example, in situations where crime is rife.

²⁰⁰ ICRC 'Protecting the Protectors'.

²⁰¹ Bjork and Jones 'Overcoming Dilemmas Created by the 21st Century Mercenaries: Conceptualising the Use of Private Security Companies in Iraq' *Reconstructing Post-Saddam Iraq: A Quixotic Beginning to the 'Global Democratic Revolution'* at 785.

²⁰² *Ibid.*

²⁰³ Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 7.

²⁰⁴ *Ibid.*

²⁰⁵ Bjork and Jones 'Overcoming Dilemmas Created by the 21st Century Mercenaries: Conceptualising the Use of Private Security Companies in Iraq' *Reconstructing Post-Saddam Iraq: A Quixotic Beginning to the 'Global Democratic Revolution'* at 785.

²⁰⁶ Åse Gili Østensen 'U.N. Use of Private Military and Security Companies' (2011) 3 *SSR Paper* available at <http://www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies> (accessed 4 September 2012) at 49. PMSC have contracts to supply humanitarian security and humanitarian services (like demining) 'on all the world's continents' (with the exception of Australia and Antarctica). 'ArmorGroup alone had conducted operations of this sort in eighteen countries as of July 2006' (Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism').

²⁰⁷ Human Rights Council 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (2010) A/HRC/15/25 (Report of the Chairperson/Rapporteur: José Luis Gómez del Prado) available at http://www.ohchr.org/Documents/Issues/Development/A.HRC.RES.15.25_en.pdf (accessed 14 July 2012) at 18. In Afghanistan the use of 'static armed guards supplied by PMSCs has become standard procedure for most international actors and organisations' (Østensen 'U.N. Use of Private Military and Security Companies' at 47).

²⁰⁸ Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism'

²⁰⁹ Østensen 'U.N. Use of Private Military and Security Companies' at 48.

department of Safety and Security (established in 2005)²¹⁰, and the ‘U.N. assistance mission in Iraq’, make use of PMSC, although with a more ‘low profile approach’²¹¹. For example, the ‘world food programme ...is an agency that recurrently relies on a broad range of security services supplied by private security companies’²¹².

Where the host State is unable to ensure the safety of relief workers, with their assets vulnerable to looting, and ‘operational access rendered impossible’²¹³, these organisations are electing to hire armed protection in the form of PMSCs to stave off ‘regular criminal activity’ directed at their offices, accommodation and warehouses²¹⁴. ‘In extreme situations this may imply provision of a proactive armed presence’²¹⁵. PMSCs have reportedly been providing ‘threat and context assessments, security audits, policy development for risk control and evacuation, security training, and the provision of security management and guards for convoys, compounds’²¹⁶ and personnel²¹⁷. So, for example, ArmorGroup, RONCO Consulting and DynCorp International are the ‘humanitarian de-miners of choice for DFID and the U.S. State Department’s Humanitarian Mine Action Program’²¹⁸.

While relief workers are clearly making greater use of PMSCs, they are slow to publicly admit this²¹⁹ and PMSCs are often bound by confidentiality agreements which preclude them from revealing that they have ‘humanitarian clients’²²⁰. Relief organisations risk losing ‘their funding if it were publicised that they were working with the peace and stability industry, no matter what the humanitarian benefits’²²¹. ‘Some agencies have dealt with the problem by instructing their staff to avoid contact with PMF personnel whenever possible’²²².

²¹⁰ Which requires U.N. agencies to ‘seek specific authority from DSS in order to buy armed security from the private sector’ (*Idem* at 14).

²¹¹ *Idem* at 48.

²¹² *Idem* at 15.

²¹³ Singer ‘Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community’ at 6

²¹⁴ Bjork and Jones ‘Overcoming Dilemmas Created by the 21st Century Mercenaries: Conceptualising the Use of Private Security Companies in Iraq’ *Reconstructing Post-Saddam Iraq: A Quixotic Beginning to the ‘Global Democratic Revolution’* at 789.

²¹⁵ Østensen ‘U.N. Use of Private Military and Security Companies’ at 14.

²¹⁶ Spearin ‘Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism’; Østensen ‘U.N. Use of Private Military and Security Companies’ at 14.

²¹⁷ Singer ‘Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community’ at 8.

²¹⁸ Spearin ‘Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism’.

²¹⁹ Singer ‘Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community’ at 7-8

²²⁰ Studies suggest that ‘twenty-five percent of the “high-end” firms that provide security services, and over fifty percent of firms that provide military support or logistics functions, such as military air transport, have worked for humanitarian clients’ (*Idem* at 8).

²²¹ *Idem* at 9. So when Africa Confidential (1996) ‘revealed that the now-defunct Executive Outcomes was providing security and information to an international aid agency; the agency subsequently went quiet in the face of its donors’ disapproval’ (*Idem* at 9-10).

²²² *Idem* at 11.

Given the increasing presence of PMSCs in the theatre of international armed conflicts however, this 'don't talk to strangers' philosophy will be of little assistance to relief workers faced with the real security threats that now see them being specifically targeted. Several humanitarian organisations have advised their personnel to 'deal with PMF employees as they would any other armed combatants'²²³. Only 'Oxfam, Mercy Corps and the ICRC' have formal policies in place instructing their personnel how to deal with PMSCs²²⁴. There are 'no specific U.N. general guidelines for humanitarians on the use of PMSCs, except those limited to criteria when PMSCs can be used for convoy protection'²²⁵.

Some PMSCs 'advertise security services specifically tailored to fit humanitarian needs'²²⁶, but 'many humanitarians tend to have doubts about the compatibility of the often somewhat militaristic security approach favoured by PMSCs'²²⁷, which are ... 'perhaps at odds with paradigms adhered to by the humanitarian clientele'²²⁸. PMSCs, who see 'humanitarianism as a future market opportunity'²²⁹ argue that they can provide the security necessary to carry out the humanitarian function, preventing relief workers from having to turn to 'traditional State military assistance'²³⁰.

Unfortunately, when PMSCs are at times indistinguishable from the armed forces of the military, their presence 'may present more danger than protection' and may in fact result in belligerents singling out 'their facilities and staff for targeting'²³¹. Sometimes the armed presence results in the increased risk of 'losing the perception of neutrality that they rely on to maintain their access and ensure their immunity from attack'²³². Any military-like presence calls into question the perceived civilian role of providing humanitarian relief, and often results in an increase in attacks directed at these 'non-military targets'²³³.

²²³ *Ibid.*

²²⁴ *Idem* at 10.

²²⁵ There is no guidance given on 'how to use them, how to select them and what specific demands to place on such contractors' (Østensen 'U.N. Use of Private Military and Security Companies' at 47).

²²⁶ *Idem* at 44.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ Spearin 'Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism'

²³⁰ *Ibid.*

²³¹ Bjork and Jones 'Overcoming Dilemmas Created by the 21st Century Mercenaries: Conceptualising the Use of Private Security Companies in Iraq' *Reconstructing Post-Saddam Iraq: A Quixotic Beginning to the 'Global Democratic Revolution'* at 786.

²³² Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 7.

²³³ Bjork and Jones 'Overcoming Dilemmas Created by the 21st Century Mercenaries: Conceptualising the Use of Private Security Companies in Iraq' *Reconstructing Post-Saddam Iraq: A Quixotic Beginning to the 'Global Democratic Revolution'* at 779.

9.7 The notion of direct participation in hostilities and the role of relief workers

International law is clear that, by definition, humanitarian assistance must be given with complete neutrality²³⁴. Having said that, the *Nicaragua* case also makes it clear that humanitarian assistance can 'be given by a state, through its military arm or otherwise'²³⁵. While that may be the case in terms of IHL, there is a strong suspicion that 'if relief is provided by a state, especially one with military or strategic interests in an area, it cannot be truly humanitarian'²³⁶. Unfortunately, the suspicion with which state-sourced relief is perceived, has begun to spill over and taint the neutrality and benevolence with which non-state humanitarian relief is received. Many belligerents now view relief workers as 'agents of outside powers'²³⁷, offering aid with an ulterior agenda. This perception is only growing as relief workers extend their mandate from 'crisis relief to post-conflict reconstruction'²³⁸ and nation building. As Anderson argues, relief workers cannot expect the same level of inviolability from hostilities if they persist in engaging in activities which call their neutrality into question²³⁹. The recent increase in attacks directed at relief workers has not only severely undermined the 'respect (and protection) usually accorded humanitarian work'²⁴⁰, but it has also fuelled debate around what constitutes legitimate humanitarian assistance, and what amounts to direct participation in hostilities.

Against this backdrop it is imperative that IHL gives some direction as to what tasks relief workers can undertake, without compromising their impartiality and infringing the notion of direct participation in hostilities²⁴¹. It is not surprising, given the high stakes²⁴², that a great deal of controversy has surrounded the issue of precisely when the actions of a civilian (and in our particular case relief

²³⁴ Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 125.

²³⁵ Of course, it was revealed in the case that relief may not always be genuinely humanitarian (*Nicaragua v United States of America*).

²³⁶ Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 125.

²³⁷ Anderson 'Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts' at 42.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 125.

²⁴¹ Although the phrase 'direct participation in hostilities' can be found in many IHL provisions, none of the four Geneva Conventions nor either of their two Additional Protocols provide any clear definition of what actions might amount to 'direct participation in hostilities'. The Interpretive Guide states that the phrase 'refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict' (ICRC '*Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law*' (Interpretive Guide) (2009) available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609> (accessed 28 November 2010) at 45).

²⁴² The reason why so much focus is placed upon determining what actions constitute 'direct participation in hostilities' is that those actions, 'if carried out by civilians, [suspends] their protection against the dangers arising from military operations' (*Idem* at 12).

workers) can be said to amount to direct participation in hostilities. When the ICRC convened a group of IHL experts to draft an Interpretive Guide on this topic it was hoped that a consensus document²⁴³ would result, replacing the unsatisfactory case-by-case analysis which had been adopted in practice²⁴⁴. The fruits of the six-year process have already been the subject of vigorous academic debate²⁴⁵, and only time will tell if State practice and *opinion juris* supports the guide's drafters, or their critics. What follows is an analysis of the position of relief workers in light of the Interpretive Guide's assessment of direct participation in hostilities²⁴⁶, as well as an assessment of their position in light of views proposed by the Guide's critics.

The Interpretive Guide begins from the standpoint that where doubt exists, an individual must be presumed to be civilian and, moreover, they must be 'presumed not to be participating directly in hostilities'²⁴⁷. It then goes on to postulate a three-part, cumulative test which states that in order to amount to direct participation in hostilities:

1. 'The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction of persons or objects protected against direct attack (threshold of harm)²⁴⁸, and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a co-ordinated military operation of which that act constitutes an integral part (direct causation), and

²⁴³ Michael Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *International Law and Politics* 697 at 698.

²⁴⁴ *Idem* at 705.

²⁴⁵ Nils Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 831; Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements'; Bill Boothby "'And For Such Time As": the Time Dimensions to Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 741; Kenneth Watkin 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guide' (2010) 42 *International Law and Politics* 641.

²⁴⁶ ICRC '*Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law*' at 47.

²⁴⁷ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 857. Schmitt in his critique rejects the presumption of non-participation, arguing that a more inclusive interpretation would incentivise civilians to refrain from anything remotely connected to the conflict, and will serve to enhance the protection afforded civilians under IHL (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 738).

²⁴⁸ Some examples cited by the Interpretive Guide include 'armed or unarmed activities restricting or disturbing deployments, logistics and communications'; 'capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary' including 'denying the adversary military use of certain objects, equipment and territory, [and] guarding captured military personnel for the adversary to prevent them being forcibly liberated'; 'clearing mines placed by the adversary'; '[e]lectronic interference with military computer network attacks or computer network exploitation'; and 'wiretapping the adversary's high command or transmitting tactical targeting information for an attack' (ICRC '*Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law*' at 48).

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 (belligerent nexus)²⁴⁹.

- i. The threshold of harm requirements

Under the Guide's first criterion, which is referred to as the 'threshold of harm' determination, relief workers must refrain from bringing about harm²⁵⁰ of a 'specifically military nature, or causing harm of a protected person or protected objects²⁵¹'. In essence, a relief worker found committing 'acts of violence against human and material enemy forces', or causing 'physical or functional damage to military objects, operations or capacity' would meet and satisfy the first of the three criteria²⁵². When one recalls that relief workers are by definition only permitted to offer 'aid...without discrimination to all in need ... to prevent suffering ... and to protect life and health and ensure respect for the human being'²⁵³, it seems unlikely that the same genuine relief workers might be engaging in acts aimed at causing harm of a military nature, or aimed at harming civilians or civilian objects. Having said that, according to the ICRC's Interpretive Guide, any actions on the part of relief workers which sabotage military capacity, or restrict military 'deployments, logistics and communications'²⁵⁴, would also satisfy the threshold of harm criteria. Relief workers, by the very nature of their vocation, often remain in the zone of hostilities, even once most of the civilians have been evacuated. To this end, their presence near 'military personnel, objects and territory' may well restrict military deployments, complicate targeting assessments (on account of the IHL principles of distinction and proportionality²⁵⁵) and require belligerents to give advance warning of potential attacks²⁵⁶. Certainly if relief workers were to disclose any tactical targeting information, which they might have gathered while offering assistance²⁵⁷, they would fall foul of the 'threshold of harm' requirement²⁵⁸.

²⁴⁹ *Idem* at 47.

²⁵⁰ The degree of harm includes 'not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict' (*Ibid*).

²⁵¹ *Idem* at 49.

²⁵² *Idem* at 47.

²⁵³ *Nicaragua v USA* at para 234.

²⁵⁴ ICRC '*Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law*' at 48.

²⁵⁵ For a fuller discussion of these principles and their application when relief workers are involved see Bosch 'Relief workers in African conflict zones: Neutrals, targets or unlawful participants?'

²⁵⁶ ICRC '*Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law*' at 48.

²⁵⁷ For example indicating where military forces might be taking cover in civilian or dual use sites.

²⁵⁸ ICRC '*Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law*' at 50.

Those, like Schmitt, who criticises the ICRC's interpretation, argues that the 'threshold of harm' requirement is under-inclusive²⁵⁹. Schmitt argues that the ICRC's Interpretive Guide unnecessarily excludes acts that benefit one of the belligerent parties (as would be the case with support activities), and that alone is likely to have an adverse effect on the opponent, although 'the causal relationship between such support and the resulting harm [to the opponent] may not always be direct'²⁶⁰. The danger for relief workers in adopting this more inclusive interpretation, is that many of their neutrally intended activities might well fall within the ambit of the required threshold of harm. According to Schmitt's interpretation relief workers who ignore an illegal maritime blockade, relief workers located at dual use sites²⁶¹, those relief workers who by their presence hinder targeting decisions and certainly those who are coerced into divulging any tactical information would satisfy the threshold of harm requirement, by virtue of the fact that their actions benefit one of the belligerent parties.

On the other hand, those like Melzer, who reject Schmitt's all-inclusive interpretation, argue that this overly inclusive interpretation 'extends the loss of protection to a potentially wide range of support activities, regardless of whether they are likely to cause any harm to the enemy or the civilian population'²⁶². Melzer points out that there is nothing in practice to suggest that states in fact favour Schmitt's more inclusive legal interpretation, against the ICRC's interpretation²⁶³. Moreover, Melzer argues that lowering the threshold (as Schmitt proposes) will only serve to undermine the longstanding recognised 'distinction between direct participation in hostilities and mere involvement in the general war effort'²⁶⁴.

ii. The direct causation requirement

Even prior to the publication of the ICRC's Interpretive Guide, much controversy already surrounded questions as to whether 'general war effort'²⁶⁵, and activities

²⁵⁹ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 714.

²⁶⁰ *Idem* at 719; Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 858.

²⁶¹ These include sites of a political nature (provided they do not play a role in the military chain of command), facilities which provide electricity, water, transport and communications. Under IHL, dual-use sites may qualify as a 'legitimate military target where they contribute, in part, to concrete military aims' and their destruction or neutralisation 'in the circumstances ruling at the time offers a definite military advantage'(AP I article 52(2)).

²⁶² Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 877.

²⁶³ *Idem* at 860.

²⁶⁴ *Idem* at 877.

²⁶⁵ This includes all activities 'objectively contributing to the military defeat of the adversary'. For example, 'design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations' (ICRC '*Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law*' at 53).

aimed at sustaining war²⁶⁶, would constitute direct participation in hostilities. It is not disputed that war-sustaining activities²⁶⁷ are indispensable to the war effort, which in effect do eventually harm the adversary. In an attempt to draw a clear line between pure 'conduct of hostilities and general war effort' or 'war-sustaining activities', the drafters of the ICRC's Interpretive Guide formulated the direct causation test (the second cumulative requirement for a finding of direct participation)²⁶⁸. In order to avoid depriving much of the civilian population of their protected status, the Guide proposed that 'there must be a sufficiently close causal relation between the act and the resulting harm' (preferably in one causal step²⁶⁹, or at least 'where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm')²⁷⁰. Activities that only indirectly cause harm were not considered sufficient to amount to direct participation in hostilities. The Guide is clear that merely being in the vicinity of hostile action is not sufficient to constitute direct participation in hostilities, as temporal or geographic proximity cannot on its own, without direct causation, amount to a finding of this nature²⁷¹. Similarly, rebuilding infrastructure or reconnecting severed amenities, even though they could potentially assist with the general war effort, is not part of a tactical operation designed to cause harm (assuming relief workers have purely humanitarian concerns as their motivation). But relief workers *will* fall foul of the direct causation test if they divulge tactical information or are used as lookout for combatants.

Once again the Guide's critics were quick to point out that this direct causation test, which requires that the 'harm must be caused in a single causal step' ... and 'result from a physical act', gives rise to an 'under-inclusive' result²⁷². Schmitt argues that the direct causation test fails to take cognisance of the 'nature of modern combat operations'²⁷³, and he prefers instead to include within the ambit of direct participants those that engage in capacity building and play an

²⁶⁶ This would additionally include 'political, economic or media activities supporting the general war effort'. For example 'political propaganda, financial transactions, production of agricultural or non-military industrial goods' (*Ibid*).

²⁶⁷ For example, providing 'finances, food and shelter to the armed forces and producing weapons and ammunition' (*Ibid*).

²⁶⁸ During the expert meetings, emphasis was placed on the idea that direct participation in hostilities is 'neither synonymous with "involvement in" or "contribution to" hostilities, nor with "preparing" or "enabling" someone else to directly participate in hostilities, but essentially means that an individual is personally "taking part in the ongoing exercise of harming the enemy" and personally carrying out hostile acts which are "part of" the hostilities' (*Ibid*).

²⁶⁹ The act must not only be causally linked to the harm, but it must also cause the harm directly. For example, 'the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly' (*Idem* at 54 and 55).

²⁷⁰ For example 'the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation' (*Idem* at 55).

²⁷¹ *Ibid*.

²⁷² Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 726.

²⁷³ *Idem* at 725.

'integrated part' in the resulting harm²⁷⁴. Unfortunately for relief workers, their involvement in rebuilding amenities, which may be commandeered by a belligerent party, might be sufficient to satisfy Schmitt's preferred interpretation of the direct causation test. It is unclear whether merely being in the theatre of hostilities, and consequently hindering the opposition's unfettered ability to engage with the opposition, would satisfy Schmitt's 'integrated part' test. It is probably fair to say that relief workers who deliberately locate themselves at dual use sites, with the hope of shielding the site from attack for civilian benefit, may be playing an integrated part in hostilities, where belligerents are seeking to use or deny access to these sites in furtherance of the war effort. When one considers the repercussions, it seems astute to heed Melzer's warning that an overly relaxed causal link, such as is proposed by Schmitt, might expose civilians to 'targeting policies prone to error, arbitrariness and abuse'²⁷⁵. Moreover, as Melzer points out, there is no *opinion juris* to suggest that states favour such a broad interpretation of acts as constituting direct participation, however remotely linked they may be to the resultant harm²⁷⁶.

iii. The belligerent nexus test

The third and final requirement set out in the ICRC's Interpretive Guide is termed the 'belligerent nexus' test, and requires that 'an 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'²⁷⁷. Once again the critics of the ICRC's Guide reject the need for the 'act to be in support of a party to the conflict *and* to the detriment of another', speculating that it is possible for participating civilians to oppose both sides in a conflict and yet still be participating directly in hostilities²⁷⁸. Instead, Schmitt recommends that this criterion be relaxed so as to only require that the act either supports one party to the conflict, *or* that it opposes a party to the conflict²⁷⁹. If we adopt this less demanding requirement, relief workers could find themselves in violation of IHL. While, by definition, relief workers are required to act with neutrality, it can appear as if their assistance is favouring one particular party to a conflict. For example, when relief workers offer aid to the civilian population of one of the belligerent parties, the effect can be an increased civilian willpower to resist an invasion. Likewise, breaking an illegal maritime blockade might appear as if one belligerent party is being favoured, even if the relief worker's real intention is to get the necessary humanitarian aid to the civilian population. Relief workers who deliberately position themselves at dual-use sites, appear to be assisting the local armed forces. Moreover, as relief workers go about their humanitarian tasks, their very presence in the theatre of

²⁷⁴ *Idem* at 729.

²⁷⁵ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 878.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 736.

²⁷⁹ *Ibid.*

hostilities may prohibit and hinder the opposition engaging with the local armed forces. When relief workers and their supplies fall victim to hijacking, they inadvertently contribute supplies and negotiating power to the hijacking belligerent party. Simply put, if one adopts Schmitt's position on the belligerent nexus requirement, then relief workers will often satisfy this leg of the test for direct participation in hostilities.

In conclusion then, it is unlikely that the activities of genuine relief workers will ever satisfy the ICRC's three cumulative criteria for 'direct participation in hostilities'. It is implausible that relief workers will satisfy the threshold of harm requirements since they are unlikely to be committing 'acts of violence'²⁸⁰ of any kind, or causing 'damage to military objects, operations or capacity'²⁸¹. At most their presence in the theatre of hostilities might sabotage military capacity, or restrict military deployments by virtue of the obligation to observe the principles of distinction²⁸² and proportionality. Moreover, those relief workers involved in rebuilding infrastructure are exempt from a finding of direct participation by virtue of the causal connection leg of the enquiry, as are those located at dual-use sites. Lastly, the belligerent nexus test will exclude all legitimate humanitarian actions, since by definition relief workers are not permitted to favour any one side in a conflict. In fact some writers go so far as to suggest that merely by categorising relief workers as civilians, States implicitly agree that the 'offering of humanitarian assistance to civilians can never amount to unlawful direct participation in hostilities'²⁸³. Probably the only occasion relief workers would satisfy all three of the cumulative criteria, would be if they acted as lookouts or divulged tactical information to belligerent parties.

Unfortunately, the outlook for relief workers in terms of Schmitt's proposed criteria is not so forgiving. Applying Schmitt's inclusive interpretation of the ICRC's three-part test is more likely to find relief workers in breach of the notion of direct participation in hostilities, oddly by no more than their mere presence in

²⁸⁰ If relief workers are found causing 'harm in individual self-defence', or in defence of vulnerable civilians, although that meets the required threshold of harm, it fails to meet the belligerent nexus test and the 'use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities' (ICRC *Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law* at 62).

²⁸¹ *Idem* at 48.

²⁸² One of the 'ancient and established rules of customary' IHL is that civilians and civilian objects are to be distinguishable from military objects and personnel at all times, since it is strictly prohibited to attack civilians or civilian objects (AP I article 48; Oeter 'Methods and Means of Warfare' at 113). It is this principle of distinction which lies at the heart of many IHL rules, including the rules which demand that combatants wear an identifying mark and carry their weapons openly; rules that require attacking and defending forces to avoid locating military objectives near areas populated by civilians (GC IV article 28) and rules that stipulate the evacuation of civilians from the vicinity of military objectives (AP I at articles 57 and 58). Moreover, it is this principle of distinction that prohibits the use of weapons which might endanger civilians indiscriminately (AP I articles 51(4) and (5); Oeter 'Methods and Means of Warfare' at 54).

²⁸³ Knut Dörmann 'International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts' (2007) available at <http://www.icrc.org/eng/resources/documents/article/other/media-protection-article-.htm> (visited on 30 June 2009).

the theatre of operations. Certainly, relief workers engaged in re-building amenities might fall foul of Schmitt's 'integrated step' requirement, provided the amenities in question could be used by belligerent parties. Moreover, in terms of Schmitt's interpretation of the belligerent nexus test²⁸⁴, many relief workers could lose their civilian privileges as it is a common misperception that relief workers are aiding one side in a conflict, when that is not the intended design. It seems then that, on the whole, the Schmitt interpretation is unnecessarily punitive of those individuals (like relief workers) who operate in the theatre of hostilities. In my view, Melzer is correct to point out that the Schmitt interpretation seems to be 'almost exclusively driven by military necessity' while giving insufficient consideration to the equally important balancing consideration of humanity²⁸⁵. To my mind Schmitt's interpretation seems counter-intuitive, in that it gives rise to a situation in which IHL both clearly legitimises the work of humanitarian workers, and yet simultaneously punishes relief workers for carrying out their mandate. The only resolution which can sustain both positions: a humanitarian mandate and restrictions upon those participating directly in hostilities, is the interpretation found in the ICRC's Interpretive Guide.

9.8 The issue of detention for relief workers with default IHL civilian status

Not only may relief workers not participate directly in hostilities²⁸⁶, but as a consequence of this restriction, and their default civilian status, they may not be taken prisoner without sufficient justification²⁸⁷. Of course, the moment any civilian engages in any actions which amount to direct participation in hostilities, they open themselves up to a defensive response from opposition forces 'for such time as they continue to actively participate in hostilities'²⁸⁸. Moreover once it is determined that they are participating in hostilities, they may be detained in terms of IHL. Given the serious consequences which flow from a determination that a civilian, and for our purposes a relief worker, has been actively participating in hostilities, it is imperative that IHL gives clear criteria for determining exactly when this might be said to have occurred. Unfortunately, if one adopts the Schmitt interpretation, the potential for relief workers to face detention in terms of IHL for direct participation in hostilities is not only greatly increased, but it is likely to land relief workers in detention for doing no more than carry out their humanitarian mission. Already statistics reveal that relief workers

²⁸⁴ Requiring only that one party to the conflict benefits, or that one belligerent party is harmed by the relief workers actions (Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' at 735).

²⁸⁵ Melzer "Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 914.

²⁸⁶ AP I article 51(3).

²⁸⁷ Civilians may only be interned in exceptional cases where it is necessary for reasons of security, provided the security concerns cannot be addressed by less severe measures (GC IV articles 41-43 and 78(1); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 99).

²⁸⁸ Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 6.

are particularly vulnerable to unjustified detention at the hands of belligerent parties, often because belligerents want control of their relief supplies (doling them out to only those who support their cause), or because belligerents want to use their release as leverage in negotiations with other belligerents. Add to this the Schmitt interpretation on what amounts to direct participation in hostilities, and one potentially legitimises the actions of belligerents who take relief workers into detention for more nefarious reasons.

Once in detention, their status under IHL has a direct impact on how relief workers can expect to be treated. Even if belligerents claim that relief workers have been participating in hostilities, and accordingly detain them, they remain classified as civilians, albeit participating illegally in hostilities²⁸⁹. As IHL stands at the moment, relief workers will not enjoy special prisoner of war (POW) status, on account of the fact that they are not members of the armed forces. Unlike their colleagues who are classified as 'medical and religious personnel of the armed forces', relief workers enjoy no special privileges, beyond those fundamental guarantees of humane treatment²⁹⁰ ordinarily granted to civilians, if they fall into enemy hands as prescribed by. The detaining power is obliged to report the identity of captured relief workers to their State of origin within two weeks²⁹¹. Moreover, 'decisions regarding such internment shall be made according to regular procedure and subject to regular review'²⁹². As detained civilians, they 'shall be enabled to receive the individual or collective relief that may be sent to them'²⁹³. If their health needs demand 'medical attention and hospital treatment', that shall be afforded by the detaining power, 'to the same extent as the nationals of the State concerned'²⁹⁴. Whilst in detention, 'they shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith'²⁹⁵. For those relief workers who are aliens in the territory of conflict (which is most often the case), they fall within a narrower category of protected civilians, and benefit from more 'detailed rules regarding their treatment in the hands of the

²⁸⁹ Once they are *hors de combat*, or fall into enemy hands, they may be held to account for their unauthorised actions, but at all times they must be afforded the 'regular and fair judicial guarantees extended to civilians' (GC IV article 5; AP I article 75; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 100; Gasser 'Protection of the Civilian Population' at 211). It is only the civilian *levée en masse* who acquire secondary POW status upon capture, despite their primary civilian status (1949 Geneva Convention Relative to the Treatment of Prisoners of War (GC III) (1950) 75 *U.N. Treaty Series* 135 at article 4A(6); Gasser 'Protection of the Civilian Population' at 233).

²⁹⁰ GC IV articles 79-135 (For a comprehensive discussion of these duties see Gasser 'Protection of the Civilian Population' at 288-292).

²⁹¹ GC IV article 136(2); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 123.

²⁹² GC IV articles 43 and 78(2); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 100.

²⁹³ GC IV article 38(1).

²⁹⁴ GC IV article 38(2); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 118.

²⁹⁵ GC IV article 38(3); Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rules 104 and 127.

enemy²⁹⁶. Alien civilians enjoy diplomatic protection as a result of diplomatic relations between their nation State and the State on whose territory they find themselves²⁹⁷. However, when one considers that legal review proceedings might well be conducted in a foreign language, if at all, in a failed state, one begins to appreciate the plight of the detained relief worker. Moreover, promises of medical attention, to the extent which nationals of the detaining State are entitled, is cold comfort when these very relief workers are often those providing for the local citizen's most basic medical needs and medical supplies.

What is of even greater concern for relief workers who are detained for alleged participation in hostilities, is that they can be held to account for their 'unauthorised actions' through judicial proceedings. While IHL prescribes that any civilian who is subject to trial for alleged participation in hostilities, be afforded the 'regular and fair judicial guarantees'²⁹⁸, what is particularly concerning is that relief workers might be tried for nothing other than carrying out their humanitarian mission. The very real dilemma for relief workers is that without special IHL status, and especially in light of Schmitt's proposed amendments to the ICRC's Interpretive Guide, relief workers are more vulnerable than ever to detention and even prosecution as unlawful combatants.

9.9 Conclusion

The last decade has seen a marked increase in the incidences of major violent attacks on relief workers in the theatre of war. One reason for this increase could be because terrorist factions, insurgents and guerrilla forces appear to have no compunction in harming those providing relief; another could be because the relief workers' vocation requires a close proximity to the theatre of war, thereby putting them in harm's way. Whatever the reason, relief workers are, by definition, those offering humanitarian assistance without associating themselves with either side in an armed conflict, and it seems right that they should enjoy at least the same immunity from attack that IHL affords civilians, and possibly special status, given their particular vulnerability. Conversely, 'in an environment where there is "no empirical evidence that declaring yourself to be neutral actually enhances your security"²⁹⁹, relief workers are heavily reliant on IHL to provide them the necessary protection in the theatre of armed conflict. As it stands, IHL does no more than presume that all relief workers are civilians. There have been U.N.-led initiatives calling for a special status to be afforded relief workers under the auspices of the U.N. Ironically, relief NGO's regard it as

²⁹⁶ Lindsey Cameron 'International Humanitarian Law and the Regulation of Private Military Companies' (2007) Plenary lecture given at conference on Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide available at <http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Cameron.pdf> (accessed 28 November 2010) at 5.

²⁹⁷ Gasser 'Protection of the Civilian Population' at 281.

²⁹⁸ GC IV article 5(3); AP I article 75, Gasser 'Protection of the Civilian Population' at 211; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at rule 100.

²⁹⁹ Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 6

'downright dangerous' to be in anyway associated with the U.N.³⁰⁰, and most NGO's feel their safety is better ensured by disassociating themselves from the U.N.³⁰¹. Understandably there has been resistance to this position, leaving relief workers in the theatre of operations with little more than an emblem to distinguish themselves from combatants.

As relief workers have expanded their mandates to include post-conflict reconstruction, so has the number of attacks targeting relief workers increased, leading some academics to speculate that perhaps belligerents perceive relief workers as participants in hostilities, particularly when they employ the services of armed PMSCs. On the whole it is unlikely that the activities of relief workers will ever satisfy the three accumulative criteria for direct participation in hostilities as set out in the ICRC's Interpretive Guide. What is more probable is that relief workers might get in the way of the normal conduct of hostilities, thereby restricting military deployments. Without more, this alone is not enough to constitute direct participation in hostilities, without proving that there is a 'sufficiently close causal relation between their interference in hostilities and the resulting harm'³⁰². This causal connection would probably only be achieved by relief workers if they were to divulge tactical information regarding combatants or be used as lookouts. Everyday humanitarian relief work would probably not on its own amount to the direct causal source of harm to military objects, operations or capacity³⁰³. Moreover, it is unlikely that neutral relief workers will be engaged in acts 'specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another'³⁰⁴. In fact, by definition, relief workers are expected to offer humanitarian assistance without discrimination, and those who claim to be relief workers while falling foul of the three-pronged test for direct participation in hostilities, are not to be classified as relief workers within the definition set by the ICJ in the *Nicaragua* case. It is entirely possible though, that in going about their jobs, relief workers may lose *de facto* protection, if they remain in close proximity to a military target. In these instances it may well be that, after assessing the risk to neutral relief workers, a commander might nevertheless order an attack on a military target in their vicinity. This alone is not unlawful, provided the proportionality test can be satisfied and the principles of military necessity, discrimination and advance warning are observed.

Unfortunately, Schmitt's proposed amendments to the ICRC's Interpretive Guide could have serious implications for relief workers. Not only are relief workers more likely to be found in breach of the IHL notion of direct participation in hostilities, but this is likely to result from their mere humanitarian presence in the theatre of operations. If they are believed to be participating in hostilities (according to Schmitt's interpretation), these well-meaning relief workers could

³⁰⁰ Mackintosh 'Beyond the Red Cross: the Protection of Independent Humanitarian Organisations and their Staff in International Humanitarian Law' at 125.

³⁰¹ *Ibid.*

³⁰² ICRC '*Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law*' at 53.

³⁰³ *Idem* at 58.

³⁰⁴ *Ibid.*

face detention and even criminal prosecution at the hands of belligerents. With this prospect it is likely that states will begin advising their nationals that relief work is ill advised in modern conflict situations. In the interests of the civilians who rely heavily on the humanitarian relief traditionally provided by relief workers, I would hope that this piece prompts further thought into the need for special IHL status, immunity from prosecution and exemption from civilian detention for all genuine relief workers. I would certainly reject Schmitt's interpretation of what actions amount to direct participation in hostilities, on the grounds that it is inconsistent with the spirit and purpose of IHL's aim of minimising unnecessary suffering and protecting the vulnerable.

Within forty-eight hours of the Israeli attack on the Gaza Freedom Flotilla on 31 May 2010, the U.N. Human Rights Council had established a committee to investigate the incident and appointed Philippe Kirsch (former International Criminal Court President) to head the investigation³⁰⁵. The speed of this response speaks to the seriousness with which the international community views attacks on those claiming to be humanitarian relief workers. I hope that what emerges from this investigation, gives States cause to consider the plight of the relief worker in today's armed conflicts, although the track record for holding perpetrators 'accountable in a court', has been rather dismal³⁰⁶.

³⁰⁵ *Palestine News Network* 'U.N. to Investigate Flotilla Attacks' (7 July 2010) available at http://english.pnn.ps/index.php?option=com_content&task=view&id=8461&Itemid=29 (accessed 28 November 2010).

³⁰⁶ Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 6

CHAPTER 10

CONCLUSION

Under-aged child soldiers recruited into non-State organised groups:

'I had a patrol that went into a village that had been wiped out. As the patrol was going through the village, the chapel doors opened and about 100 people were hidden inside... The sergeant in charge of the patrol called my headquarters and said he needed vehicles to move these people to a safe place. As he was on the radio calling, from one side of the village there were about 30 boys, 9, 10, 12, 14 [years of age]... who opened fire on the sergeant, clearly in uniform, and the soldiers and the people he was protecting. As he was reeling from that attack, from the other side of the village there were about 20 girls, the same ages; some of them pregnant. They were human shields behind which other boys were shooting at the sergeant, his soldiers and the people he was protecting'¹.

Private military and security contractors (PMSCs):

'On 31 March 2004 four American security contractors, accompanying a shipment of kitchen equipment through Iraq, were ambushed, killed, set on fire, dragged through the streets, and hung from a bridge before a cheering crowd in the city of Fallujah'².

Voluntary human shields (VHSs):

'Convoys of foreign peace activists (including students, a mother of three and a businessman who has given up his job), and led by former US marine and Gulf War veteran Ken Nichols O'Keefe, arrived in Baghdad to act as "human shields", hoping to deter a US-led bombardment of the country. They signed up to the cause despite the clear risks'³.

¹ Lieutenant-General Roméo Dallaire (retired) 'Motion Urging the Repatriation of Omar Khadr' (18 June 2008) available at <http://romeodallaire.sencanada.ca/en/Vote-on-Senator-Romeo-Dallaires-motion-urging-the-repatriation-of-Omar-Khadr/> (accessed 16 October 2012).

Although this narrative, told by Lieutenant-General Roméo Dallaire, played out in Rwanda (the scene of a non-international armed conflict) the reality remains that incidences of this sort have characterised conflicts of both international and non-international types. Retired Lieutenant-General Roméo Dallaire now heads up the 'Roméo Dallaire Child Soldier Initiative' and uses his accounts of these events to lobby for ending the use and recruitment of child soldiers worldwide in all forms of conflict.

² Suzanne Kelly 'Confessions of a Private Security Contractor' (27 December 2011) available at <http://security.blogs.cnn.com/2011/12/27/confessions-of-a-private-security-contractor/> (accessed 21 October 2012). For the most part it is uncontroversial and widely acknowledged that from March 2003 to June 2004 the armed conflict in Iraq 'clearly constituted an international armed conflict under the scope of application provisions of the Geneva Conventions' (David Turns 'The International Humanitarian Law Classification of Armed Conflicts in Iraq since 2003' in Raul Pedrozo (Ed) *The War in Iraq: A Legal Analysis International Law Studies* (2010) Vol 86 97 at 117).

³ BBC News 'Volunteer "Human Shields" Flock to Iraq' (17 February 2003) available at

Journalists:

'Terry Lloyd, a veteran correspondent with ITV News, was confirmed dead on 23 March 2003 after coming under fire from US or British forces while driving in convoy to the southern Iraqi city of Basra. US troops, who recalled opening fire on cars marked "TV", believed that Iraqi suicide bombers were using the cars to attack US troops'⁴.

Relief workers:

'In the aftermath of the bombing of the Baghdad UN headquarters ...security barriers are being built or reinforced, bullet-proof vests line office hallways at the ready, and luggage of relief staffers is being piled up daily for flights out as agencies rein in their programs, or - in some cases - stop them altogether. UN officials say that they are evacuating more than 200 of their 350 Baghdad staff, many of whom were wounded in the blast. The ICRC this week also began sending home more than half its Baghdad staff of 200 - the culmination of a series of security measures launched when one field officer was murdered on a road south of Baghdad on July 22, 2003'⁵.

When international armed conflicts break out in predominantly civilian locations, far from the sterile battlefields which were envisaged by the drafters of the Geneva Conventions⁶, it should come as no surprise that the theatre of hostilities is populated by a range of non-State actors. Moreover, when one considers that, with global military downsizing, many States have been forced to outsource to non-State actors a range of functions traditionally performed by the military, there is an understandable and significant increase in the prevalence of these non-State actors.

While the notion that armed hostilities might impact on civilian locations is briefly referred to in International Humanitarian Law (IHL)⁷, the IHL conventions were drafted with a passive, non-participating civilian in mind, a far cry from the present day reality of relief workers (accompanied by convoys of much needed relief supplies and medicines); journalists and voluntary human shields (and their ability to draw the attention of the international

http://news.bbc.co.uk/2/hi/middle_east/2771529.stm (accessed 1 October 2012).

⁴ ITV News 'Terry Lloyd' (22 March 2003) available at <http://www.cpj.org/killed/2003/terry-lloyd.php> (accessed 21 May 2013)

⁵ Scott Peterson 'Iraq Aid Groups Reduce Presence' (28 August 2003) available at <http://www.highbeam.com/doc/1G1-106983751.html> (accessed 21 May 2013).

⁶ And their subsequent additional protocols.

⁷ IHL concedes that when conflict breaks out in civilian locations, it is possible that, by their mere presence in the vicinity of military targets, civilians might *de facto* compromise their otherwise civilian immunity against attack, in a manner which is legally defensible under IHL. For example, after assessing the risk to civilians, a commander might nevertheless order an attack on a military target in their vicinity. This alone is not unlawful provided the proportionality test can be satisfied, and the principles of military necessity, discrimination and advance warning are observed. Moreover IHL makes allowances for the fact that, where civilians choose to remain near to military targets, that exercise of their free will brings with it an increased risk that they might be injured as part of collateral damage.

media); heavily armed private military and security contractors; and under-aged child soldiers, recruited into non-State organised armed groups.

For a legal regime, like IHL, founded on the notion that civilians are to be respected and enjoy immunity from direct attacks on account of their non-participation in the hostilities, this new reality is proving to be legally challenging. It simply was not considered, when the Geneva Conventions and their Additional Protocols were drafted, that the principle of distinction (which distinguishes combatants from civilians) would not be readily observed. This, in turn, calls into question the continued effectiveness of the Geneva Conventions in modern international armed conflicts⁸. The non-State actors discussed in this thesis appear to occupy a hybrid 'grey area' (which technically is legally non-existent), between the two mutually exclusive IHL categories: combatant and civilian. During hostilities, commanding officers and legitimate combatants are finding themselves in the unenviable position of having to make targeting decisions in respect of individuals whose actions appear to vacillate between those performed by innocent civilians, and combat-related activities. This results in much controversy as non-State actors (who would otherwise be classified as civilian), behave in ways that may or may not be regarded as participating directly in hostilities. This legal ambiguity persists even after these non-State actors fall into enemy hands: very often the detaining powers simply do not know what legal regime to apply to them.

The bleak narratives with which I opened this chapter illustrate to some extent the pressure IHL is under to provide clear directives to all parties in international armed conflicts. There are lacunae in existing IHL at three levels: the first is that of assessing and assigning primary IHL status to these new non-State actors, whose presence in the theatre of hostilities was never envisaged by the drafters of the Geneva Conventions (and their additional protocols). The second involves determining when the actions of these non-State actors amount to direct participation in the hostilities. The third involves understanding the legal consequences which result from a determination that a civilian's activities amount to direct participation in hostilities.

i. Assigning primary IHL status

As IHL stands at present, primary combatant status is only afforded to those individuals participating in an international armed conflict who can show both:

- a) membership of an armed force (which is subject to command responsibility), and
- b) observance of the principle of distinction by, at a very minimum, carrying their weapons openly during, and in preparation for, any military engagement.

This inviolable primary IHL status clothes the individual with the necessary authorisation to participate directly in hostilities. While the combatant privilege brings with it full immunity from prosecution for their lawful hostile acts (provided they observe the laws of war), and prisoner of war (POW)

⁸ Daphne Richemond-Barak (2011) 'Non-State Actors in Armed Conflict: Issues of Distinction and Reciprocity' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (Columbia Studies in Terrorism and Irregular Warfare) at 2355-47.

status upon capture, it necessarily also exposes the individual combatant to continuous lawful targeting. It is this exposure to targeting which demands that combatants ensure that they distinguish themselves from the civilian population, or run the risk of forfeiting their POW status if they fall into enemy hands.

For the purposes of assessing this primary IHL status, it does not matter that these individuals might be younger than the legal recruitment age of fifteen years, provided the armed group which they have voluntarily joined enjoys combatant status⁹. There is also no insurmountable legal barrier to individual PMSCs being afforded primary combatant status¹⁰ when they are either 'formally incorporated into the States' armed forces'¹¹, or where 'they fulfil the customary IHL criteria for combatant status'¹². However, most commentators agree that the attainment of either of these conditions is likely to be rare¹³.

As for VHSs¹⁴, relief workers and journalists¹⁵, they do not fulfil even the most basic requirements¹⁶ which IHL demands of combatants, and consequently they will not enjoy primary combatant status¹⁷. They, like all other individuals who find themselves in the theatre of armed conflict, but who do not qualify for combatant status, are clothed with presumptive default civilian status. This default civilian status is also afforded to child soldiers who

⁹ Save to add that for those recruited under eighteen years of age, IHL dictates that upon capture, these combatants are to enjoy the full range of special protections afforded to children as a category.

¹⁰ Renée De Nevers 'Private Security Companies and the Laws of War' (2009) 40 *Security Dialogue* available at <http://sdi.sagepub.com/content/40/2/169> (accessed 10 July 2012) at 176.

¹¹ 'The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' (Montreux Document) available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf (accessed 14 June 2012) principle 26(b) at 39; Rikke Ishøy (2008) *Handbook on the Practical Use of International Humanitarian Law* (revised edition) Danish Red Cross: København at 107.

¹² Montreux Document at principle 26(b).

¹³ *Idem* at 36; Banks 'Introduction' at 228-35.

¹⁴ The current body of IHL (expressed in 'opinion, limited judicial consideration and even more limited State practice') presumes that VHSs retain their civilian status, until a competent tribunal dictates otherwise (Rewi Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' (2008) 9 *Melbourne Journal of International Law* 313 at 332).

¹⁵ Until such time as it can be said that the media broadcast facilities are being used for 'military purposes or to incite people to commit grave breaches of IHL, acts of genocide or acts of violence', they remain immune from attack - even if they are broadcasting propaganda (Alexandre Balguy-Gallois 'The Protection of Journalists and News Media Personnel in Armed Conflict' (2004) 86:853 *International Review of the Red Cross* 37 at 56; Jean-Marie Henckaerts and Louise Doswald-Beck (2005) *Customary International Humanitarian Law Volume I: Rules* Cambridge University Press: Cambridge at 115-118).

¹⁶ They are not members of the armed forces, subject to a command structure responsible for internal discipline; they do not distinguish themselves from the civilian population by way of a uniform or emblem; they do not carry their arms openly; and they cannot be said to constitute a *levée en masse*.

¹⁷ Those journalists who opt to work for the military's information services, will be classified as non-combatant members of the armed forces. All other journalists, both those embedded in the armed forces, and those who do not accompany the armed forces, will always be presumed to retain their civilian status in international armed conflicts (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 115-118).

are recruited in a non-State-armed group which do not satisfy the IHL requirements for combatant status, and for the majority of PMSC who are not formally incorporated into the State's armed forces¹⁸.

As for those civilian contractors who 'accompany the armed forces' (like embedded journalists), provided they are in possession of the necessary identity cards, they are afforded the unusual privilege of POW status upon capture, in light of the non-combative functions which they carry out in close proximity to hostilities. There might then be room to argue that this is the case where States have contracted PMSCs to assist the armed forces, thereby affording them the status of 'civilians accompanying the armed forces'.

ii. Assessing the activities of non-State actors in light of the notion of direct participation in hostilities

For those individuals in the theatre of armed conflict who enjoy presumptive primary civilian status, it is imperative that they desist from any activities which amount to direct participation in hostilities. Exactly what activities qualify as 'direct participation in hostilities' has been a cause for much controversy which has further heightened the perception of a lacuna in the law with regard to these non-State actors. It is this controversy which prompted the ICRC to publish a non-binding Interpretive Guide on the topic. The Interpretive Guide proposes a cumulative three-pronged test to determine whether a specific hostile activity rises to the minimum threshold of harm, has a direct causal link to the resultant harm, and is associated with the belligerencies. Each leg of the test is crafted to ensure that the principle of presumptive civilian status is observed, while overly broad and arbitrary targeting policies, aimed at general war effort and common criminal activities, are excluded from the scope of restricted activities.

Applying the Interpretive Guide's test to the five categories of non-State actors discussed here, it is safe to conclude that the active combat functions and a range of direct support functions¹⁹ which child soldiers and PMSCs have reportedly carry out, will amount to direct participation in hostilities, irrespective of whether it is performed by children under the minimum recruitment age of fifteen years. On the other hand, most the activities carried out by those who fall within the IHL definition²⁰ of a neutral and independent

¹⁸ In the end, it is misleading to say that PMSCs are without status under IHL. It is more accurate to say that 'there is no single simple answer applicable to all' (Emanuela-Chiara Gillard 'Private Military/Security Companies: The Status of their Staff and their Obligations Under International Humanitarian Law and the Responsibilities of States in Relation to their Operations' (2005) *Third Expert Meeting on the Notion of Direct Participation in Hostilities* Geneva at 2; Singer 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community' at 24; Won Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' (2010) 38:3 *Denver Journal of International Law and Policy* 361 at 412).

¹⁹ UNICEF (2003) *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* available at http://www.unicef.org/emerg/files/option_protocol_conflict.pdf (accessed 6 July 2011) at 14.

²⁰ As set by the ICJ in the *Military and paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) Judgment (1986) *ICJ Rep* para 273.

'relief worker', a VHS, and a journalist, would not ordinarily contravene the notion of direct participation in hostilities.

Questions have been raised however as to the legal situation when relief workers restrict military deployments by getting in the way of hostilities, or when they engage in reconstructive work, particularly when they employ the services of armed PMSC. According to the Interpretive Guide, the interference alone that relief workers and journalists might unwittingly provide by their presence near to military objectives, is not sufficiently causally connected to any resulting harm so as to compromise their civilian immunity against attack. If, on the other hand, these same relief workers, VHSs and journalists were to gather intelligence in enemy-controlled territory (which assists the opposition in the identification and marking of military targets), divulge tactical information regarding combatants, or be used as lookouts, this would certainly satisfy the cumulative test and amount to direct participation in hostilities. Similarly, when VHSs *intentionally* impede access to a legitimate target, their actions amount to direct participation in hostilities.

As for PMSCs, their use of camouflage fatigues together with the visibility of their weapons often creates the mistaken impression that they are active combatants. Legally speaking, civilian PMSC are permitted to carry 'light, personal weapons for their own self-defence, or the defence of those they are protecting'²¹, and this alone is not sufficient to infer direct participation in hostilities. Moreover many of the routine activities which PMSC perform are not considered hostile acts which fulfill the threshold of harm, direct causation and belligerent nexus tests. That said, when PMSC have been 'hired for the explicit purpose of engaging in combat operations'²²; sabotaging military capacity; operating weapons systems in the theatre of hostilities; guarding captured military personnel; gathering military intelligence for identifying military targets; and conducting training for predetermined hostile acts - these actions clearly satisfy the threshold of harm requirement.

For the most part, however, PMSC are hired to provide guarding services in situations of armed conflict. In many ways the guarding role played by PMSC, and the shielding role played by VHSs is legally analogous. Neither PMSC nor VHSs are deemed to be participating directly in hostilities when they carry out defensive guarding²³ and defensive shielding duties in respect of purely civilian sites²⁴, civilian personnel, and even dual-use sites²⁵. This *status quo* persists until the site they are guarding or shielding can be said to amount to a legitimate military objective. Even after a site is determined to be military in nature, it is still permissible for civilian PMSC to undertake to guard it defensively (provided, that is, that they are only guarding the military sites against criminal elements). Similarly, while the presence of VHSs at a military

²¹ Anthony PV Rogers 'Unequal Combat and the Law of War' (2004) 7 *Yearbook of International Humanitarian Law* 3 at 22.

²² John Ricou Heaton 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' (2005) 57 *Air Force Law Review* 155 at 188.

²³ Provided PMSCs use force only in a 'defensive manner and employ no more force than was strictly necessary' (Anthony Dworkin 'Security Contractors in Iraq: Armed Guards or Private Soldiers' (2004) available at www.crimesofwar.org/onnews/news-security.html (accessed 27 October 2010)).

²⁴ For example schools, churches, hospitals and reconstruction companies.

²⁵ Presumptive civilian status protects dual-use sites until the status of the installation can be deemed to be definitely military in nature.

installation poses an 'exclusively legal obstacle to an attack'²⁶, it does not of itself contravene the notion of direct participation in hostilities. In short, it is not considered direct participation in hostilities when the presence of VHSs or PMSC 'simply causes the attacker moral pause, or creates a legal barrier' (through operation of the proportionality principle or demanding precautions prior to an attack)²⁷. And while PMSC and VHSs located at a military objective never become personally subject to attack, by their mere presence the military installation itself remains a permissible military objective²⁸. As such their presence near to a military objective exposes PMSC and VHSs to a greater risk of collateral injury, provided an attack on the site satisfies the targeting principles of military necessity, discrimination/distinction, humanity and proportionality.

iii. Exploring the legal consequences for non-State actors participating directly in hostilities

The complete immunity from direct targeting which comes with inviolable civilian status is assured for all civilian non-State actors, for so long as they desist from any direct participation in hostilities. The moment a civilian breaches this proscription, they expose themselves to direct targeting. Their presumptive civilian status, with its attendant immunity against attack, is only restored (according to the revolving door phenomenon) once they desist from their direct participation. In the event that such hostile activities are being carried out by a group in a continuous combative manner (as might be the case with some PMSC and child soldiers), the Interpretive Guide precludes the immediate return to their full civilian immunity against attack for the entire 'duration of their formal or functional membership'²⁹ of the group.

At no time however do any of these civilian, non-State actors forfeit their primary civilian status³⁰. Neither do they become 'unlawful combatants or unlawful belligerents', two terms which have recently been bandied about, but which are legally irrelevant and utterly misguided. As unauthorised participants, they only stand to lose their right to enjoy complete immunity against direct targeting, and that situation persists only until they cease their direct participation in hostilities, or fully disengage from the combative group.

This subsequent resumption of their full civilian immunity does not preclude them from the very real possibility that they will face prosecution for their unauthorised participation in hostilities when they fall into enemy hands,

²⁶ Melzer N 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 831 at 869.

²⁷ Michael N Schmitt 'Human Shields in International Humanitarian Law' (2008-2009) 47 *Columbia Journal of Transnational Law* 292 at 317.

²⁸ Stefan Oeter (1995) 'Methods and Means of Combat' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 163.

²⁹ Melzer 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' at 914.

³⁰ Hans-Peter Gasser (1995) 'Protection of the Civilian Population' in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* Oxford University Press: Oxford at 233.

or are rendered *hors de combat*³¹. Nevertheless, when they fall into enemy hands, all participants (authorised or otherwise), including these civilian non-State actors, retain the customary IHL right to be treated humanely, in accordance with the basic fair judicial guarantees extended to civilians³². For those non-State actors who may have had a claim to POW privilege (as may be the case for some PMSC, child soldiers performing support tasks and possibly some embedded journalists), on account of the fact that they 'accompany the armed forces', they have the added penalty of forfeiting their POW privilege if they are found to have participated directly in hostilities.

Concluding remarks: the way forward

It has been my aim, in chapters 4-9, to provide some guidance for military commanders involved in international armed conflicts, when they are faced with making targeting decisions which implicate these five types of non-State actors. It is my hope that in exploring the question of the primary IHL status of these non-State actors that the perceived 'grey area' has been brought into sharper focus, exposing misconceptions and unravelling the legal complexities.

As for the controversy surrounding when the activities of these non-State actors can be said to amount to direct participation in hostilities, I hope that by exploring the functions of each of the non-State actors in light of the ICRC's Interpretive Guide, this thesis goes some way to clarifying the issue. It was my aim to set out clearly what these non-State actors are permitted to do in the theatre of hostilities without compromising their civilian immunity against attack, and what activities would cross that line. Equally, military commanders might better understand when they may legitimately target non-State actors directly, and when these non-State actors resume full civilian immunity against attack.

To date the Interpretive Guide provides the most useful, neutral and balanced interpretation of the important IHL concept of direct participation in hostilities, although it must be conceded the guide is merely a recommendation, and has no legal binding force at present. I would like to think that this thesis has provided a useful opportunity to test the practical application of the ICRC's Interpretive Guide against real life scenarios. Moreover, I hope that this might provide a starting point for academics and military advisors to engage in dialogue around whether the ICRC's Interpretive Guide, in its application to these non-State actors, yields appropriate answers which might receive supportive state practice and *opinion juris*.

Likewise I trust that this thesis might bring into bold relief the practical consequences which might result were States to reject the ICRC's proposed Interpretive Guide in favour of a wider interpretation of direct participation in hostilities (such as that proposed by Schmitt). It is in the real life application of

³¹ Kidane 'The Status of Private Military Contractors Under International Humanitarian Law' at 400-401.

³² GC IV article 5(3); AP I article 75; Gasser 'Protection of the Civilian Population' at 211; ICRC (2012) 'International Humanitarian Law and Private Military/Security Companies' available at <http://www.icrc.org/eng/resources/documents/faq/pmsc-faq-150908.ht> (accessed 16 October 2012).

an over-inclusive notion of direct participation in hostilities – where for example the mere presence of relief workers, PMSC and journalists in the theatre of operations could very well find them in violation of the notion direct participation in hostilities – that support for the more cautious interpretation favoured by the ICRC will be found.

I hope this thesis has also exposed some of the shortcomings of IHL, and that it will motivate further debate and remedial action. For example, while relief workers and journalist are for the most part afforded primary civilian status, and their activities seldom compromise their civilian immunity, the reality remains that this *status quo* has not proven effective in protecting them against kidnappings, assault and murder in armed conflict situations.

Lastly it has been my aim, throughout chapters 4-9, to offer some guidance as to the legal obligations upon the detaining powers who hold non-State actors in detention. Here I have covered the potential for criminal prosecution, the possibility of POW privilege, and the rights to humane treatment and fair trial guarantees.

I wonder what Henri Dunant would say were he to walk amongst these non-State actors in the theatre of today's international armed hostilities, and stumble upon the foreign peace activist chained to a hospital, in order to shield the site from direct targeting? What would he make of the myriad of journalists who risk their lives to broadcast images of the conflict directly around the globe? How would he look upon the relief worker, who is ambushed and kidnapped for her supplies and potential hostage value? No doubt the specter of the ever-burgeoning private military and security industry will take him by surprise, as will the youthful visage of the eight year old toting an automatic rifle. This is the reality of modern international armed conflicts, and while it may not have been envisaged by the drafters of the IHL conventions, international humanitarian law, as a growing organic body of law, needs to provide a response... lest the memory of Solferino be lost in the mists of time.

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LIST OF ACRONYMS

ACRWC African Charter on the Rights and Welfare of the Child
AI Amnesty International
AP I Additional Protocol I
AP II Additional Protocol II
ASIL American Society of International Law
AU African Union
BAPSC British Association of Private Security Companies
BBC British Broadcasting Corporation
CAF Central Adjudication Facility
CAR Central African Republic
CENTCOM US Central Command
CC Constitutional Court
CMR Civil-Military Relations
CNN Cable News Network
CSR Congressional Research Service
CTV Canadian Television
DFID Department for International Development.
DRC Democratic Republic of the Congo
EOD Explosive Ordnance Disposal
FRIDE Fundación para las Relaciones Internacionales y el Diálogo Exterior
FRY Federal Republic of Yugoslavia
GA General Assembly
GC I Geneva Convention I
GC II Geneva Convention II
GC III Geneva Convention III
GC IV Geneva Convention IV
HPCR Humanitarian Policy and Conflict Research
HPG Humanitarian Policy Group
HR Hague Regulations
HRC Human Rights Council
HPCR Humanitarian Policy and Conflict Research
IASC Inter-Agency Standing Committee

IASMN Inter-Agency Security Management Network
ICC International Criminal Court
ICJ International Court of Justice
ICRC International Committee for the Red Cross
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the former Yugoslavia
IED Improvised Explosive Device
IEEPA International Emergency Economic Powers Act
IGO Inter-governmental Organisation
IHL International Humanitarian Law
ILA International Law Association
ILM International Legal Materials
ILO International Labour Organisation
IPOA International Peace Operations
IRIN Integrated Regional Information Networks
LOAC Law of Armed Conflict
LOIAC Law of International Armed Conflict
LRA Lord's Resistance Army
LRTWC Law Reports of Trials of War Criminals
MPRI Military Professional Resources Inc.
MSF Medecins Sans Frontierers
NATO North Atlantic Treaty Organization
NGO Non-Governmental Organization
OAU Organisation of African Unity
OP-AC Optional Protocol to the UNCRC on the Involvement of Children in
Armed Conflict
PASA Pan African Security Association
PCATI Public Committee Against Torture in Israel
PMC Private Military Contractors
PMF Private Military Firms
PMSC Private Military and Security Contractors
POW Prisoner of War
PSC Private Security Contractors
PSCAI Private Security Company Association of Iraq

RAND Research and Development
RTS Radio Televisija Srbije
RUF Revolutionary United Front
SAPSE South African Post Secondary Education
SAYIL South African Yearbook of International Law
SC Security Council
SCSL Special Court of Sierra Leone
SEAL Sea, Air and Land
SFRY Socialist Federal Republic of Yugoslavia
SIPRI Stockholm International Peace Research Institute
TRC Truth and Reconciliation Commission
UK United Kingdom
UN United Nations
UNCRC UN Convention on the Rights of the Child
UNDSS UN Department of Safety and Security
UNESCO UN Educational, Scientific and Cultural Organization
UNHCR UN High Commissioner for Refugees
UNICEF United Nations International Children's Emergency Fund
UNIDAR United Nations Institute for Disarmament Research Periodical
UNSECOORD UN Security Coordination Office
US United States
USAWC US Army War College
VHS Voluntary Human Shield