TABLE OF CONTENTS

Chapter 7 - The Innocent Civilian, the Moral Soldier and the Unlawful Fighter - An Evaluation of the Direct Participation in Hostilities Dilemma

ABBREVIATIONS

AP's	Additional Protocols – together Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 & Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977
API	Additional Protocol I of 1977 - Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977
APII	Additional Protocol II of 1977 - Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977
AYIHL	African Yearbook on International Humanitarian Law
Charter	United Nations Charter
CIHL	Customary International Humanitarian Law[1]
DPH	Direct Participation in Hostilities
ECHR	European Court of Human Rights
EJIL	European Journal of International Law
GA	General Assembly
GC's	Geneva Conventions
GCI	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949

[1] Note: CIHL comprises the rules reproduced in Case No. 43 [Part C.], drawn from Henckaerts, JM & Doswald-Beck, L *Customary International Humanitarian Law* (2005) Cambridge/Geneva, CUP/ICRC, 3 Vols. 5032. Collected Courses: Hague Academy of International Law Commentary: – Pictet, J (Ed) *Commentary*, Geneva, ICRC, 1952/1960/1960/1958, 466 pp./320 pp./764 pp./660 – Sandoz, Y; Swinarski, C and Zimmerman, B *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC (1987) at 1625.

GCII	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949
GCIII	Geneva Convention (III) Relative to the Treatment of Prisoners of War, of 12 August 1949
GCIV	Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949
HCJ	Israel High Court of Justice
HRL	Human Rights Law
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Council of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILR	International Law Review
IRRC	International Review of the Red Cross
LOAC	Law of Armed Conflict
NIAC	Non-International Armed Conflict
OAU	Organisation of African Unity (“African Union” since July 2002)
PIL	Public International Law
POW	Prisoner of War
SC	Security Council
UN	United Nations
US	United States of America
USSR	Union of Soviet Socialists Republics
WWI	World War 1
WWII	World War 2

Use of Terms

Before attempting the assessment of the meaning and practical implications of the concept of civilian direct participation in hostilities ("C-DPH"), it seems beneficial to evaluate some key concepts, which are relevant to the argument in this thesis. This is done to ensure that repetition of discussions regarding the meaning of these terms do not appear within the main text of the thesis. Contested or undefined concepts are not included in this section and these will be evaluated within the main text, as and where necessary. The system of law that regulates armed conflict contains very specific terminology and the proper use thereof is critical to provide an accurate understanding of the law.

The terms used in this research comprise those commonly used in the Law of Armed Conflict ("LOAC"), which has specific and non-specific meanings in the discipline. A list of commonly used abbreviations is also included herein. The phrase will be set out in full with the abbreviation following in brackets on the first occasion that an abbreviation is used in each chapter. Thereafter only the abbreviation will be used in that chapter.

The terms 'Law of War', 'LOAC' and 'International Humanitarian Law' ("IHL") are not used as synonyms herein. The difference between these terms is not regarded as academic.[2] LOAC will be used to refer to the totality of the system of international law that regulates armed conflict. One of the main functions of LOAC is to confirm that one may do all that is required to overcome the enemy, be that by overpowering the adversaries military potential or their will to continue their involvement in the conflict. This must be balanced against the humane treatment of persons during armed conflict. LOAC regulates the application of violence within armed conflict and reference to LOAC is thus, in my view, the appropriate terminology to refer to this area of international law. The constant use of the term IHL may thus create confusion and an impression that LOAC favours an interpretation of C-DPH which is mainly premised on humanitarian principles as opposed to military necessity.

[2] See in general Shearer, I *Rules of Conduct during Humanitarian Intervention* (2001) available at http://www.unc.edu/depts/diplomat/archives_roll_/2001_70-09/hum_06_shearer.html> (last assessed on 1 May 2014); Nabulsi, K *What is International Law?* (2004) ICRC http://www.icrc.org/Web/eng/siteengo.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf (last assessed on 1 May 2014); Henderson, I 'Contemporary Law of Targeting: Military Objectives, Proportionality, and Precautions in Attack under Additional Protocol I' *International Humanitarian Law Series* Vol 25 (2011) at 3; Dinstein, Y *The Conduct of Hostilities Under the Law of International Armed Conflict* (2004) at 13l; Kalshoven, F & Zegveld, L (4th Ed) *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (2011) at 11.

The terms 'armed conflict' and 'war' are used synonymously throughout but the term armed conflict is preferred. However, the term 'war' will specifically be used with reference to armed conflict where an official declaration of a state of war was made. No official and formal declaration of war is, however, required for an armed conflict to exist.[3] The use of the terms will also be retained in its original form where they were used as such in previous studies referred to herein.

The phrases 'direct participation in hostilities', 'taking a direct part in hostilities' and 'directly participating in hostilities' are also used synonymously and will be abbreviated as 'DPH' throughout. The terms 'direct participation in hostilities' ("DPH") and 'civilian direct participation in hostilities' ("C-DPH") will be used. DPH refers to general direct participation, as is associated with the actions of combatants in international armed conflict ("IAC") as opposed to C-DPH, which refers specifically to the actions of civilians directly participating on behalf of an organised armed group in a non-international armed conflict ("NIAC"). The implications of the use of the phrases 'active participation' and 'direct participation' in hostilities are not settled and will be evaluated in the main text.

Reference is made to the term 'non-State armed group' throughout. Non-State armed groups represent a specific category of non-State actor, who pursue their objectives by violent means, requiring a basic command structure and who are outside of the effective control of the State.[4] The use of 'armed group' should also not be interpreted to indicate a singular structure and these groups often display political and other structure that may or may not be separated from their armed components.

Reference is also made to the term 'targeting', which will be divided into 'intentional targeting' or 'direct targeting' and 'collateral targeting', which refers to 'indirect targeting'. The terms 'direct' and 'indirect' is, however, awkward and does not adequately describe the nature of targeting decisions where proportionality assessments are incorporated into the decision. The person responsible for the targeting decisions will not be referred to as the 'targeter', as others have, but as an alternative, reference will be made to 'observer', which is

[3] See the ICRC, *Commentary, International Humanitarian Law: Treaties and Documents*, Chapter 1, para 1 available at http.helpicrc/ihl.nsf/COM/370-580005?OpenDocument (last assessed on 1 May 2014).
[44] Miodownik, D & Barak, O (Eds) *National and Ethnic Conflict in the 21st Century: Non-State Actors in Intrastate Conflict* (2013) at 3.

the term used within the military. Targeting itself is defined as the process of planning and execution, including the consideration of prospective targets, accumulation of information to meet military, legal and other requirements, the determination of which weapon and method to be employed to prosecute the target, the carrying out of the actual attack and associated activities. The practical characteristics of targeting include, *inter alia*, weapons and weapons platform characteristics, intelligence, surveillance and reconnaissance capabilities, the targeting cycle, targeting methodologies, collateral damage approximation, patterns of life analysis, etc.[5]

It is considered good practice to write in gender neutral terms. I will not intentionally alternate between 'he' and 'she'. The writing, however, applies equally to both genders but male pronouns will be used throughout for the sake of convenience and ease of reading. This should not be interpreted to mean that only the male form is intended except where specifically stated. This is done for uniformity and to avoid multiple references to masculine and female descriptions and categories of terms that may be confusing or repetitive.

This thesis refers to 'asymmetrical' armed conflict and the term is meant to refer to a factual difference of the military capacity between the adversaries or a situation where the parties to an armed conflict are unequal and differently structured in a legal sense. These armed conflicts will, to a greater or lesser extent, involve the flexible use of additional human resources in the conduct of hostilities to obtain strategic and economic advantages, unconventional methods to compensate for the inequality and an increase in the "civilianization" of armed conflicts. It is accepted that all armed conflicts are asymmetrical as adversaries can never be exactly equally matched in terms of military capacity.

[5] Boothby, WH *The Law of Targeting* (2012) at viii.

Chapter 1

Introduction and General Background of the Study

1. General Introduction

The Law of Armed Conflict ("LOAC") is a manifestation of a particular order that represents a power configuration between States. This system prescribes obligations and awards rights in a predictable manner.[1] LOAC, generally, makes no distinction based on the purpose of the conflict and also does not prevent one party from forcefully overcoming the other. It, however, assumes specifically to IAC that the parties to an armed conflict have reasonable and realistic objectives and it encourages 'the authorities in power' to grant the widest possible amnesty to persons who have participated in the armed conflict,[2] provided such persons have not committed war crimes. LOAC thus endeavours, independently of the causes fought for, to regulate the application of violence in armed conflicts by restricting its application only to weaken the military potential of the adversary.[3]

Traditionally the term 'war', may be defined as a declared contention, through the use of armed force and between States, undertaken for the purpose of overpowering the adversary.[4] This does not describe those armed conflicts between States and non-State armed groups or between such groups. To achieve a military victory, it is not necessary to kill all the adversaries or to destroy all its assets. Von Clausewitz stated that "[w]ar is thus an act of force to compel our adversary to do our will".[5] Military success is achieved by preventing or decreasing the ability of the adversary, as a collective, to attack[6] and execute military operations.[7] This is important as the collective nature of armed conflict allows for the legitimate direct targeting of direct participants to the conflict at any time and even where the individual poses no direct threat at the time. This is done to progressively minimise and eventually exclude the opposing force's military potential.

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[1] Mohamedou, MO *Understanding Al Qaeda Changing War and Global Politics* (2011) at 20.
[2] APII, Article 6(5).
[3] The purpose of LOAC is "to mitigate and circumscribe the cruelty of war for humanitarian purposes" based on the "overriding consideration of humanity" - based on the "overriding consideration of humanity", *Nuclear Weapons Case* [1996] ICJ Rep 226 paras 86 & 95. See in general Cimbala, SJ *Coercive Military Strategy* (1998).
[4] Von Glahn, G & Taulbee, JL (9th Ed) *Law Among Nations An Introduction to Public International Law* (2010) at 568.
[5] See Von Clausewitz, C *On War* (Michael Howard and Peter Paret trans (1986) at 75.
[6] See API, Article 49 - "acts of violence against the adversary, whether in offence or in defence."
[7] See Nauman, JP 'Civilians on the Battlefield: By Using US Civilians in the War on Terror, Is the Pot Calling the Kettle Black?' *Vol 91, Issue 2 Neb. L. Rev.* (2013) at 461 available at http://digitalcommons.unl.edu/nlr/vol91/iss2/5 (last assessed on 1 May 2014).

LOAC does not prohibit the use of violence and it does not protect all those affected by armed conflict. LOAC also does not prohibit military action even when it results in the loss of civilian life.[8] LOAC prohibits cruel and unnecessary practices in certain armed conflicts and accordingly limits the use of violence in armed conflicts by sparing those who do not, or no longer, directly participate in hostilities, and by restricting violence to the amount necessary to achieve the aim of the conflict.

LOAC is separated into two subgroups of rules, being the "Hague Law", which regulates the rules governing the means of warfare and methods of warfare among the enemy's civilian population, and treachery or perfidy against enemy combatants. The other branch of LOAC is the so–called "Geneva Law", which governs, in essence, the treatment of "protected persons".[9] The primary aim of LOAC is thus to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity. The function of LOAC, based on this construction, is to inject humanity into armed conflict and to set this off against the demands of military necessity. This has not been totally successful as it has been reported that civilians constitute up to 75% of all casualties in armed conflict.[10] The disproportional effect of armed conflict on civilians may be a result of the geographically dispersed nature of armed conflict, which includes actual combat within urban centres. The main contributing factor is, however, the reliance by States on air power to overcome their adversaries while minimising harm to their own assets.[11]

It may be argued that, although a substantial body of LOAC has developed, these rules have been ignored and even intentionally violated.[12] The maxim, *inter arma silent leges*, in war the laws are silent, reflects this. It is, accordingly, important that LOAC incorporate realistic

[8] Engdahl, O & Wrange, P (Eds) 'International Humanitarian Law Series' Vol 22: *Law at War: The Law as it Was and the Law as it Should Be* (2008) at 207.
[9] Escorihuela, AL 'Humanitarian Law and Human Rights Law: The Politics of Distinction' *Michigan State Journal of International Law Vol. 19:2* (2011) at 308 available at http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1048&context=ilr (last assessed on 5 January 2015).
[10] Mandel, R *Global Security Upheaval: Armed Nonstate Groups Usurping State Functions* (2013) at 45; See also Rothbart, D *Why They Die: Civilian Devastation in Violent Conflict* (2011) at 16. This statistic, like all other statistics is open to varying interpretation, as these deaths include those that occur off the "battlefield" and includes death that results from life-threatening armed conduct-generated conditions that affects the civilian population.
[11] Lesh, M *Routledge Handbook of the Law of Armed Conflict* Part II: Principle of Distinction (Draft, forthcoming March 2015) at 2 available at http://law.huji.ac.il/upload/Lesh_LossofProtection.pdf (last assessed on 5 January 2015).
[12] Popovski, V *Religion and War in World Religions and Norms of War* (2009) at 20.

alternatives to achieve military goals where constraints are placed on the conduct of hostilities by the law, failing which the rules will be ignored. Parties will not agree to, or abide by, norms disproportionately infused with humanitarian considerations, and which will result in probable military failure and in the parties' possible demise.[13] LOAC norms must, as a result, carefully balance the equilibrium between military necessity and humanity and any attempt to clarify and interpret LOAC norms must be consistent with this premise. LOAC must also be flexible enough to respond to new realities in hostilities but any changes must be sufficiently reasoned and consistent with the basic tenets of the international legal system. The basic tenants of LOAC have been established and there is probably no need to modify the law. It may be accepted that any such attempt is bound to fail, based on the failure of States to agree on issues in LOAC. It is, however, submitted that "there might be a need to further clarify their proper interpretation and application".[14]

2. The Status of the Law of Armed Conflict

The status of LOAC[15] is depreciating as international military affairs are moving from a predictable framework of monopoly, distinction, concentration, brevity and linearity to an unpredictable order of privatisation, indifferentiation, dispersion, open-endedness and non-linearity where States are less important and non-State actors are central.[16] This decline of LOAC results from the fact that it is generally State-centred, State-defined and State-controlled. LOAC can, accordingly, only function effectively where it is grounded in an expression, and an assumption, of the equality of the parties involved.[17] This equality of parties is currently being challenged by the increased involvement of non-State armed groups in armed conflict.[18] In fact, it is submitted that, because of the asymmetric nature of most contemporary armed conflicts, the incentives to violate LOAC; to obtain a tactical advantage over the military superior party, have never been more pronounced.[19]

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[13] Schmitt, MN 'The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' *Harvard Journal of National Security Law* 5 (May 2010) available at http://harvardnsj.org/2010/05/the-interpretative-guidance-on-the-notion-of-direct-Participation-in-hostilities-a-critical-anyalysis/ (last assessed on 1 May 2014).

[14] Kellenberger, J *International Humanitarian Law at the Beginning of the 21st Century* (2002) International Committee of the Red Cross available at http://icrc.org.web.eng/siteengo.nsf/iwplist99/efc5a1c8dd70b9c1256c3600 (last assessed on 1 May 2014).

[15] ICRC, What is International Humanitarian Law? http://www.icrc.org/web/eng/siteeng0.nsf/html/humanitarian-law-factsheet (last assessed on 1 May 2014).

[16] Mohamedou, MO *op cit* note 1 at 35.

[17] Ibid at 32.

[18] See the complex situations in the Democratic Republic of Congo and the Darfur region of Sudan.

[19] GeiB, R 'Asymmetric Conflicts Structures' *IRRC* Vol 88 No 864 (December 2006) at 762.

The public recognition of LOAC has, however, never been more evident due to the media attention and their commentary on armed conflict. The civilian population is more informed about the effects of armed conflict on combatants, civilians and other participants than in the past. This status of LOAC is further accentuated by the increased intricacy and effectiveness of modern weapon systems and munitions, which has made the conduct of armed conflict exponentially more complicated. These technological advances have, however, also increased the accuracy of targeting decisions resulting, together with better intelligence, in the potential improved compliance with the principles of distinction and proportionality.[20] The capacity to attribute actions in armed conflict to specific actors is, unfortunately, also, being diminished through the use of these technologies. Cyber hostile operations are a developing example of this difficulty.[21] It has thus been argued that LOAC has become partially redundant to effectively manage the challenges of contemporary armed conflict.[22]

3. Civilian Direct Participation in Hostilities

Contemporary armed conflicts have seen many civilians directly engaged in the hostilities.[23] These participants are not "[m]embers of the armed forces of a Party to the conflict" or qualifying militia, volunteer corps, organized resistance movements, or *levee en masse*.[24] This has resulted in confusion regarding the distinction between protected civilians and those who may be legitimately and directly targeted. This is accompanied by an increased failure, amongst those[25] directly participating in hostilities, to adequately distinguish themselves from the civilian population.

The notion of C-DPH, found in the Common Article 3 of the Geneva Conventions[26] ("GC's") and in Additional Protocol I ("API"), Article 51(3)[27] and Additional Protocol II ("APII"),

[20] See in general Gill, TD *11th of September and the International Law of Military Operations* () at 26.
[21] See in general Allan, C 'Attribution Issues in Cyberspace' *Kent J. Int'L & Comp. L.* (May 2013).
[22] See for example *Al Bihani v. Obama, 594 F. Supp*. 2d 35, 44 (D.C. Cir. 2009) "War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare."; Ronald Watson, Geneva Accords Quaint and Obsolete, Legal Aide Told Bush *Timesonline* (May 19, 2004) http://www.timesonline.co.uk/tol/news/world/iraq/article426900.ece (last assessed on 1 May 2014).
[23] Geneva Convention III, Article 4.
[24] Geneva Convention Relative to the Treatment of Prisoners of War, Article IV, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see Int'l Comm. of the Red Cross *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 20 (2009) available at http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (last assessed on 1 May 2014).
[25] Civilians and members of the armed forces.
[26] 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

Article 13(3) represents one of the most contested concepts in LOAC.[28] This regulatory structure created by LOAC incorporates terms and concepts that, on *prima facie* scrutiny, appear uncomplicated but their meaning and practical applications have proven to be highly contested and ambiguous.

C-DPH is a cornerstone on the conduct of hostilities and has attained the status of customary international law.[29] This is based on the assumption that, on a conceptual level, civilians should be protected from direct attack unless and for such time as they directly participate in hostilities. In basic terms, C-DPH represents the notion that, during IAC and NIAC, civilians may legitimately be intentionally targeted "for such time as they take a direct part in hostilities."[30] However, despite the serious practical and legal consequences resulting from DPH, neither the GC's nor their AP's define the concept, nor do they outline the actions that amount to DPH.[31] The commentary on API, Article 51 explains direct participation to mean "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".[32]

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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'.

[27] '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 API, Article 51 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 -Henckaerts, J & Doswald-Beck, L (Eds) *Customary International Humanitarian Law* Volume 1: Rules (2005) at 23.

[28] 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, contains the words 'active' participation. The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1979) 1125 U.N. Treaty Series 1391 contain the words 'direct participation'. The French text of the GCIV and API contains the words "participent directement"' throughout. This would indicate 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 LOAC (Interpretive Guide) available at http://www.icrc.org/web/eng/siteeng0.nsf/html/directparticipation-LOAC-feature-020609 (last assessed on 1 May 2014) at 43); Melzer, N *Targeted Killings in International Law* (2009) at 335.

[29] Harvard University Program on Humanitarian Policy and Conflict Research, Policy Brief, LOAC and Civilian Participation in the Hostilities in the OPT 3 (October 2007) available at http://hpcrresearch.org/pdfs/ParticipationBrief.pdf (last assessed on 1 May 2014).

[30] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API), Article 51(3), 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII), Article 13(3), 1125 U.N.T.S. 609.

[31] Melzer, N *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* ICRC (2009) at 12.

[32] Schmitt, MN *Deconstructing Direct Participation in Hostilities: The Constituent Elements* (2010) at 711. See also *PCATI v Government of Israel* (2006) HCJ 769/02 at para 34.

DPH thus generally refers to "combat-related activities[33] that would normally be undertaken only by members of the regular armed forces".[34] Combatant status is defined as "[m]embers of the armed forces of a Party to the conflict (other than medical personnel and chaplains…)". Combatants, accordingly, have the right to participate directly in hostilities".[35] In general, all those with combatant[36] status are authorised to participate directly in hostilities.[37] Civilians, on the other hand, are protected against intentional attack,[38] even though this protection is not absolute.[39] Civilians forfeit their immunity to direct attack when they directly participate in hostilities and are, as a result, exposed to intentional targeting as a legitimate military objective[40] for the duration of their participation in hostilities.[41] Acts of DPH may further result in criminal prosecution of civilians, in terms of domestic law.[42]

The International Committee of the Red Cross ("ICRC") Commentary on API only states that "direct participation means acts of war which by their nature or purpose are likely to cause harm to the personnel and equipment of the enemy armed forces".[43] The ICRC convened expert process also produced no definitive consensus to the extent that the ICRC ultimately

[33] Rogers, APV *Unequal Combat and the Law of War Yearbook of International Humanitarian Law* (2004) 3 at 19.
[34] Another category of persons are acknowledged, who directly participate in hostilities being the *levée en masse* (*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)).
[35] Article 43(2).
[36] The individual members of the regular armed forces enjoy this status – Ipsen, K *Combatants and Non-combatants* at 65 (1995) in Fleck, D (Ed) *The Handbook of Humanitarian Law in Armed Conflict* (1999) at 66-67.
[37] Provided they adhere to LOAC regarding the methods and means of warfare - Ipsen, K *Combatants and Non-combatants* (1995) at 65-66 & 68 in Dieter Fleck (Ed) *The Handbook of Humanitarian Law in Armed Conflict* (1999); API, Article 43(2)).
[38] 'Those who do not participate in the hostilities shall not be attacked' - Schmitt, NM *op cit* note 32 at 715.
[39] The ICRC Commentary on AP I article 51(3) clarifies that: '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 *Direct Participation in Hostilities* (2011) in William C Banks (Ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (20130 at 1995-2003.
[40] Schmitt, NM *op cit* note 32 at 703
[41] Blank, L & Guiora, A 'Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare' 1 *Harv. Nat'L Sec. J.* 45 (2010) at 63; see also McDonald, A 'The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities' 30 *Univ. of Teheran & Harvard Univ. Humanitarian Law Research Initiative on the Interplay Between Int'l Humanitarian Law & Int'l Human Rights Law, Working Paper* (2004) available at http://www.asser.nl/Default.aspx?site_id=9&level1=13337&level2=13379 (last assessed on 1 May 2014).
[42] *PCATI v Government of Israel supra* at para 26 and 31; See Telman, DAJ 'Introduction: Targeting in an Asymmetrical World' *46 Val. U. L. Rev. 697* (2012) at 701–03.
[43] ICRC Commentary on API.

published the findings of the process as an Interpretative Guidance of the ICRC and not of the experts involved in the meetings.[44]

It may be argued that LOAC anticipates C-DPH[45] as no provision clearly disallows such civilian participation in hostilities. Provisions of international criminal law[46] do not incorporate a particular offense of civilian DPH. The International Criminal Tribunal for the Former Yugoslavia ("ICTY") also did not generate a conviction for such offense, notwithstanding pervasive civilian DPH during that armed conflict. It is suggested that this omission may be regarded as evidence that States prefer to deal with this participation as an offense domestically as opposed by means of LOAC.[47] This is supported by the fact that only domestic courts have prosecuted civilian DPH as an offense as such. Only one United States of America ("US") case explicitly based the offense in international law.[48]

C-DPH has, in the past, been interpreted narrowly. This creates a high threshold for civilian action to qualify as C-DPH[49] but it also makes it difficult to justify the targeting civilians.[50] A broad interpretation of C-DPH, however, produces a low threshold for C-DPH and accordingly, makes it uncomplicated to justify the targeting of civilians.[51] Preference for one interpretation risks alienating some States and this in turn may weaken LOAC. A reinterpretation of the elements of C-DPH may also negate any current agreement on its meaning. It is submitted that a definition of C-DPH should not be based on compromise language that seeks to appease advocates of both the narrow and broad interpretations thereof. Such a compromise will likely be as vague as the original terms of C-DPH.

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[44] Melzer, N *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).
[45] GCIV anticipates civilian participation in hostilities. Article 5 of the Convention permits states to suspend or derogate some civilian protections of persons suspected of committing sabotage or otherwise posing a threat to their national security. GC IV, Article 5. Protocol I of 1977 also clearly anticipates civilian participation in hostilities by suspending protection of intentional targeting. API, Article 51(3).
[46] *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 90.
[47] See Maxwell, MD & Watts, SM 'Unlawful Enemy Combatant: Legal Status, Theory of Culpability, or Neither?' 5 *J. Int'L Crim. Just.* (2007) at 19.
[48] *Ex parte Quirin*, 317 U.S. 1 (1942).
[49] ICRC, Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities 60 (2005) available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-LOAC-311205/ (last assessed on 1 May 2014).
[50] Ibid.
[51] Schmitt, MN 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian' 5 *CHI. J. Int'L L*. 511 (2005) at 534–35.

Any reinterpretation must, as a result, be sensitive to the potential beneficial and negative consequences of such an undertaking. A starting point is that "[c]ivilians who take up arms . . . lose their immunity from attack during the time they are participating in hostilities, whether permanently, intermittently, or only once, and become legitimate targets".[52] The second fundamental point is that DPH confirms that humanity demands the protection of civilians.[53]

C-DPH thus only deals with the loss of immunity of a civilian against attack based on the civilian's decision to directly participate in the armed conflict. However, this issue also touches on various other important considerations, including the distinction between combatants and civilians, and the determination of who qualifies as a civilian. It further concerns the nature of participants in an NIAC and their status for targeting purposes. C-DPH essentially therefore concerns the protection of civilians as much as it relates to the intentional legitimate targeting of civilians for their direct participation.

4. Purpose of the Research

Contemporary asymmetric armed conflicts between States and non-State groups or between non-State groups, which commonly occur in urban environments, results in civilians being exposed to unnecessary harm.[54] The harm stems from the difficulty in assessing the identity of legitimate targets. The term, 'direct participation in hostilities', must thus be evaluated and defined to ensure continued or improved protection for those civilians who do not participate or who only indirectly participate in the armed conflicts.

This study intends to provide useful information regarding the meaning and application of the concept of C-DPH in both IAC and NIAC. The concept of DPH is a cornerstone of LOAC on the conduct of hostilities, and its practical importance has grown as armed conflicts have become "civilianized". The reasons for this civilianisation of armed conflict include the end of the Cold War, the use of advanced technologies by the military, reduced accountability by the military where civilians are used, and financial considerations.[55]

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[52] Blank, L & Guiora, A *op cit* note 41 at 63; see also McDonald, A *op cit* note 41. ("The most serious consequence of taking a direct part in hostilities has already been alluded to: the civilian loses his or her protected status and may be attacked, for the duration of his or her participation, however long that is determined to be."). See also the *Targeted Killings Case* [2006] HCJ 769/02 (13 December 2006) [31].

[53] Camins, E 'The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity' (2008) 90 *International Review of the Red Cross* 853 at 855.

[54] See Schmitt, MN 'Asymmetrical Warfare and International Humanitarian Law' *Vol. 62 A.F. L. Rev.* (2008).

[55] Nauman, JP *op cit* note 7 at 464.

C-DPH in asymmetrical hostilities currently elicits more disagreement than assent and its novelty creates confusion due to analytical limitations. A universal and comprehensive explanation of C-DPH will be useful as LOAC rights can only be comprehensively understood when the exact meaning and content thereof is defined and clear. There is thus scope for the development of LOAC relevant to C-DPH based on a holistic interpretation thereof, which should include reference to LOAC instruments, customary LOAC, State practice, judicial reasoning, and expert analysis but also to include reference to human rights and the impact thereof on the application of LOAC.

5. Problem Statement

The most vulnerable persons affected by armed conflict, the civilian, also seem to bear its greatest burdens.[56] It is argued that the violence that civilians experience in armed conflict is embedded in the character of armed conflict. This is most prominent in the fact that some civilians experience the negative consequences of armed conflict simply because of their physical location and may even, as a result, become collateral damage in the process. The negative emotions that persons hold towards their adversary is further not limited to direct participants in the conflict, but extends to the group, whether that be a comprised of the citizens of a State, or the members of an organised armed non-State group. This results in the effortless conversion of animosity towards direct participants to apply equally to civilians, especially when some civilians directly participate in the hostilities on a continuous or sporadic basis.

The loss of civilian protection against intentional targeting due to C-DPH necessitates an accurate justification of the conduct that qualifies as C-DPH.[57] LOAC require that all feasible measures be taken to prevent the exposure of the civilian population to erroneous or arbitrary targeting. The primary challenges and uncertainty regarding C-DPH relates to the conduct which qualifies as C-DPH and the temporal scope of the loss of protection from direct attack before and after acts of C-DPH.[58]

[56] Rothbart, D *op cit* note 10 at 1.
[57] Frakt, DJR 'Direct Participation in Hostilities as a War Crime: America's Failed Efforts to Change the Law of War' *Legal Studies Research Paper Series Working Paper* 2012 (21 September 2012) at 728 – 764.
[58] See Boothby, B 'And for Such Time As: The Time Dimension to Direct Participation in Hostilities' 42 *N.Y.U. J. & Pol.* 741 (2010); Goodman, R & Jinks, D 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum' 42 *N.Y.U. J. Int'L L. & Pol.* 637 (2010); 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

The US court commented in the matter of *Al-Bihani v Obama* that "war is a challenge to law, and the law must adjust".[59] However, it has been noted that "[t]he language of the international instruments in question is often obtuse and unintelligible".[60] The 1972 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict noted the "importance of succeeding in laying down . . . rules which were clear, precise and easily understood and applicable by combatants and by civilians alike".[61] The basic principles of LOAC must therefore be used to guide interpretations and find solutions to novel challenges and to preserve and protect the law's core values. A proper understanding of LOAC is vital to achieve humanity during armed conflict.

LOAC and specifically the law on C-DPH thus have to be clear. The rules of LOAC are likely to be effective and deliver the required outcomes when they are appropriate to the conditions in which the rule operates. The practical needs of participants in armed conflict must be taken into account as this will motivate compliance with LOAC. The interpretation of LOAC must not be legalistic or complex as this is self-defeating. C-DPH could be interpreted as affording strategic and tactical advantages to some parties in armed conflict.[62] This result is undesirable and should be avoided. It is thus submitted that the current guidance for lawyers and military personnel on C-DPH is not adequate or satisfactory. The vagueness of C-DPH allows States and armed groups to adopt various interpretations based on their respective needs, goals, and abilities.

Hostilities' 42 *N.Y.U. J. Int'L L. & Pol.* 831 (2010); Meyer, M & Garraway, C 'Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities' 59 *Int'L & Comp. L.Q. 180* (2010); Hays Parks, W 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' *42 N.Y.U. J. Int'L L. & Pol.* 769 (2010); Schmitt, MN *op cit* note 13; Schmitt, MN 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' 1 *Harv. Nat'L Sec. J. 5* (2010); Taylor, RS 'The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis when Attacking Civilians who are Directly Participating in Hostilities?' (2010) *Army Law* at 103; Watkin, K 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' 42 *N.Y.U. J. Int'L L. & Pol.* 641 (2010).

[59] 590 F 3d 866; 389 US App DC 26.

[60] Murphy, R 'International Humanitarian Law Training for Multinational Peace Support Operations Lessons from Experience' (2000) *International Review of the Red Cross* at 840 available at http://www.icrs.org/Web/eng/siteengo.nsf/iwpList180/C8F44398050AEB52C1256B66005F39DD (last assessed on 1 May 2014).

61 ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict Vol I, Report on the Work of the Conference (1972) at 127.

[62] Rosen, RD 'Targeting Enemy Forces in the Law of War on Terror: Preserving Civilian Immunity' 42 *V and J Transnat'l L* 683 (2009) at 691.

6. Research Objectives

The research objectives are intended to ensure that the research questions are approached in a logical manner. These objectives represent the issues that should be explored, evaluated, answered, solved and proved in a comprehensive study of the research question.

The following issues must be investigated to ensure a proper understanding of C-DPH:

- The historical meaning and development of LOAC and how armed conflict has evolved into becoming increasingly asymmetrical in nature;
- Civilian/combatant status for the purpose of the conduct of hostilities;
- The meaning of the term 'combatant' in relation to direct participation in hostilities;
- The meaning of the term 'civilian' in relation to direct participation in hostilities;
- The possible existence of further categories of participants in armed conflict subject to continuous legitimate intentional targeting;
- The contemporary legal and philosophical debates concerning C-DPH;
- The current meaning of C-DPH in IAC and NIAC;
- The role of C-DPH in asymmetrical armed conflict;
- An acceptable, practical and comprehensive definition of C-DPH;
- The interaction between LOAC and International Human Rights Law ("IHRL") on C-DPH.

These objectives intend to elaborate on the use of C-DPH in international instruments, government policy documents, academic writing and judicial review. The context in which the term is used and the extent of its use will also be examined.

The further objectives are intended to establish the contemporary philosophical debates concerning DPH and to incorporate these arguments into the research on the meaning of the concept. The final objectives intend to make recommendations towards, and propose an acceptable and comprehensive definition of DPH. The study into these research objectives is therefore intended to contribute to the resolution of the primary research question.

Finally, the thesis is intended to provide a better understanding as to whether LOAC requires revision regarding the status of the participants in NIAC. This relates to the broader and more fundamental question of whether LOAC as a whole, has become outdated and unresponsive to contemporary challenges that results from modern armed conflict.

Participants in armed conflict must be able to make judgments on the basis of what is certain. Targeting decisions, and the definition and test to establish C-DPH must be made primarily with the perspective of the person who is tasked with targeting decisions (the observer) in the armed conflict. This test must be linked to the reasonable evaluation that such a person could make under such circumstances. LOAC is complicated and the burden of a mistake in judgment may have serious consequences. Thus, from a moral and legal perspective, these decisions should not be made more difficult and combatants should only be required to make decisions which are possible in the prevailing circumstances. It is indeed incumbent on all laws to adapt and evolve in line with the situations they seek to regulate. The objective of LOAC, in attempting to infuse humanity into armed conflict, must be to simplify the application of the law, as this may "be a better humanitarian working-tool than what has become endlessly complicated".[63]

LOAC must, accordingly, create a realistic balance between military necessity and humanity. It cannot just be seen to restrict military operations, as participants will ultimately regard it as unrealistic and theoretical. The law must guard against becoming impractical as this would reduce its importance as an effective regulatory regime.[64] The focus on military necessity has historically resulted in atrocities.[65] The dominance of humanitarian interests, however, causes LOAC to become unrealistic and onerous rules, which ultimately reduce the probability of compliance.

7. Primary Research Question

The primary research question for this study is: Does the notion of C-DPH, as it pertains to asymmetrical armed conflict, have a sufficiently determinate meaning for it to be applied consistently as a legal test in LOAC?

[63] Best, G *Law and War Since 1945* (1997) at 262.
[64] See in general Reeves, SR & Thurnher, JS 'Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance' *Harvard National Security Journal Features (2013) at 1*.
[65] See in general *United States v. List (The Hostage Case)*, Case No. 7 (Feb. 19, 1948) *available at* http://www.worldcourts.com/ildc/eng/decisions/1948.02.19_United_States_v_List1.pdf (last assessed on 1 May 2014), at 1253-54. *See also* Schmitt, MN. *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. Int'L L. 795 (2010) at 797.

To formulate a comprehensive definition of a concept in LOAC is often complicated, due to the diverse objectives of the States involved in armed conflict.[66] Such a definition may be an indictment on some government actions in the pursuit of their own national interest. It will be beneficial if a definitive set of practical legal principles could be established which could be used to determine whether a civilian has, or is, participating directly in hostilities. The research question thus goes beyond the doctrinal and requires a theoretical investigation to establish a result. The investigation into C-DPH is not just an exercise in academic curiosity; these situations are a reality for many participants in armed conflict.

8. Significance of the Study

The nature of current armed conflict escapes codification and thus renders LOAC less effective. This study intends to generate new knowledge regarding the scope of the concept of C-DPH in IAC and NIAC. The significance of the study may therefore be appreciated from a theoretical and a practical perspective. It is submitted that the development of the understanding of C-DPH is required before the substantive and functional dimensions of the concept will comprehensively reinforce each other.

9. Scope of the Study

LOAC alone cannot guarantee the total protection of civilians in armed conflict and therefore any attempt to provide such protection must take this limitation into account. LOAC, and possibly IHRL, however, offers a significant opportunity to achieve some protection for civilians where it is properly interpreted, understood and utilized. In this regard, an innovative interpretation may be required to realise the best possible outcome. The interpretation and development of LOAC must therefore be realistic to ensure that LOAC remains relevant.

The study is limited to the meaning and definition of C-DPH in new fourth generation asymmetrical hostilities and its implications on LOAC. The main focus of the study will be on C-DPH in land-based armed conflicts. This is based on the fact that the primary focus of the study is on the Additional Protocols of 1977 to the Geneva Conventions of 1949, and that these instruments only deal with attacks against objectives on land or to attacks that may

[66] "One of the most significant challenges in attempting to explain who can be targeted in armed conflict is the state of the existing "black letter" law and the degree of clarity it brings to the contemporary debate." - Watkin, K *op cit* note 57 at 665.

affect civilians and civilian objects on land.[67] Attacks on naval targets and airborne targets are excluded from the study, except where these attacks from the sea or air may affect civilians, as these are specialised areas of law that deserve their own detailed evaluation. In this regard, the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* of 1994 and research initiatives on international law governing air and missile warfare may be accessed should the reader require further information on these issues.[68] This limitation should not influence the quality of the research as issues regarding C-DPH and the current controversy thereon are mostly, if not only, found in armed conflict on land and the greatest impact thereof is also experienced by civilians in this context.

This thesis will not deal with instances where civilians are intentionally targeted for purposes other than a pure military objective. Belligerents are required to identify those that are hostile or presumed to be hostile and therefore subject to attack. Civilians should accordingly be identified correctly and are to be presumed non-hostile and not subject to intentional targeting. This thesis further only covers situations of *jus in bello* and not *jus ad bellum*. Considerations relating to the right to enter into an armed conflict will not be evaluated.[69]

A further limitation relates to the conduct of hostilities and the interpretation of the rules of LOAC in the light of different religious frameworks. The relationship between religion and armed conflict is complex.[70] There is an ambiguity of religious attitudes towards armed conflict with internal tensions between tolerance and intolerance coexisting within its framework. Religion normally commands tolerance but the destruction of the enemies of the 'faith' is authorised at the same time.[71] Sectarian violence is pervasive in territories like India and Pakistan, Israel and Palestine, Northern Ireland, Chechnya, the former Yugoslavia, Sri Lanka and Iraq.[72] Significant religions also influenced, together with military doctrines, and humanitarian impulses, the setting and codification of LOAC and of the actual conduct of

[67] See in general Henderson, I 'Contemporary Law of Targeting: Military Objectives, Proportionality, and Precautions in Attack under Additional Protocol I' *International Humanitarian Law Series* Vol 25 (2011) at 13.
[68] See the San Remo Manual on International Law Applicable to Armed Conflict at Sea (1994) ICRC available at http://www.icrc.org/Web/Eng/siteengo.nsf/iwpList375/966627225C719EDCC1256B6600598Eo (last assessed on 1 May 2014) and LOAC in Air and Missile Warfare, International Humanitarian Law Research Initiative available at http://www.LOACresearch.org/amw (last assessed on 1 May 2014).
[69] United Nations Charter, Article 2(4) contains a general prohibition on the use of force: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
[70] See in general Nazir-Ali, M *Conviction and Conflict: Islam, Christianity and World Order* (2006) at 139 – 159.
[71] Popovski, V *op cit* note 12 at 11.
[72] Ibid at 13.

hostilities. However, different religious traditions, although similar in some instances, are also different with regards to their sources, inspiration, priorities and messages.[73] The norms of armed conflict in Shia Islam, for example, prohibit aggression against civilians. The rules and military ethics in the Islamic world are founded on religious principles.[74]

There is thus no common denominator regarding the rules of LOAC that may be found in some form of secular universalism.[75] The disconnect between religion and LOAC creates divergent opinions and understandings of the interpretation of LOAC, specifically regarding the interpretation of C-DPH. International law is, however, in general, the creation of Western civilization, Christian ideology, and to an extent, a capitalist outlook on world affairs.[76] The different religions, however, insist that civilians and those *hors de combat* should not be intentionally targeted and this has been codified into LOAC.[77]

There may be value in secular approaches to the norms of armed conflict as these norms have religious origins and religious convictions still dictate the conduct with regards to current armed conflict.[78] The assessment herein will be limited to the evaluation of LOAC. LOAC is, however, not cross-cultural but universal or faith neutral.[79] Ultimately this thesis is concerned with the legal implication of armed conflict with specific reference to C-DPH. The religious and cultural issues that influence the conduct of armed conflict can, however, not be ignored.[80] The evaluation of C-DPH and its interpretation with regards to various religions is, therefore, outside of the scope of this thesis.

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[73] Ibid at 14.
[74] See in this regard the discussion by Feirahi, D *Norms of War in Shia Islam in World Religions and Norms of War* ((2009) at 255 – 281 available at http://archive.unu.edu/unupress/sample-chapters/world_religions_and_Norms_of_War.pdf (last assessed on 5 January 2015).
[75] Reichberg, G; Turner, N & Popovski, V (Eds) *Norms of War in Cross-Religious Perspective in World Religions and Norms of War* (2009) at 303 available at http://archive.unu.edu/unupress/sample-chapters/world_religions_and_Norms_of_War.pdf (last assessed on 5 January 2015).
[76] Cassese, A (2nd Ed) *International Law* (2005) at 30 – 31.
[77] Reichberg, G; Turner, N & Popovski, V *op cit* note 74 at 310 available at http://archive.unu.edu/unupress/sample-chapters/world_religions_and_Norms_of_War.pdf (last assessed on 5 January 2015). For a discussion of Islamic notions of armed conflict see Charney, JP *Islamic Warfare* in Gardner, H & Kobtzeff, O *Ashgate Research Companion to War: Origins and Prevention* (2012) at 551 – 566.
[78] For a discussion see Reichberg, GM; Turner, N & Popovski, V *op cit* note 74 at 303 – 315 available at http://archive.unu.edu/unupress/sample-chapters/world_religions_and_Norms_of_War.pdf (last assessed on 5 January 2015).
[79] Popovski, V *op cit* note 12 at 14.
[80] See for a general discussion Popovski, V *World Religions and Norms of War* (2009) at 1-10.

10. Interpretation of LOAC Rules

One of the main difficulties in the interpretation of international law results from the fact that States often draft treaties in general, equivocal and ambiguous language to enable them to flexibly interpret and apply their agreements.[81] There are basically three different approaches to treaty interpretation.[82] The first focuses on the text of the treaty (objective), the second at the intention of the parties (subjective) and the third the object and purpose of the treaty.[83] It will be argued that all three approaches should be involved when a treaty is interpreted. Some States do interpret treaties with reference to their negotiating history[84] but under the Vienna Convention, recourse to preparatory work is on a "supplementary means of interpretation" and "in order to confirm the meaning".[85] Other States focus on the objective interpretation of treaties by concentrating on the actual wording thereof.[86]

The Vienna Convention,[87] Article 31, which reflects customary international law,[88] declares that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose". The interpretation of a treaty should include reference to the preamble and annexes of the treaty.[89] Any subsequent agreement or practice relating to the treaty must also be in context.[90] Ultimately the interpretation must be based upon the text of the treaty.[91] Special meaning should only be accorded to a term where it is established that the parties thereto, so intended.[92] This rule gives preference to a literal, systematic and teleological interpretation of treaties.[93] Treaties should also be interpreted to be effective and useful and have the appropriate consequences. The interpretation must accordingly give effect to the literal meaning, emphasise the main object and purpose of the treaty and also give effect to the

[81] Provost, R *International Human Rights and Humanitarian Law* (2002) at 242.
[82] Shaw, MN (6th Ed) *International Law* (2010) at 932; Dugard, J *International Law A South African Perspective* (4th Ed) (2012) at 425; Cassese, A *op cit* note 75) at178; Von Glahn, G & Taulbee, JL *op cit* note 4 at 79-81.
[83] Shaw, MN *op cit* note 81 at 932. Dugard, J *op cit* note 81 at 425.
[84] France, Italy, the USA. See Cassese, A *op cit* note 75 at 178.
[85] *Vienna Convention on the Law of Treaties*, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), Article 32 ("Vienna Convention").
[86] Britain. See Cassese, A *op cit* note 75 at 178.
[87] Vienna Convention.
[88] *Bosnia v Serbia* case, ICJ Reports, 2007 at para 160; *Indonesia/Malaysia* case, ICJ Reports, 2002 at 625, 645-6.
[89] Article 31(2), *Vienna Convention*.
[90] Article 31(3), *Vienna Convention*.
[91] The *Libya/Chad* case, ICJ Reports, 1994 at 6, 22, 100 ILR at 1, 21.
[92] Article 31(4), *Vienna Convention*. *Eastern Greenland case*, PCIJ, Series A/B, No. 53, 1933 at 49.
[93] Article 31(1), *Vienna Convention*; Cassese, A *op cit* note 75 at 179.

intention of the parties thereto with reference to the circumstances prevailing at the time when the treaty was concluded.[94] This represents all three approaches to interpretation that have been approved by the ICJ and are accepted by the Vienna Convention[95] but it seems that the ICJ favours the textual approach to interpretation.[96] The International Law Commission, however, confined itself to isolating "the comparatively few general principles which appear to constitute general rules for the interpretation of treaties".[97] This Commission regards the intention of the parties as expressed in the text as the best guide to interpretation of the common intention of the parties.[98]

It is submitted that the interpretation of LOAC principles must, if it is to be realistic, take into account that LOAC is the product of the pursuit of self-interest by States. It is acknowledged that humanitarian principles constituted an important factor in the development of LOAC but ultimately LOAC creates a system of reciprocal entitlements and interests between States. This results in a contradiction whereby States agree to co-operate in times of armed conflict between them.[99] The principle of distinction is central to this system.

It seems essentially utilitarian at first glance as military force should only be employed against military objectives. On closer scrutiny it may be argued that the principle preserves the civilian population and objects of States in armed conflict. This leads to the conclusion that the protection of civilians is based on military rationality as opposed to a moral motivation.[100] This rationale is, however, only true in IAC's as the reciprocity is not present in NIAC's. This is further supported in conduct armed conflicts and specifically targeting during decisions, where States attempt to exclude civilian harm for the main purpose of achieving political support for the military operations.

11. The Status of the Knowledge on Direct Participation in Hostilities

A review of the current research and knowledge on the history, definition and primary and secondary sources to inform and justify the research questions are included in the study. It is uncontroversial that the sources of LOAC are generally limited to those listed in Article 38 of

[94] Shaw, MN *op cit* note 81 at 934. See also *Cameroon v. Nigeria*, ICJ Reports, 2002 at 303, 346.
[95] Dugard, J *op cit* note 81 at 425.
[96] Brownlie, I (7th Ed) *Principles of Public International Law* (2008) at 631.
[97] Ibid.
[98] Ibid.
[99] Gordon, S *Civilian Protection – What is Left?* in Perrigo, S & Whitman, J (Eds) *Geneva Conventions Under Assault* (2010) at 81.
[100] Ibid at 82.

the Statute of the International Court of Justice.[101] The current literature on C-DPH in LOAC may be categorised into international conventions relevant to C-DPH, customary LOAC, academic books on LOAC written by highly qualified authors, the commentary by the ICRC where an article-by-article analysis is done of the relevant LOAC instruments, journal articles on various aspects on C-DPH, military manuals of States and reports prepared by international organisations and groups. The traditional literature concerning LOAC is plentiful but it may be argued that this constitutes a part of the problem. Jurists have provided various interpretations of the tensions inherent in the legal texts and historians have considered and reconsidered the political, institutional and normative contexts within which LOAC was formulated while the work of diplomats and organisations has resulted in a myriad of archival records. Most of these contributions favour the principal achievements of LOAC as opposed to its weaknesses.

LOAC displays distinctive characteristics and has marked connections to security and defence politics. Numerous actors in the international community pursue their own agenda when interpreting the existing LOAC. LOAC thus develops continuously and the relevance of a specific source must always be cautiously considered. LOAC developed within the constraints of States' interests and with a value-laden assumption that these interests were reconcilable within LOAC. This is a major flaw of LOAC as the interests of States are normally narrowly defined and ultimately, and in general incompatible.

The current LOAC relevant to targeting in armed conflict includes the four GC's,[102] API and APII, the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and the Hague Convention for the Protection of Cultural Property in the Event of Armed

[101] *Statute of the International Court of Justice*, June 26, 1945, 59 stat. 1055, 33 U.N.T.S. 993 - Which provides in part that "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations [and] subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."; See *Prosecutor v Erdemovic*, (Appeals Chamber) Case No IT-96-22 (7 October 1997) at 40.

[102] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature on 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature on 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature on 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Geneva Convention for the Relative to the Treatment of Civilian Persons in Time of War*, opened for signature on 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

Conflict of 1954.[103] The primary source is the Law of Geneva, which aims to protect combatants no longer engaged in conflict, and civilians not involved in hostilities.[104] The founding principle of the GC's is that persons not actively engaged in hostilities should be treated humanely.[105] This principle emanates from the Hague Regulations of 1907 and the Geneva Conventions of 1929.

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 is probably the least relevant but none of the instruments mentioned above apply as a whole to targeting. It may also be argued that although the Hague Convention (IV) Respecting the Laws and Customs of War on Land has attained customary LOAC status, that it was superseded by API.[106] The Hague Regulations of 1907 and customary international law incorporate the principles of distinction and proportionality. API accordingly contains several interlocking norms specifying these obligations.[107]

The Hague Rules of Air Warfare has never been adopted in treaty form, nor has it been officially endorsed in LOAC, but some of its individual rules may have attained customary LOAC status.[108] In this regard, Article XXII prohibits aerial bombing for the purpose of terrorising the civilian population or for, *inter alia*, injuring non-combatants. This is supported by API, Article 48, which requires that operations be directed only against military objectives and API, Article 52(2) which refers to the primary purpose of attacks. Article AAIV legitimises aerial bombardment only when directed at a military objective. API, Articles 48 and 52(2), also deal with attacks on military objectives and API, Articles 51(4) and (5) prohibit and define indiscriminate attacks.[109]

A more contentious issue is whether IHRL applies to targeting decisions in armed conflict. Numerous authors have expressed such applicability but then fail to refer to any specific instruments.[110] It may be argued that LOAC provides the relevant tests in armed conflicts

[103] *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956). See also Williamson, JA 'Challenges of Twenty-First Century Conflicts: A Look at Direct Participation in Hostilities' *Duke Journal Of Comparative & International Law [Vol. 20:457]* available at http://ssrn.com/abstract=2326568 (last assessed on 1 May 2014).
[104] See the four Geneva Conventions of 1949 and specifically the fourth Geneva Convention.
[105] Dugard, J *op cit* note 81 at 524.
[106] See in general Henderson, I *op cit* note 66 at 25.
[107] Engdahl, O & Wrange, P (Eds) *op cit* note 8 at 210.
[108] Henderson, I *op cit* note 66 at 25.
[109] Ibid at 26-7.
[110] Ibid at 32-33.

against which violations of human rights may be measured, and that LOAC remains the *lex specialis*.[111] The Nuclear Weapons case[112] also supports this and the ICJ specifically held that the protection of the International Covenant on Civil and Political Rights[113] ("ICCPR") is applicable in armed conflict, except where the instrument allows for derogation in times of national emergency.[114] The court further held that respect for the right to life is not derogable and one cannot, in principle, be arbitrarily deprived of life, even in armed conflict. The test for arbitrarily deprivation of life is, however, within the scope of determination by LOAC.[115]

The principles above on the conduct of hostilities have become rules of customary international law, and custom will further be evaluated as a primary source.[116] Arguably, the most significant customary principle is that the rights of belligerents to adopt means of injuring the enemy are limited. This was introduced in the Brussels Declaration, the Oxford Manual, and codified in the two Hague Regulations and API.[117] The term, 'combatant' remained customary until it was defined in 1977 in API.[118] The further fundamental customary principles are proportionality and discrimination, which include the general principles of military necessity, humanity and chivalry.[119] The GC's, and LOAC for centuries before that, have been based on the four key principles of distinction, proportionality, military necessity, and humanity.[120]

Customary LOAC is important as the CV's and the AP's do not constitute a complete codification of all the relevant law.[121] The Customary LOAC study by Henckaerts and Doswald-Beck on behalf of the ICRC states that none of the customary LOAC rules applicable to targeting are more restrictive than applicable treaties.[122] It is acknowledged that

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[111] Ibid at 33.
[112] *ICJ Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Report [1996] 226.
[113] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 17, 6 I.L.M. 368 (entered into force 23 March 1976) ("ICCPR").
[114] ICCPR, Article 4.
[115] *Nuclear Weapons Case* supra 226 at 25. See also the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory – *Palestinian Wall Case* [2004] ICJ Rep 131 at 106.
[116] Dinstein, Y *Conduct of Hostilities under the Law of International Armed Conflict* (2004) at 5.
[117] See Article 35(1). See also the Preambles to the 1980 *Convention on Certain Conventional Weapons* and the 1997 *Ottawa Convention on Anti-Personnel Mines*.
[118] API, Article 43(2).
[119] See in general Roberts, A & Guelff, R (3rd Ed) *Documents of the Laws of War* (2010) at 10.
[120] U.S. Department of the Army, *Field Manual* 27-10: The *Law of Land Warfare*, app. A-1 (1956) available at http://www.aschq.army.mil/supportingdocs/FM27_10.pdf (last assessed on 1 May 2014).
[121] This statement is supported by the inclusion of the Martens Clause in API, Article 1(2).
[122] Henckaerts, JM & Doswald-Beck, L (Eds) *Customary International Humanitarian Law* (2005) Vol I (Chapter I).

this study does not constitute a codification of LOAC but it has been widely accepted and has greatly assisted in developing this area of international law. The ICRC Study on the Customary Status of LOAC concluded that "a precise definition of the term 'direct participation in hostilities" does not exist.[123] In this regard, it is argued that DPH has attained the status of customary international law[124] because, on a conceptual level, civilians should be protected from attack unless, and for such time, as they directly participate in hostilities.

The commentary by the ICRC contains an article-by-article analysis of the relevant LOAC instruments.[125] The ICRC has been entrusted by High Contracting Parties to the four GC's and their AP's,[126] and through the Statutes of the International Red Cross and Red Crescent Movement,[127] under the guardianship of LOAC. The ICRC Commentary is often cited as having special authority.[128] The ICRC Commentary is regarded as authority but it is not authoritative on the interpretation of LOAC. Courts like the ICTR, ICTY and ICJ have not done so. Judge Kooijmans stated in the *Palestinian Wall Case* that the ICRC commentaries on the 1949 Convention are regarded as non-authoritative. [129] This is because the ICRC "is an impartial, neutral and independent organisation whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with

[123] Henckaerts, JM & Doswald-Beck, L (Eds) *Customary International Humanitarian Law*, 2 Volumes, Vol I Rules, Vol. II Practice (2005) Vol I at 22.
[124] Harvard University Program on Humanitarian Policy and Conflict Research, Policy Brief, LOAC and Civilian Participation in the Hostilities in the OPT 3 (October 2007) available at http://hpcrresearch.org/pdfs/ParticipationBrief.pdf (last assessed on 1 May 2014).
[125] See e.g. Sandoz, Y; Swanarski, C & Zimmerman, B (Eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 122 August 1949* (1987).
[126] For instance, Articles 9, 9, 9 and 10 respectively of the four Geneva Conventions provide that "the present Convention constitute[s] no obstacle to the humanitarian activities which the International Committee of the Red Cross . . . may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of the wounded and sick, medical personnel and chaplains, and for their relief." *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* Article 9, Aug. 12, 1949, 75 U.N.T.S. 31; *Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea* Article 9, Aug. 12, 1949, 75 U.N.T.S. 85; *Convention Relative to the Treatment of Prisoners of War* Article 9, Aug. 12, 1949, 75 U.N.T.S 135; *Convention Relative to the Protection of Civilian Persons in Time of War* Article 10, Aug. 12, 1949, 75 U.N.T.S. 287. Common Article 3 the Geneva Conventions - "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." Int'L Comm. of the Red Cross, the ICRC: Its Mission and Work 3-5 (2009), http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0963/$File/ICRC_002_0963.PDF (last assessed on 1 May 2014).
[127] The Statutes of the International Red Cross and Red Crescent Movement were adopted by the 25th International Conference of the Red Cross at Geneva in October 1986 and as amended in 1995 and 2006. Statutes of the Int'l Red Cross and Red Crescent Movement, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/$File/Statutes-EN-A5.pdf (last assessed on 1 May 2014).
[128] Henderson, I *op cit* note 66 at 20.
[129] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004 – Case No. 123 (A)* (separate opinion of Judge Kooijmans).

assistance".[130] The additional research here is contained in commentary termed the New Rules for Victims of Armed Conflict: Commentary on the two 1977 Protocols Additional to the Geneva Conventions *of 1949.*[131]

The current knowledge generated by journal articles on various aspects on DPH is of great importance. Some of these articles deal with specific topics, conflicts, the Interpretative Guide on DPH, or judicial reasoning. These articles are useful, depending on the depth of analysis and the incorporation of interrelationships and consequences to the current issues on DPH. The challenge is that the majority of these articles deal with the ICRC Interpretative Guide and either support or criticise the work. This was initially useful but it may have impaired the progressive development and introduction of novel ideas. The two schools of thought that either represents military necessity or humanity have, it will be submitted, not found a compromise, while States have interpreted DPH to give effect to their needs. The interpretation of civilian DPH is, in general, overly technical to be of use in an actual armed conflict situation and more importantly, the authors thereof are not ideologically neutral.

Military Manuals do not, as a result of their specific objectives, have very specific analysis and States would normally not commit themselves to an interpretation of the law in a manual. Manuals normally refer to treaty articles and academic sources are rarely cited.[132]

The reports prepared by international groups, in general, made an important contribution to the research in the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*.[133] The final document, which comprises the main secondary data source, is the ICRC's Interpretive Guidance[134] compiled as a result of these meetings together with the academic and government comment thereon. There are also references to conferences discussions held subsequently and more specifically the Congress - International Society for Military Law and Law of War.[135]

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[130] The ICRC's Mission Statement (2005) ICRC available at http://www.icrc.org/Web/Eng/siteengo.nsf/htmlall/68EE39?OpenDocument (last assessed on 1 May 2014).
[131] Bothe, M; Partsch, K & Solf, W *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982).
[132] The military manuals of the US and Canada are available on the internet. The UK manual has been published as the UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004).
[133] Available at http://www.un.org/icty/pressreal/natoo613oo.htm (last assessed on 1 May 2014).
[134] Melzer, N *op cite* note 31.
[135] 1 to 5 May 2012, Quebec City, Canada.

12. Research Design and Methodology

The aim is to determine a practical meaning of the notion of C-DPH and to propose various tests to establish whether a civilian could be the object of legitimate intentional targeting due to direct participation or the subject of criminal prosecution thereafter. The methodology herein is consistent with a typical legal analysis to determine the law on a particular subject, *in causa*, C-DPH. It is not the intention to conduct a jurisprudential style critique of the areas of LOAC applicable to C-DPH but to focus on and possibly resolve areas of uncertainty on C-DPH by adopting a relatively traditional legal approach.

There is little disagreement on which conventions and the articles therein, are applicable to C-DPH. The issue is to identify the areas of uncertainty in LOAC on C-DPH. A preferred interpretation will be advanced but where this is impossible, then a specific interpretation will be proposed, together with justification for not following alternative interpretations.

There are certain fundamental principles that have been applied in reaching conclusions on the issue of C-DPH. These are that LOAC has essentially a humanitarian purpose, but that military necessity must be incorporated into any interpretation. LOAC "in armed conflicts is a compromise between military and humanitarian requirements".[136] Neither the requirements of humanity, nor the dictates of military necessity may be given undue preference in LOAC. The interpretation of LOAC should reflect its object and purpose.[137] Secondly, LOAC should not be applied *ex post facto* by experts but should be designed to operate in armed conflict. It is accepted that it would be impossible to remove all ambiguity from the concept of C-DPH, but it is hoped that some of the issues might be reduced and clarified. This research is intended to be a general assessment of C-DPH, the legality of actions in particular conflicts will accordingly not be reviewed.

The comparative research assesses the similarities and differences between the policies, manuals and training materials of various states with regard to C-DPH and the loss of civilian protection. States have been selected that have been actively involved in armed conflict. The obvious selection of foreign jurisdictions will include the USA, UK, Russia and Israel. It is

[136] Greenwood, C 'Historical Development and Legal Basis' in Fleck, D (Ed) *The Handbook of Humanitarian Law in Armed Conflicts* (1995) at 7-8.
[137] Kellenberger, J 'International Humanitarian Law at the Beginning of the 21st Century' (2002) *International Committee of the Red Cross* available at http://icrc.org.web.eng/siteengo.nsf/iwplist99/efc5a1c8dd70b9c1256c3600 (last assessed on 1 May 2014).

assumed that the practice of many states was influenced by the international instruments relevant to armed conflict and the ICRC perspectives thereon which may cause these practices to be similar and comparable. The research is mainly qualitative by means of critically evaluating the sources via textual analysis.

13. Research Inquiry Strategy

The major research subjects are content specific historical and current documents in the form of written words. The appropriate research design is based on content analysis with a detailed and systematic examination of the relevant instruments. The aim is to critically investigate, test and describe the relevant body of knowledge to explain and produce theory by asking conceptual questions. This includes an examination of the words used in the text, the application thereof and the identification of the text tone. The study aims to devise a theory as informed by the research subjects to produce the required outcome.

14. Organisation of the Study and Chapter Overview

This section intends to provide an overview of the structure of the dissertation. The study is organized into seven chapters:

Chapter 1 - Introduction and General Background of the Study

This chapter contains administrative documentation, acknowledgements, table of contents, abbreviations and terms used. It provides an introduction on the nature and characteristics of LOAC and the broad implications of the notion of C-DPH. It further deals with the purpose of the research with regards to the interpretation of C-DPH. The research objectives, primary research question and significance of the study are also evaluated. The chapter then presents the manner in which LOAC rules will be interpreted, a concise evaluation of the status of the current knowledge, the research design and research inquiry strategy.

Chapter 2 – The Nature and Scope of Armed Conflict and the History and Development of Direct Participation in Hostilities in International Humanitarian Law

This chapter evaluates the historical circumstances in which States and LOAC developed in order to provide an insight on its impact on the form, content and interpretation of LOAC, the rationale behind the mutually exclusive categories of combatant and civilian and the impasse created by civilian DPH. The development of C-DPH is assessed by considering the major historical events that shaped the law into its current form.

Chapter 3 - Contemporary Perspectives on DPH

This chapter evaluates the contemporary perspectives on C-DPH. The activities that amount to C-DPH are not defined in any LOAC treaty. The current interpretations thereof are thus considered. The ethical and moral justification for civilian protection and loss thereof, the legal perspectives on C-DPH, relevant judicial reasoning, the Interpretative Guidance on DPH, the ICRC, the expert comment thereon and State practice are also considered.

Chapter 4 - The Nature of Armed Conflict and Its Participants

This chapter focuses on the legitimate intentional and permanent targeting of mandated participants, regular and otherwise, based on their affiliation to a participating party, in armed conflict. The chapter concludes that LOAC displays an inadequacy regarding the classification of who may lawfully directly participate in armed conflict. The protection of participants in armed conflict under LOAC remains characterized by a certain level of uncertainty as regards the codified provisions for combatants and civilians.

Chapter 5 - Direct Participation in Hostilities in International Armed Conflict and Non-International Armed Conflict

This chapter deals with C-DPH in IAC and NIAC. Civilian status is defined as immunity from intentional targeting and is, in general, dependant on civilian status. Thereafter the constituent elements of C-DPH are evaluated, with specific reference to common Article 3 of the GC's of 1949, API, Article 51(3) and APII, Article 13(3).

Chapter 6 - Direct Participation in Hostilities and the Application of International Human Rights Law during Armed Conflict

This chapter evaluates the relationship between IHRL and LOAC. The possibility of the developed of complementarity between the two areas of law, specifically with regards to the right to life, is assessed. The main issue is whether a member of an armed group, be that of the regular armed forces, other armed forces or a civilian direct participant, may be intentionally targeted under LOAC until such time as he surrenders or becomes otherwise *hors de combat* or whether, under IHRL, such a participant may only be intentionally targeted under exceptional circumstances, where capture is not feasible.

Chapter 7 - Evaluation and Recommendations on Direct Participation in Hostilities

This chapter provides a summary of the relevant research findings.

15. The Reality of Urban Asymmetric Armed Conflict

On 12 July, 2007 "[t]he soldiers of Bravo Company, 2-16 Infantry had been under fire all morning from rocket-propelled grenades and small arms on the first day of Operation Ilaaj in Bagdad".[138] An 'Air Weapons Team' from the 1st Cavalry Division arrived on station where the sporadic attacks on coalition forces occurred and a series of air-to-ground attacks were performed by two US Army AH-64 Apache helicopters in Al-Amin al-Thaniyah, New Bagdad, Bagdad, Iraq. The first attack, using 30mm canon rounds,[139] was directed at ten men. The US avers that some of the men were armed with RPG's, AKM's and RPG warheads. The second engagement, again using 30mm canon rounds, was directed at a private unmarked vehicle and its occupants, that were attempting to assist the wounded. The third attack resulted in three AGM-114 Hellfire missiles being fired at a building.

The first attack killed seven men, including two Iraqi war correspondents working for Reuters. The journalist's long range camera lens was misidentified as a RPG. The second attack resulted in the deaths of three men, while two children in the 'van' were seriously wounded. No weapons were found in the vehicle or on its occupants. An Apache aircrew member commented that "[w]ell, it's their fault for bringing their kids into a battle". The third attack resulted in the death of seven people inside the building and one pedestrian passing by in view of the Apache crew's sights before the targets were engaged.

The above must be interpreted in context, but it shows a disregard for civilian life by the military personnel. The footage, which was leaked by WikiLeaks, is disturbing.[140] The dethatched conversation of the Apache aircrew, while they observe their targets through the video screen of their targeting system, is disconcerting. No attempt was made to identify civilians and to apply the principle of distinction; no attention was given to the notion of C-DPH or to military objectives, nor was a proportionality assessment done. The choice of weapons used is also disproportionate to the aim sought. The M230 cannon[141] is an area weapon and the AGM-114 Hellfire air-to-surface missile[142] is a primary 100lb class weapon.

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[138] Cohen, T *Leaked Video Reveals Chaos of Bagdad Attack* CNN (7 April, 2010).
[139] M230 30x113 Chain Gun, single-barrel automatic cannon is the Area Weapon System on the AH-64 Apache attack helicopter. The M789 HEDP is normally used in the Apache and this round contains a 21.5 gram explosive charge sealed in a shaped-charge liner capable of penetrating 5cm of RHA (Rolled homogeneous armour) – produced by McDonald Douglas.
[140] See http://wikileaks.org/wiki/collateral_Murder,_5_April_2010 (Last assessed on 22 May 2014)
[141] http://.www.atk.com/products-services/lw30mm-m230-automatic-cannon/ (last assessed on 22 May 2014).
[142] http://.www.lockheedmartin.com/us/products/HellfireII.html (last assessed on 22 May 2014).

The Army Report on this incident found that the aircrew had "neither reason nor probability to assume that neutral media personnel were embedded with enemy forces". The report concludes that "[t]he video . . . is graphic evidence of the dangers involved in war journalism and the tragedies that can result".[143]

This is the reality of contemporary technology based fourth generation armed conflict.

[143] http://.wwwmaxkeiser.com/2010/04/collateral-murder-wikileaks/ (last assessed on 22 May 2014).

Chapter 2

The History and Development of Direct Participation in Hostilities*

1. Introduction

Civilians, directly participating in armed conflict, is not what Dunant saw at the Battle of Solferino and San Martino in 1859 when the Austrian Empire and Franco-Italian forces fought an International Armed Conflict ("IAC") in the Castiglione delta Pieve.[2] Dunant's vision was to ameliorate the suffering that results from armed conflict between regular armed forces.[3] This form of armed conflict has, however, as time passed, become the exception[4] and as a result, the further development of the Law of Armed Conflict ("LOAC") concerned itself more, and specifically since the Lieber Code, with the challenges that resulted from the ever-increasing participation of civilians in armed conflict,[5] which has been a prominent feature of armed conflict since at least the nineteenth century.[6] This legal system that developed over the next century, displayed a persistent negative attitude by States, based on self-interest, towards these irregular participants, to the extent that an explicit definition of civilian direct participation ("C-DPH") has, to date, not been agreed upon.[7]

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* A shortened version of this chapter was accepted for publication, in two parts, in the African Yearbook of International Humanitarian Law (2014 & 2015).

[2] Dunant, H *A Memory of Solferino* ICRC (1987) available at www.icrc.org/eng/assets/files/other/icrc_002_0361_memory_of_solferino.pdf (last accessed on 1 May 2014). Durham, H & Wynn-Pope, P The Relationship between International Humanitarian Law and Responsibility to Protect: From Solferino to Srebrenica in Norms of Protection: Responsibility to Protect, Protection of Civilians and their Interaction (2012) at 177.

[3] See in general Moorehead, C *Dunant's Dream* (1998).

[4] Engdahl, O (ed) International Humanitarian Law Series, Vol 22: *Law at War: The Law as it Was and the Law as it Should Be: Lieber Amicorum Ove Bring* (2008) at 21; Themnér, TL & Wallensteen, P *Armed Conflicts by Type, 1946-2011*, 49(4) *Journal of Peace Research* (2012) at 565, 566, 568 available at http://www.pcr.uu.se/digitalAssets/122/122552_conflict_type_2011.pdf (last accessed on 1 May 2014); Themnér, TL & Wallensteen, P *Armed Conflicts by Type, 1946-2011*, 49(4) Journal of Peace Research 565 (2012) at 566 & 568 available at http://www.pcr.uu.se/digitalAssets/122/122552_conflict_type_2011.pdf (last accessed on 1 May 2014); Dudziak, ML War-Time: An Idea, its History, Its Consequences *USC Legal Studies Research Paper No. 12-1* (2012); Johnson, WJ & Gillman, AD (eds) 'Law Of Armed Conflict Deskbook. International and Operational Law Department' *The Judge Advocate General's Legal Center And School, U.S. Army Charlottesville, Virginia* (2012) at 7 – 17.

[5] *See* Kellenberger, J (ICRC President) Address at the Sixtieth Anniversary of the Geneva Conventions: Sixty Years of the Geneva Conventions: Learning from the Past to Better Face the Future (Aug. 12, 2009), http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-president-120809.htm (last accessed on 1 May 2014); Kellenberger, J (ICRC President) *Address at the Follow-Up Meeting to the Sixtieth Anniversary of the Geneva Conventions: Strengthening Legal Protection for Victims of Armed Conflicts* (September 21, 2010) available at http://www.icrc.org/eng/resources/documents/ statement/LOAC-development-statement-210910.htm (last accessed on 1 May 2014).

[6] *See* Rivkin, BD & Casey, LA 'The Use of Military Commissions in the War on Terror' *24 B.U. Int'L L.J. 123* (2006) at 131-132.

[7] See in general Scheipers, S 'Fighting Irregular Fighters. Is the Law of Armed Conflict Outdated?' *Parameters 43(4)* Winter 2013-14.

The year 2014 signalled the hundred year anniversary since the start of World War 1 ("WWI"), seventy-five years since World War II ("WWII") broke out and the twenty-fifth anniversary of the end of the Cold War.[8] It is thus appropriate to evaluate the historical circumstances in which LOAC developed in order to understand its impact on the form, content and interpretation of LOAC and the rationale behind the mutually exclusive categories of combatant and civilian.[9] This is intended to provide the building blocks for the construction of the normative paradigms which will provide the framework for evaluating C-DPH.

C-DPH will accordingly be evaluated by considering the negotiating history[10] of the treaties within which the concept was created and the major events that shaped the law into its current form. This will be done with reference to the state of affairs prior to the Lieber Code of 1863. Thereafter, reference will be made to the events between the Lieber Code, the St Petersburg Declaration, the Brussels Declaration, the Oxford Manual, the Hague Peace Conferences, the Geneva Conventions[11] of 1949 ("GC's") and the Additional Protocols *I*[12] ("API") and II[13] ("APII") of 1977 (together the "AP's").[14]

The armed conflict that occurred during these periods will be examined and classified according to the COW Typology of War.[15] Here, the Correlates of War Project[16] define armed conflict, as inter-State wars; those that were conducted between or among members of the interstate system or IAC; extra-State wars, those conducted between a system member

[8] See in general Morris, I *War What is it Good For?* (2014) at 10.
[9] See Beruto, GL (ed) *The Conduct of Hostilities. Revisiting the Law of Armed Conflict 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols* (2007) at 1 – 40.
[10] France, Italy, the USA. See Cassese, A (2nd Ed) International Law 2005 at 178.
[11] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, of 12 August 1949; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, of 12 August 1949; *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, of 12 August 1949; *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, of 12 August 1949.
[12] *Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* ("AP1"), 8 June 1977.
[13] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* ("APII"), 8 June 1977, 1125 *UNTS* 609.
[14] API & APII ("the AP's").
[15] Gleditsch, NP; Wallensteen, P; Eriksson, M; Sollenberg, M & Strand, H 'Armed Conflict 1946-2001: A New Dataset' *Journal of Peace Research* (2002) at 615 available at http://jpr.sagepub.com/cgi/content/abstract/39/5/615 (last accessed on 17 July 2014).
[16] Other conflict data projects are the Uppsala Conflict Data Project, the Major Episodes of Political Violence and the Conflict Simulation Model. For a discussion of the COW Project and the three others mentioned here see Williamson, M *Terrorism, War and International Law* (2009) at 12 – 16.

and a non-State entity; intra-State wars, conducted between a State and a group within its borders and non-State wars. The last three conflicts conform to the various definitions of a NIAC.[17] This classification is useful as it contains a comprehensive index of conflicts since 1816 and organizes conflicts based on their temporal domain; battle-related deaths; the "bulk of the fighting"; the war's duration; the initiator; the outcome; and the location of the wars.[18]

2. International Law and Statehood

International law is, at least for now, by its very nature, tautologously State-centred, State-defined and State-controlled.[19] States purposefully shape and determine the international system but the international system also comprises various relationships, which in turn, determine the nature of the State.[20] This biased fixation on States contains an assumption of the equality of these parties.[21] The State comes into existence after it brings pre-existing modes of domination to an end and the State then becomes a distinct, *primus inter pares*, institution within society. The State, itself, is an abstract, continuous, survival seeking, resource gathering entity.[22] International law treats States as moral agents regardless of the degree to which they actually approximate this ideal.[23] International Law accordingly grants legal personality to States who have moral and legal interests, rights and responsibilities.[24] States, as high contracting parties, define the terms of International Law through treaty and State practise and eventually custom.[25] International Law, as a direct result, represents a manifestation of a specific order with an identifiable power configuration,[26] which reflects the goals of States consenting to be bound by it.[27] It may be argued that LOAC has historically been used as an instrument of forced socialization of non-Western nations into

[17] See in general Sarkees, RM 'The Correlates of War Data on War: An Update to 1997' *Conflict Management and Peace Science* 18, No. 1 (Fall 2000) at 123–144.
[18] See in general Reid, M 'Defining and Categorizing Wars' in Sarkees, RM & Wayman, FW *Resort to War: A Data Guide to Inter-State, Extra-State, Intra-State, and Non-State Wars, 1816–2007* (2010) at 39-73.
[19] Fletcher, GP & Ohlin, JD *Defending Humanity. When Force is Justified and Why* (2008) at 137.
[20] Hobson, J *State and International Relations* (2005) at 224.
[21] Mohamedou, MO (2nd Ed) *Understanding Al Qaeda Changing War and Global Politics* (2011) at 32.
[22] See in general Mohamedou, MO *Iraq and the Second Gulf War – State Building and Regime Security* (2011).
[23] Fletcher, GP & Ohlin, JD *Defending Humanity When Force is Justified and Why* (2008) at 11.
[24] Ibid.
[25] Schmitt, MN 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' *Virginia Journal of International Law* Vol 50 Issue 4 at 798.
[26] See in general Mohamedou, MO *op cit* note 20 at 34.
[27] Schmitt, MN *op cit* note 24 at 799.

the international community and non-western States was forced to wage war on the terms set by the Western military mores, which reinforced Western supremacy.[28]

International Law predictably and specifically defines States and the classical Weberian State displays sovereignty, territory, a population, a government and a monopoly over the legitimate exercise of force.[29] A State has the authority to engage in legal relations with other States; it can negotiate and sign treaties, borrow and lend money, appear before international bodies and can be held accountable for its actions.[30] Governments represents States and it is this group that enters into armed conflict, makes peace, enacts domestic laws, exercises justice, raises revenue, is responsible for internal security and contributes to the formation of international law.[31] The objectives of States are, or should be, to pursue and safeguard national interests and to ensure the public good. LOAC principles will accordingly reflect principles and rules to most efficiently accommodate these goals.[32] LOAC, as expected, will thus also reflect these principles and rules with regards to the nature of armed conflict. It has been argued that State policy focus on its economic interest, State security and lastly on other considerations including human rights.[33] Security concerns have become increasingly important, which has resulted in less significance being afforded to human rights considerations.

States were characterised by the separation between the armed forces and the civilian population. This was not limited to the distinction between the military and civilians but also manifested itself in the provision of associated services such as engineering, supplies,

[28] Megret, G 'From Savage to Unlawful Combatants: A Postcolonial Look at International Humanitarian Law's Other' in Engdahl, O & Wrange, P (eds) *Law of War – The Law as it was and the Law as it Should Be* (2008) at 209: "The laws of war . . . can be seen as having been historically one – in fact probably one of the foremost – instruments of forces socialization of non-Western nations into the international community, one whereby non-Western peoples have been called upon to wage war on the West's terms, by adopting Western military mores (thus almost inevitably reinforcing Western supremacy". See also Megret, F 'From 'Savage' to 'Unlawful Combatants': A Post Colonial Look at Humanitarian Law's Other' in Engdahl, O & Wrange, P (eds) *Law of War – The Law as it was and the Law as it Should Be* (2008) at 207.
[29] See the *Montevideo Convention on the Rights and Duties of States*, 1933.
[30] Fletcher, GP & Ohlin, JD *op cit* note 22 at 136.
[31] Van Creveld, M *Rise & Decline of the State* (1999) at 415 available at http://www.libertarianismo.org/livros/mvcradots.pdf (last accessed on 6 January 2015).
[32] Schmitt, MN *op cit* note 24 at 799.
[33] Donnelly, J 'International Human Rights: Unintended Consequences of the War on Terrorism' in Kessing, PV 'Terrorism and Human Rights in International Studies in Human Rights' Vol 92: *Human Rights in Turmoil: Facing Threats, Consolidating Achievements* (2006) at 146.

administration, medical and religious.[34] The development of LOAC also increasingly prohibited those not wearing uniforms from participating in the conflicts between States.[35] This in turn created a situation whereby civilians were spared, in principle, from the horrors of armed conflict as long as they did not directly participate in the conflict.[36]

The State-building processes have, however, also had an opposite reaction, based on the relocation of authority, which circumvents Statehood and its monopoly over legitimate violence, resulting in the militaristic empowerment of non-State actors.[37] Recent events have seen the proliferation of powerful geographically indeterminate, armed and emancipated sub-State and transnational non-State actors.[38] States found their sovereignty threatened, both politically and territorially, by these non-State actors.[39] The perceived failure of some States to act on behalf of their citizens has resulted in the formation of transnational non-state actors that seek to undertake the martial responsibilities of the State on behalf of the citizens. Predictably, armed conflict started between these actors and States. Al Queda and Islamic State, as examples, are new generation *sui generis* global private non-State actors that are possibly more goal-orientated as opposed to rule-orientated. These groups aim to affect a more legitimate social, political, economic and religious rule for their followers.[40]

States, after the introduction of nuclear weapons, and the increase in armed conflict against non-State groups, found that their armed forces and the manner in which they conducted hostilities, was ineffective against non-State armed groups. Numerous States, including the Soviet Union (in Afghanistan), France (in Vietnam), the US (in Vietnam), South Africa (in Angola), India (in Cambodia) and others struggled to deal with counterinsurgency.[41] This resulted in a need for police forces to deal with counterinsurgency as the armed forces were not equipped or trained to do so. However, confidence in the police declined as time passed, and as the State started sharing some of its core functions with other entities. This is most notable in the provision of security, a role which is regarded as the most important function

[34] Van Creveld, M *op cit* note 30.
[35] Ibid.
[36] Ibid.
[37] Mohamedou, MO *op cit* note 20 at 47.
[38] Lind, WS 'The Changing Face of War: Into the Fourth Generation' *Marine Corps Gazette* (October 1989) at 23.
[39] *See* Schachter, O *The* 'Decline of the Nation-State and its Implications for International Law' *36 Colum. J. Transnat'L L. 7* (1998) at 7-8.
[40] Mohamedou, MO *op cit* note 20 at 42 - 43.
[41] Van Creveld, M *op cit* note 30.

of the State.[42] The police forces are, as a result of the failure of the State, being supplemented and in some instances, totally circumvented by private security forces as civilians lose faith in governments.[43] Further reasons for the development of armed non-State actors are an increase in the international arms trade, the development of private armies; international drug trafficking; the expanding power of multinational corporations, and the fact that boundaries are increasingly permeable by people and weapons.[44]

Non-State actors challenge the State system, as they do not require legal recognition, nor do they respect the value of a legal approach to conflict.[45] States require legal predictability and accordingly applied this system of law to develop the structure for IAC. This system delineates obligations and awards rights in a predictable manner, based on armed conflict that is, in theory, characterised by predictability, [46] monopoly (of the use of force), distinction (between civilian and military, legitimate and illegitimate combatants, internal and external and public and private), concentration (of forces and targeted sectors), brevity (of battle) and linearity (of organisation and engagement).[47]

Non-State actors and the resulting NIAC, which is characterised by unpredictability, privatisation, indifferentiation, dispersion, open-endedness and non-linearity,[48] contradict the design created by States in IAC. NIAC is based on non-Trinitarian patterns and is increasingly unconventional, undeclared, fought within the territory of States and between States and non-State actors outside the territory of the State. [49] This occurred at the end of the twentieth century and during the beginning of the twenty-first century. The international rules governing the use of force[50] were eroded, together with Westphalian symmetrical conflict.[51]

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[42] Ibid at 406.
[43] Ibid at 405.
[44] See Sarkees, MR *The COW Typology of War: Defining and Categorizing Wars (Version 4 of the Data)* at 6 available at http://www.correlatesofwar.org/ (last accessed on 1 May 2014).
[45] Fletcher, GP & Ohlin, JD *Defending Humanity* (2008) at 137.
[46] *See generally* Bobbitt, PC *The Shield of Achilles: War, Peace, and the Course of History* 75–143 (2002) at 501-538; Prakash, S *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 Corn. L. Rev. 45 (November 2007) at 67-77.
[47] Mohamedou, MO *op cit* note 20 at 20, 24. See Article 29 of the *Lieber Code* of 1863, the German doctrine of *Blitzkrieg* and the USA's Rapid Dominance campaign regarding brevity and linearity.
[48] Mohamedou, MO *op cit* note 20 (2011) at 35.
[49] *See in general* Bobbitt, PC *op cit* note 45 at 667–807.
[50] Mohamedou, MO *op cit* note 20 at 19.
[51] See in general Bobbitt, PC *op cit* note 45; *See* Prakash, S *op cit* note 45 at 66-77.

Improved technologies will progressively increase the prevalence of these phenomena.[52] The capability of non-State actors to exercise State-level violence, combined with the declining relationship of armed groups to States, will further negate various features common to contemporary armed conflict.[53] These effects are seen in the depreciation of the value of LOAC due to its real or perceived inability to regulate new forms of armed conflict.

3. The Development of the Law of Armed Conflict

Increasingly, modern technologies and methods of warfare are causing the foundational principles of LOAC to be tested[54] and to be re-interpreted. This is done to accommodate the regime of status-based targeting due to the devalued legal distinction between combatants and civilians.[55] The merit of this distinction will further decrease as asymmetrical conflict drives non-State actors to seek anonymity in hostilities.[56]

3.1 The Law of the Law of Armed Conflict Prior to the Lieber Code of 1863

From 1816 to 1863 there were 167 recorded armed conflicts,[57] which included 154 NIAC's and 13 IAC's. The first well-documented armed conflict took place in 1457 BCE near the city of Megiddo in modern-day Syria.[58] This battle included the use of infantry, archers and cavalry, and ended in a siege which forced one side to surrender. Some scholars start the evaluation of armed conflicts which occurred as long as 6000 – 10 000 years ago in the Indus, Yellow Rivers, Peru and Mexico.[59] Sun Tzu, a Chinese military general, stated in the 5th century B.C. that there is an obligation to 'treat the captives well and care for them . . .

[52] See Watts, S 'Low-Intensity Computer Network Attack and Self-Defense' *in 87 Int'L L. Stud.* 59, 71–72 (Pedrozo, RA & Wollschlager, DP (eds) (2011) at 61.
[53] Ibid at 62, 73, 76.
[54] Doswald-Beck, L 'Implementation of International Humanitarian Law in Future Wars' 71 *Naval War College International Law Studies* (1998) 39; see also Rosen, SP 'The Future of War and the American Military' *Harv. Mag*., May–June 2002; Jacobs, F & Khanna, P *The New World*, N.Y. Times (September 22, 2012) available at http://www.nytimes.com/interactive/2012/09/23/opinion/sunday/the-new-world.html (last accessed on 1 May 2014); Koh, HH 'The State Department Legal Adviser's Office: Eight Decades in Peace and War' 100 *GEO. L.J.* (2012) 1747, 1772; Scheipers, S *op cit* note 6 p 14.
[55] Brooks, RR 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror' 153 *U. PA. L. Rev.* 675, 745 (2004) 706, 730-31, 756 – 57 & 761. Jacob Kellenberger President, Int'l Red Cross, Sixty Years of the Geneva Conventions and the Decades Ahead at the Conference on the Challenges for LOAC posed by New Threats, New Actors and New Means and Methods of War, ICRC (September 11, 2009) available at http://www.icrc.org/eng/resources/documents/statement/geneva-convention-statement-091109.htm (last accessed on 1 May 2014).
[56] Watts, S *op cit* note 29 at 72-73.
[57] Sarkees, MR *op cit* note 12 at 6.
[58] Parker, B *The Physics of War From Arrows to Atoms* (2014) at 15.
[59] Wright, Q *The Study of War* (1965) in Williamson, M *Terrorism, War and International Law* (2013) at 8.

generally in war the best policy is to take a State intact; to ruin it is inferior to this.'[60] These concerns were, however, based on pragmatism and not on an ideological or moral inclination to spare civilians from attack. The motivation was based in the usefulness of the civilian population to the eventual victorious party.[61] Three centuries later, Egypt and Sumeria formulated an intricate procedures regarding armed conflict.[62] The Hindu empire produced the Book of Manu, which was similar to The Hague Regulations of 1907. One of its central themes included a prohibition against attacks on civilians.[63]

The idea of creating a political and military order that depended on a distinction between those who could be killed and those who were immune to attack was formally initiated by the Greeks and Romans, who customarily observed certain humanitarian principles.[64] Roman law developed the notion that a privileged class of warriors exists, which is bound by, and benefits from, LOAC. The *jus fetaile*, accordingly, dictated that no person could lawfully engage in armed conflict with a public enemy without being enrolled in the military. This idea developed through time into the concept of contemporary lawful combatancy.[65]

The ideas on immunity were, however, different with regard to religion, status and identity. The Christian Bible indicates in Deuteronomy that, in war, women and children are to be spared, together with livestock, but all males are to be killed.[66] Upon capture of Canaanite cities, anything that breathed was to be 'annihilated'.[67] Moses, during the holy war against the Medians, stated that all men and women should be killed.[68] Female virgins were to be spared based on their 'usefulness' but men were to be killed, notwithstanding age.[69]

[60] Sun Tzu *The Art of War* (1963) at 76.
[61] Keck, TA *Restraints on the Use of Force* (2011) at 117.
[62] Pictet, JS *Development and Principles of International Humanitarian Law* (1985) at 7-8.
[63] Jochnick, C & Normand, C 'The Legitimization of Violence: A Critical History of the Laws of War' 35 *Harv. IntL. L. J.* 49 (1994) 60 in Trevor A Keck *op cit* note 41 at 117.
[64] Kinsella, HM *The Image before the Weapon A Critical History of the Distinction between Combatant and Civilian* (2011) 30; Adam Roberts & Richard Guelff (eds) (3rd ed) *Documents of the Laws of War* (2010) at 2.
[65] Watkin, K 'Warriors without Rights? Combatants, Unprivileged Belligerents and the Struggle Over Legitimacy' *HPCR Occasional Paper Series* (2005) at 1-77.
[66] 20: 14-18 *The New Oxford Annotated Bible* (1994).
[67] Ibid 20: 17.
[68] Numbers 31: 13-19 *The New Oxford Annotated Bible* (1994).
[69] Kinsella, HM *op cit* note 44 at 33.

The writings of Augustine during the fifth century and Thomas Aquinas in the thirteenth century further influenced the content of restraint in war.[70] The idea of Just War, a synthesis of Christian doctrine and natural law conception of morality,[71] developed during this time to justify why Christians were allowed to participate in war. The innocence of the soldier was more important than who may be killed. Augustine states that innocence comes from obedience in war, which is conducted under the command of a superior and God.[72] Augustine is credited with the construction of the three primary parts of Just War theory, being *jus ad bellum*, *jus in bello*, and *jus pos bellum*.[73] Aquinas, in the *Summa Theologiae,* indicates that the killing of an innocent is only acceptable if God, the sovereign authority over life, commands it.[74] Here there is, however, still an element of use that women and children (and the environment) have and this is the reason why they should not be unjustly destroyed.[75] These ideas were further developed by natural law scholars such as Francisco de Vitoria, Alberico Gentili, Francisco Suarez, Hugo Grotius, Samuel Pufendorf and Emerich de Vattel between the sixteenth and eighteenth centuries.[76]

The influence of the Catholic Church during the Middle Ages made the concept of immunity central to the establishment of a 'right order', as understood by Christian Europe. The perceived motivation for restraint during armed conflict was the result of honourable and 'civilized' actions.[77] This signified a perpetual suspension of hostilities against particular consecrated persons (clergy) and places (churches) and times (Sunday).[78] The true development of non-combatant immunity, however, stems from the self-interest of the church as the largest landowner and, in part, of the nobility.[79] The economics of landowning dictated that agriculture and trade needed to continue uninterrupted, and as a result, certain goods, people and sites became specifically protected. These included religious persons, but

[70] Ibid at 33.
[71] Rodin, D *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) at 19.
[72] Kinsella, HM *op cit* note 44 at 33.
[73] Patterson, E *Just War Thinking: Morality and Pragmatism in the Struggle against Contemporary Threats* (2007) 2; Holmes, MB *Just War Theory and Its Applicability to Targeted Killing. A thesis Presented to the Faculty of the U.S. Army Command and General Staff College* (Master of Military Art and Science Strategic Intelligence (1999) at 14.
[74] Aquinas, T 'Injustice' Q.64 *A Summa Theologiae: Latin Text and English Translation* in Helen M Kinsella *op cit* note 44 at 33.
[75] Kinsella, HM *op cit* note 44 at 33.
[76] Engdahl, O & Wrange, P *op cit* note 3 at 23.
[77] See Doswald-Beck, L & Vite, S 'International Humanitarian Law and Human Rights' *IRRC* No 293 (30-04-1993) at 1.
[78] Kinsella, HM *op cit* note 44 at 35.
[79] Ibid at 35.

pilgrims, travellers, merchants and peasants, together with their possessions, also received protection based on their utility to preserve the resources of the rich.[80]

Knighthood and religion, both Christian and Islam,[81] were now intrinsically linked and the right to wage war was primarily reserved for knights and princes in the form of public wars, which were to be conducted in a chivalrous manner.[82] Islam contributed to the chivalric ideals that permeated Christian Europe, with the Koran as the main source thereof.[83] These ideals were embodied in the actions of Saladin[84] during; inter alia, the *Battle of Hittin*[85] and the recapture of Jerusalem[86] in 1187 against the Christian crusaders. *Jus in bello* thus originated in the medieval chivalric code where the knights and nobility recognised the need to restrict their military activities only to each other, to the exclusion of civilians.[87]

The armed conflicts of the Middle Ages, however, created disorder, and the fundamental authority to suppress private war and to engage in public war was placed with the State.[88] Armed conflict was to be conducted by the 'right authority' to be legitimate. Actions by the State to preserve internal order also constituted a lawful exercise of the State's monopoly on the use of force.[89] Persons participating on behalf of the State in NIAC, or employed to maintain internal order, accordingly enjoyed a legitimate status. This armed conflict during 1648 to 1789 was prohibitively expensive,[90] and was funded by, and conducted in the service

[80] Paxton, F *History, Historians and the Peace of God in Peace of God* at 32 quoted in Helen M Kinsella *op cit* note 44 at 41.
[81] Wallach, EJ 'Pray Fire First Gentlemen of France: Has 21st Century Chivalry been Subsumed by Humanitarian Law?' *Harvard Law School National Security Journal* (2013) at 7.
[82] Kinsella, HM *op cit* note 44 at 43.
[83] Wallach, EJ *op cit* note 61 at 10; Hussain, J *Islam – Its Law and Society* (2004) at 56.
[84] 1138 - 1193, al-Malik al-Nasir Salah-ed-din Yusef ibn Ayyub (The King, the Defender, the Honor of the faith, Joseb son of Job), know to the West as Saladin – Evan J Wallach op cit note 61 p 11.
[85] Hattin or Horns of Hattin in western literature - Abu-Munshar, M *Islamic Jerusalem and Its Christians: A History of Tolerance and Tensions* 144.
[86] Shah- Kazemi, R 'Recollecting the Spirit of Jihad' *Sacred Web, A Journal of Tradition and Modernity* at 12; Abu-Munshar, M *Islamic Jerusalem and Its Christians: A History of Tolerance and Tensions* (2003) at 179.
[87] Johnson, JT *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (1981) at 47; Holmes, MB *Just War Theory and Its Applicability to Targeted Killing* A thesis Presented to the Faculty of the U.S. Army Command and General Staff College (Master of Military Art and Science Strategic Intelligence (1999) at 17.
[88] See Rousseau, JJ *The Social Contract* (2004) at 9: '[P]rivate wars…were no more than an abuse of feudal government, an irrational system if ever there was one, and contrary to natural justice and to all sound policy.'
[89] Watkin, K 'Warriors 'Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' *Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series Winter* (2005) No 2 at 17; Moir, L *The Law of Internal Armed Conflict*: *Cambridge Studies in International and Comparative Law Series* (2007) at 60.
[90] Wright, Q *op cit* note 39 at 310; van Creveld, M *op cit* note 31 at 156.

of, the State. It was characterised by the participation of expansive professional armies, with only a minor contribution by the civilian population.[91] Such military professionalism resulted in the protection of the civilian population.[92] This reality was the new inspiration for and foundation of the concept of civilian immunity.[93] During this time, Francisco de Vitoria produced *De indis noviter inventis*[94] in 1532 and *De jure belli*[95] in 1539. These works comprised the first analysis of the principle of distinction based on humanitarian principles.[96] Victoria concluded that the 'deliberate slaughter of the innocent is never lawful in itself . . . the basis of a just war is wrong done. But wrong is not done by an innocent person.'[97] Victoria, however, provided for an exception to the principle of distinction based on military necessity.[98] Military necessity, as a result, prevailed over the principle of distinction until the GC's.[99] The principle of distinction thus originated from the Just War tradition and was later formalized in the Lieber Code.[100]

The second major contribution to the laws of war during this period came from Hugo Grotius who produced *De jure pradae*[101] in 1604 and *De jure belli ac pacis libri tres*[102] in 1625.[103] Grotius's goal was to develop a systematic jurisprudence of International Law.[104] His 1625 work attempted to regulate the conduct of war and introduced the concept of moderation in warfare.[105] This constituted a qualification of the work of Victoria and the first reasoned basis of the law of land warfare.[106] War was no longer the infliction of punishment on individuals, but a method of settling legal disputes between States.[107]

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[91] Kinsella, HM *op cit* note 44 at 53; Cassese, A *International Law in a Divided World* (1986) at 255.
[92] Best, G *War and Law Since 1945* (1994) at 34.
[93] Ibid at 56.
[94] On the Indians Recently Discovered. See Grotius, H *The Rights of War and Peace* (2005) at 446.
[95] On the Laws of War, Ibid 1745.
[96] Keck, TA *op cit* note 41 at 118.
[97] de Victoria, F *On the Indies and the Law of War* (1532) in Leon Friedman (ed) *The Law of War: A Documentary History* (1972).
[98] Keck, TA *op cit* note 41 at 119.
[99] Ibid at 119.
[100] Maxwell, MD & Meyer, RV 'The Principle of Distinction: Probing the Limits of Customariness' *Army Law* 1 (2007) at 9; Hays Parks, W 'Air War and the Law of War' 32 *A.F. L. REV.* 1 (1990) at 4–8.
[101] On Prize Laws.
[102] Grotius, H *On the Laws of War and Peace* (A. Campbell trans, 1814) available at http://www.constitution.org/gro/djbp.htm (last accessed on 1 May 2014).
[103] Kinsella, HM *op cit* note 44 at 55.
[104] von Glahn, G & Taulbee, JR (9th Ed) *Law Among Nations An Introduction to Public International Law* (2010) at 27.
[105] Ibid at 28.
[106] See Hartigan, RS *Lieber's Code and the Law of War* (1983) at 3.
[107] Primoratz, I (ed) *Civilian Immunity in War* (2007) at 74.

Grotius was influenced by the Thirty Years' War from 1618 to the Treaty of Westphalia of 1848.[108] This armed conflict was driven by religious differences between Protestants and Catholics to determine which religion would dominate Germany.[109] This War marked the demise of the power of the church in favour of the nation State.[110] Grotius confirmed that 'according to the law of nations, anyone who is an enemy may be attacked anywhere.'[111] He regarded honourable action in war as a basic principle which dictates that '[o]ne must take care, so far as is possible, to prevent the death of innocent persons, even by accident.'[112] Grotius conceded that the law, as it existed, recognized the killing of these innocent persons because they, according to Grotius, were 'enemies' in a public war. It is, however, apparent that the law of nations still did not acknowledge the separate identity of the individual and the State.[113] The work of Grotius constitutes the basis for the principle of proportionality and the obligation to prevent civilian deaths.[114] The most significant contribution from Grotius was that he redefined Just War theory as self-defence.[115]

The Thirty Years' War ended with the Treaty of Westphalia in 1648, which marked the demise of the war-preventing effect of the Just War theory and it was recognised that all the parties to an armed conflict could have a just cause.[116] The conventional interpretation of Westphalia holds that it indicated the political beginning of a State-centric international system of independent sovereign and equal States, and of modern international law because of the deliberate approval of common regulation by concerted action.[117] Most of the mercenary forces that engaged in armed conflict before Westphalia were absorbed into

[108] See for a comparison of the Thirty Years War and current armed conflict – Zanetti, V *Women, War, and International Law in Civilian Immunity in War* (2007) at 222 – 223.
[109] Copeland, DC *The Origins of Major War* (2000) at 1 & 216.
[110] Sarkin, J *The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and their Application from at least the Nineteenth Century Human Rights and International Legal Discourse* Vol 1 (2007) at 4 available at http://ssrn.com/abstract=1304613 (last accessed on 1 May 2014).
[111] *De Jure Belli Ac Pacis* (1646), Book iii, ch.iv.v.i. in W Hays Parks 'Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect' *International Law and Politics* (2010) Vol 42:769 at 830.
[112] Grotius, H *op cit* note 82.
[113] Gardam, JG *Non-Combatant Immunity as a Norm of International Humanitarian Law* (1993) at 12.
[114] Keck, TA *op cit* note 41 at 119.
[115] Maogoto, JN *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (2013) at 11.
[116] Ibid.
[117] von Glahn, G & Taulbee, JR *op cit* note 84 at 32; Kinsella, HM *op cit* note 44 at 53. See also Perrigo, S *Geneva Conventions under Assault* (2010) at 18.

standing armies or were reabsorbed into civilian life.[118] The modern State, as recognised during the seventeenth century and stimulated by the Industrial Revolution, is therefore not a fact of nature but an historic response to a new social order.[119]

So-called first generation warfare started with the Treaty of Westphalia and continued until around 1860.[120] Europe formed an organic society of States bound by a common bond, which set it apart as 'civilized', notwithstanding the armed conflict between the States in Europe over the next 150 years.[121] War could only be legally waged with the authority of the State and had to be conducted in an open and public manner.[122] These ideas constituted the basis for the new Just War theories and military honour.[123] States found that armed conflict was inherent to the nature of sovereignty as States were forced to secure their own security.[124]

The success of irregular warfare diminished with the rise of the nation State and the use of standing armies that followed the Thirty Years' War.[125] From the Treaty of Westphalia to the 1950s, the actions of irregular armed groups were seldom outcome-determinative[126] and subsequently only a number of irregular armed groups have succeeded, at least temporarily, in winning asymmetric armed conflicts.[127] The recruitment of military personnel, their payment, clothing, equipment and other necessary administrative functions became

[118] van Creveld, M *op cit* note 31 at 160.
[119] Evans, T *Politics of Human Rights: A Global Perspective* (2005) at 60.
[120] Lind, W 'Understanding Fourth Generation Warfare' *Military Review* 84/5 September-October (2004) at 12.
[121] von Glahn, G & Taulbee, JR *op cit* note 84 at 33.
[122] Draper, GIAD 'The Status of Combatants and the Question of Guerrilla Warfare' *British Yearbook of International Law* Vol 45 (1971) at 175.
[123] Ibid at 173–175.
[124] Maogoto, JN *op cit* note 95 at 12.
[125] Boot, M *The Evolution of Irregular War*, Foreign Affairs, January 5, 2013, http://www.foreignaffairs.com/articles/138824/max-boot/the-evolution-of-irregular-war?page=show (last accessed on 1 May 2014).
[126] See in general *Insects, Disease and Military History: The Destruction of the Grand Armee* available at http://entomology.montana.edu/historybug/napoleon/typhus_russia.htm (last accessed on 1 May 2014); *see also* 'Captain Coignet's Escape: Excerpts of Jean-Roch Coignet's notes on the Retreat from Moscow' available at http://www.napoleonguide.com/campaign_russ_coignet.htm (last accessed on 1 May 2014).
[127] The Vietcong supporting the North Vietnamese Army defeated the US and the Army of the Republic of Vietnam in the 1970s; the *mujahedeen* defeated the Soviet Union in the 1980s; the Chechen rebels won a short-term victory against the Russians in the mid-1990s; *see* BBC News, *Timeline: Chechnya* available at http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/2357267.stm (last accessed on 1 May 2014); for the peace treaty ending the first Chechen war see Alessandra Stanley 'Yeltsin Signs Peace Treaty with Chechnya' *NY Times* (May 13, 1997) available at http://www.nytimes.com/1997/05/13/world/yeltsin-signs-peace-treaty-with-chechnya.html (last accessed on 1 May 2014); and the FARC continue a forty-eight-year conflict with the Colombian government; see Jeff Franks 'Colombia Marxist FARC Rebels End Ceasefire' *NBC News* (January 20, 2013) available at http://worldnews.nbcnews.com/_news/2013/01/20/16610564-colombias-marxist-farc-rebels-end-ceasefire?lite (last accessed on 1 May 2014).

centralized with war ministries.[128] Armed conflict was no longer waged for personal reasons as these operations were now conducted on behalf of the impersonal State.[129]

The impersonal nature of armed conflict resulted in changes in the treatment of prisoners of war. These persons were no longer seen as the private property of their captors, but as the property of the State, which negotiated with its adversary to agree on payment for their return.[130] The further development of the changing nature of armed conflict resulted in the creation of an additional legal category of wounded persons in armed conflict.[131] The provision of quarter did not depend on the goodwill of the victorious party since military personnel were no longer regarded as criminals, but as participating on behalf of and in the duty of their sovereign States.[132] This evolving nature of the State and of armed conflict resulted in an environment where the conclusion of agreements between States became relatively unproblematic.[133] The further result was the separation of the civilian population from the military. Members of the military started wearing uniforms, not to distinguish themselves from their adversaries, but from the civilian population, and to identify those that were 'licensed' to participate in armed conflict on behalf of the State.[134]

The State's monopoly over the use of armed force was cemented in the *Seven Years' War* from 1756 to 1763, which was fought between Austria, supported by Russia, and their adversary, Prussia.[135] De Vattel[136] stated that the sovereign is the real author of war and those, by whom the sovereign wages war, are his instruments; they execute his will and not their own.[137] The State's domination over external conflict resulted in armed conflict being classified as a continuation of State policy by other means.[138] The combatant, as instrument of the State, underlay the developments in LOAC in the twentieth century. Combatants need not be engaged in combat to qualify as legitimate targets and they could be targeted as the means to a military or political objective. The attempts of other non-State groups to use

[128] van Creveld, M *op cit* note 31 at 160.
[129] Ibid.
[130] Ibid at 161.
[131] Ibid.
[132] Ibid at 162.
[133] Ibid.
[134] Ibid at 163.
[135] Copeland, DC *op cit* note 89 at 225.
[136] 1714–67.
[137] de Vattel, E *The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758), trans. Charles G Fenwick (1916) book 3 § 6 at 237.
[138] van Creveld, M *op cit* note 31 at 169-170; See also von Clausewitz, C *On War (1976) Book I* Chapter 1 & 2.

violence for their ends attained a stigma and came to be known by various names, such as civil war, uprisings, rebellion and terrorism.[139] At this time, most of the regulation of armed conflict was based on custom.[140] The conclusion of the US-Prussia Treaty of *Amity* and Commerce represents one of the first positive international formulations of restraint on the conduct of land warfare.[141]

The next significant armed conflicts were the French Revolution from 1792 to 1801 and the Napoleonic Wars from 1803 to 1815.[142] Thereafter, the Crimean War from 1854 to 1856 saw a rapid change in the nature of armies due to social and political changes within States, together with major advances in military technology. The Crimean War was the last 'old-fashioned' war in Europe. The Prussian-German military model of professional cadre became the dominant military strategy but the entire civilian population occasionally supported the war effort.[143] This resulted in spontaneous organised acts of armed resistance in the form of guerrillas and *francs-tireurs*,[144] and the *levee en masse*.[145] The involvement of civilians in the conflict was considered to be criminal[146] and resulted in severe punishment.[147] The first multilateral international LOAC treaty was negotiated during 1856 and the Paris Declaration Respecting Maritime Law[148] proclaims that '[p]rivateering is, and remains, aboliged'.[149]

This background shaped the efforts of Rousseau, who stated that war is a relation between States, and its citizens are involved only as accidental enemies and as soldiers defending the State.[150] Rousseau thus acknowledged that those who are not soldiers do not qualify, in any actual sense, as enemies of a hostile army.[151] This created an uncomplicated theoretical

[139] van Creveld, M *op cit* note 31 at 170.
[140] Watts, S 'Reciprocity and the Law of War' *Harvard International Law Journal* Vol 50 No 2 (Summer 2009) at 388.
[141] Ibid at 389.
[142] Copeland, DC *op cit* note 89 at 229.
[143] Rousseau, JJ *op cit note 68* book I ch. 4 at 59; von Glahn, G & Taulbee, JR *op cit* note 84 at 36.
[144] Citizens who took up arms to resist invading forces.
[145] Nabulsi, K *Traditions of War* (1999) at 42.
[146] Brenet, A *La France et l'Allemagne devant le droit international, pendant les ope´rations militaires de la guerre 1870–1871*, Rousseau, JJ Paris (1902) at 29 quoted in Nabulsi, K *op cit* note 124 at 43.
[147] Ibid at 63.
[148] Dinstein, Y *Conduct of Hostilities under the Law of International Armed Conflict* (2010) at 9.
[149] Article 1, *Paris Declaration Respecting Maritime Law*, 1856, Laws of Armed Conflict 787 – 788; Durham, H & Wynn-Pope, P *op cit* note 1 at 177; Bordwell, P *The Law of War Between Belligerents: A History and Commentary* (1908) at 47–8 in Nabulsi, K *op cit* note 124 at 36–37.
[150] Rousseau, JJ *Jean-Jacques Rousseau* book I ch. 4 at 56.
[151] See Jochnick, C & Normand, R 'The Legitimation of Violence: A Critical History of the Laws of War' *Harvard International Law Journal* Vol 35 (1994) 62 n. 48.

separation between combatants and citizens,[152] further shaping the jurisprudential foundation for the principle of citizen immunity.[153] The Rousseau *Portalis doctrine*[154] was, however, not collectively approved,[155] but it introduced the notion that the only legitimate object of war is to weaken the military forces of the enemy, as later codified in the St Petersburg Declaration.

The US Civil War between 1861 and 1865 was an example of total war. It occasionally turned into unqualified violence, which resulted in the distinction between combatant and civilian being disregarded.[156] In 1862, the Confederate Congress adopted the Partisan Ranger Act, which empowered the president to authorize partisan rangers to operate against Union forces behind their lines.[157] The rebel authorities asserted a right to engage in guerrilla warfare and to be treated as combatants. In fact, each side in this conflict employed irregular fighters.[158] It, however, seems that the Union army initially equated all irregular troops with 'guerrillas' and accordingly classified them as criminals.[159] This classification included individuals who bore arms for the South and civilians who, either actively or passively, supported irregular troops. The Union and Confederacy, nevertheless, observed a set of mutually-agreed limits to the violence, as opposed to the conduct during the wars against the US-Indians in 1865, where Unionists engaged in indiscriminate massacres.[160]

The General-in-Chief of the Union armies, Henry Wager Halleck, considered the Partisan Ranger Act as a breach of the customs of war. He requested an authoritative legal opinion from Dr Francis Lieber. This resulted, in 1862, in an initial essay on the topic[161] entitled Guerrilla Parties Considered with Reference to the Laws and Usages of War. This text concerned the treatment of 'armed parties loosely attached to the main body of the army, or altogether unconnected with it'[162] and constituted a legal evaluation of irregular fighters.

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[152] Best, G *op cit* note 72 *at* 258.
[153] Gardam, JG *op cit* note 93 at 13; See also Best, G *op cit* note 72 at 32.
[154] Sassoli, M & Bouvier, A (2nd Ed) *How does the Law Protects in War?* (2006) at 203; Rousseau, JJ *The Social Contract* in Sir Ernest Barker (ed in trans.) *Social Contract: Essays by Locke, Hume, and Rousseau* (1967) at 173-78.
[155] Best, G *op cit* note 72 at 55–59.
[156] Kinsella, Hm *op cit* note 44 at 82.
[157] Scheipers, S *op cit* note 6 at 47.
[158] Hays Parks, W *op cit*e note 91 at 773.
[159] Camins, E 'The Past as Prologue: the Development of the 'Direct Participation' Exception to Civilian Immunity*' IRRC* Vol 90 No 872 (December 2008) at 861.
[160] Kinsella, HM *op cit* note 44 at 82.
[161] See Hartigan, RS *op cit* note 86 at 31–44. This was implemented by General Order No 30: Official Orders Dealing with the Application of Lieber's Essay on Guerrilla Warfare, approved 22 April 1863.
[162] Ibid at 31.

Lieber then embarked on a more significant effort, which produced a comprehensive field manual, the 'General Orders, no. 100: Instructions for the Armies of the United States in the Field',[163] in which he distinguished between lawful partisan and other unlawful types of irregular fighters. Lieber concluded that prisoner of war rights must be denied to those who commit hostilities 'without being part . . . of the organized hostile army' and who resorted to 'occasional fighting and the occasional assuming of peaceful habits, and to brigandage' would not enjoy the protection of the laws of war.[164] Lieber, as did Grotius, acknowledged that the basic institutions of armed conflict are collective and that 'the citizen or native of [a] hostile country' is also an enemy and even though unarmed, may not be inoffensive.[165] Lieber thus assumed that combatants are completely identified with the collective and therefore only the collective commits and suffers aggression.[166] Admittedly, the 1899 Hague Convention changed this and it is no longer rational to consider a combatant as only part of a collective mass, but it is only when a combatant commits a crime that he emerges from the collective and becomes an individual.[167] Lieber understood that nations go to war and civilians thus share in the 'hardships of war'. He, however, pleaded for a general principle that would minimize harm to 'unarmed citizens'.[168]

Lieber believed that it was necessary to ensure that the Union army was disciplined and that the status of the enemy troops was well defined.[169] Fyodor Fyodorovich von Martens, as a result, commented that the Code was a perfect balance between brutality and humanity in war.[170] A close inspection, however, reveals that Lieber accords the greatest worth to military necessity and the Code allowed for a great degree of destruction and devastation.[171] In the end, the Code depends on the moral strength of combatants to abide by the code, exercise

[163] *General Orders No 100: Instructions for the Armies of the United States in the Field*, approved 24 April 1863 ('Lieber Code') (reproduced and available at http://www.icrc.org/LOAC.nsf/FULL/110?OpenDocument (last accessed on 1 May 2014).
[164] Lieber Code, Article 82; see also Boothby, WH 'And for Such Time As': The Time Dimensions to Direct Participation in Hostilities' *International Law and Politics* Vol 42:741 at 744.
[165] Ibid, Article 21.
[166] Ibid, Article 20 - '[p]ublic war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilian existence that men live in political, continuous societies, forming organised units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war'. See Fletcher, GP & Ohlin, JD *op cit* note 13 at 179.
[167] See in general the *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 90.
[168] Lieber Code, Article 22.
[169] Freidel, F *Francis Lieber* (1947) in Hartigan, RS *Lieber's Code and the Law of War* (1983) at 15.
[170] Kinsella, HM *op cit* note 44 at 82.
[171] Ibid at 86.

careful discrimination and be prudent in their use of violence.[172] The primary source for the Code was based on the work of Kant, and military necessity was allowed as long as it did not include any act of hostility 'which makes return to peace unnecessarily difficult'.[173] Already at this stage, some signs of human rights law with prohibitions on rape, slavery, and disparate treatment of captured combatants based upon race, were included in the Code.[174]

The Lieber Code was not an international instrument. It arose in the context of a NIAC but it initiated a movement to codify the customs and usages of armed conflict into multilateral treaties.[175] The Code was generally adopted, but not ratified in Europe.[176] It became the basis of many national manuals,[177] was respected by its contemporaries[178] and was the foundation of the draft text for the Brussels Conference in 1874[179] and the Hague Law.[180] The Lieber Code has been referred to as the genesis of the Law of Land Warfare[181] and was followed by the St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight of 1868 ('St Petersburg Declaration').[182]

3.2 The Lieber Code - The St Petersburg Declaration - The Brussels Declaration

From 1863 to 1868 there were 23 recorded armed conflicts,[183] which included 18 NIAC's and 5 IAC's. The movement that would eventually become the International Committee of the Red Cross was formally founded in 1863.[184] The current LOAC developed from the middle of the nineteenth century. These milestones in this development included the 1864 *Geneva*

[172] Ibid at 87.
[173] Article 16. See Fletcher, GP & Ohlin, JD op *cit note* 13 at 18.
[174] Hansen, MA 'Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict' *Military Law Review*, Vol 194 (Winter 2007) at 20.
[175] Watts, S *op cit* note 119 at 391.
[176] Lord Russell of Killowen 'International law: the annual address before the American Bar Association', *Albany Law Journal* Vol 54 (1896–7) at 122.
[177] Italy, 1896 and 1900; Russia, 1904; France, 1901 and 1912 – see in general von Glahn, G & Taulbee, JR *op cit* note 84 at 606; Kinsella, HM *op cit* note 44 at 85. See also in general Keck, TA *op cit* note 41 at 120.
[178] Sir Edward Creasy *First Platform of International Law* (1876) cited in Oppenheim, L 'On war treason' *Law Quarterly Review* Vol 33 (1917) at 278.
[179] *Final Protocol of the Brussels Conference*, opened for signature 27 August 1874, 4 Martens Nouveau Recueil (ser. 2) 219, and *Project of an International Declaration Concerning the Laws and Customs of War*, not opened for signature, 1874, both reproduced in Schindler, D and Toman, J (eds) *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (1988) at 25–34.
[180] Kinsella, HM *op cit* note 44 at 84.
[181] Lang, AF 'Civilians and War: Dilemmas in Law and Morality' *Carnegie Council for Ethics in International Affairs* available at http://www.carnegiecouncil.org/ resources/articles_papers_reports/95.html (last accessed on 1 May 2014).
[182] Reproduced in Roberts, A & Guelff, R (eds) *op cit* note 44 at 53.
[183] Sarkees, MR *op cit* note 12 at 6.
[184] von Glahn, G & Taulbee, JR *op cit* note 84 at 37.

Convention for the Amelioration of the Condition of the Wounded in Crimes in the Field, later revised in 1906; the 1868 Declaration of St. Petersburg Prohibiting the Use of Small or Incendiary Projectiles; the 1899 and 1907 Hague Conventions Codifying the Laws of Men; the 1949 Four Geneva "Red Cross" Conventions and the 1977 two Additional Protocols to the Geneva Conventions.[185]

In 1864 the Geneva Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field was adopted, as a direct outcome of the appalling suffering on the battlefield of Solferino, and only revised in 1906.[186] This Convention focused mainly on the humanitarian concerns of the wounded. Hereafter, the St Petersburg Declaration further attempted to regulate the conduct of warfare.[187] The purpose of the St Petersburg Declaration was to limit the use of 'exploding projectiles' but the clauses in the Preamble are important as they state "[t]hat the progress of civilization should have the effect of alleviating as much as possible the calamities of war; [t]hat the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy".[188]

The St Pietersburg Declaration recognized the balance between military necessity and humanity when seeking to "fix [] the technical limits at which the necessities of war ought to yield to the requirements of humanity".[189] This reasoning was adopted in the *Hostages Trial* where the Tribunal stated that 'military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with least possible expenditure of time, life and money'.[190]

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[185] *International Humanitarian Law as An Evolving Field of Law* 33 Integrated Bar of the Philippines Journal (2007). Keynote speech at the opening ceremonies of the 2007 Conference on International Humanitarian Law to Mark the 30th Anniversary of the 1977 Additional Protocols, held at Manila on 29 August 2007 available at http://miriam.com.ph/newsblog/wp-content/uploads/2011/10/INTERNATIONAL-HUMANITARIAN-LAW-AS-AN-EVOLVING-FIELD-OF-LAW.pdf (last accessed on 20 January 2015).

[186] Shaw, MN (6th Ed) *International Law* (2008) at 1168.

[187] See *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, opened for signature 29 November / 11 December 1868, 138 CTS 297 (entered into force 11 December 1868) preamble, reproduced in Roberts, A & Guelff, R (eds) *op cit* note 44 at 55; Melzer, N *Targeted Killing in International Law* (2008) at 283.

[188] *St Petersburg Declaration*, preamble; reproduced in Roberts, A & Guelff, R (eds) *op cit* note 44 *at* 53.

[189] See in general Schmitt, MN *op cit* note 24 at 799; GeiB, R 'Asymmetric Conflicts Structures' *IRRC*, Vol 88 No 864 December (2006) at 759 (referring to military necessity incorporated into the Lieber Code).

[190] *United States of America v Wilhelm List, et al (Judgement)* (1949) 8 Law Reports of Trials of War Criminals 34 at 66.

Hereafter, from 1868 to 1874, there were 18 recorded armed conflicts,[191] which included 17 NIAC's and one IAC. During this period, the Franco-Prussian War took place from 1870 to 1871. Prussia conceived of a military doctrine in 1870, known as *Kriegraison*.[192] This doctrine provides that '[a] war conducted with energy cannot be directed merely against the combatant forces of the Enemy State and positions they occupy, but it will and must in like manner seek to destroy the total intellectual and material resources of the latter. Humanitarian claims, such as the protection of men and their goals, can only be taken into consideration in as far as the nature and the object of war permit.'[193] Military victory was thus seen as a legitimate reason to reject humanitarian principles. The Prussian army had defeated the French forces and was about to capture Paris when the French government, in October 1870, called French citizens to resist the German occupation forces as *francs-tireurs*[194] and to attack their lines of communication. The Prussians issued an order, according to which *francs-tireurs* were not to be treated as prisoners of war upon capture.[195] The Franco-Prussian War and the realities of civilian participation required a reassessment of the laws of war.

3.3 The Brussels Declaration of 1874 - The Oxford Manual of 1880

From 1874 to 1880 there were 20 recorded armed conflicts,[196] which included 17 NIAC's and 3 IAC's. On the initiative of Tsar Alexander II of Russia, delegates from fifteen European States met in Brussels to consider the new realities of armed conflict as understood by the European powers and to draft an international agreement concerning the laws and customs of war. The Brussels Conference of 1874, which may be seen as an important expression of *opinion iuris*, offers a useful insight on the transformation in State-led mobilization and the definition and treatment of the enemy across the previous century. The time period from 1874 is referred to as the inception of the 'modern laws of war' inspired by the desire to introduce legal conventions into the practise of armed conflict.[197]

[191] Sarkees, MR *op cit* note 12 at 6.
[192] Keck, TA *op cit* note 41 at 120.
[193] The War Book of the German General Staff (1915) 68 (Morgan, JH translation) in Keck, TA *op cit* note 41 at 120.
[194] Literally 'free shooters'.
[195] *Bismarck in the Franco-German War 1870-1871* (Dr Moritz Busch trans. 2 Volumes (1879) Vol 2 at7. See generally Laqueur, W 'The Origins of Guerrilla Doctrine', 10 *Journal of Contemporary History* 341 (1975) at 357-358.
[196] Sarkees, MR *op cit* note 12.
[197] Nabulsi, K *op cit* note 124 at 4.

The Brussels Declaration confirmed, in varied terms, the principle of restraint, in which the only legitimate object of war is to weaken the enemy without inflicting unnecessary suffering.[198] It specified the classes of persons who could be considered as 'belligerents' under LOAC.[199] The laws applied to armies, militia and volunteer corps, who were commanded by a responsible person, had a fixed distinctive emblem recognisable at a distance, carried arms openly, and conducted their operations in accordance with LOAC.[200] This confirms the requirement of 'openness' in armed conflict and rejects perfidious methods. Belligerent status was also conferred on the members of a levee en masse,[201] and prisoner of war status was granted[202] to non-combatant members of the armed forces. The Brussels Conference was bound to fail[203] and closed without adopting a binding instrument.[204] Despite this, the Brussels Document resulted in the Manual of the Laws and Customs of Armed Conflict at Oxford in 1880, which formed the basis of The Hague Conventions on Land Armed Conflict of 1899 and 1907.[205]

3.4 The Oxford Manual of 1880 - The Hague Peace Conference of 1899

From 1880 to 1899 there were 60 recorded armed conflicts,[206] which included 54 NIAC's and 6 IAC's. Armed conflict during this time included formal uniformed armed forces and occurred on defined territory with a code of conduct, beginning with a formal declaration of war and ending with a peace treaty.[207] Some jurists, within the then formed Institute of International Law, worked on drafts of possible legal codes. The text produced is known as the Oxford Manual of 1880, which was thus a private attempt to codify the law of war.[208] The Oxford Manual, was widely ignored by States. It sought to codify 'the accepted ideas of our age so far as this has appeared allowable and practicable'.[209] Article 1 provided that [t]he state of war does not admit of acts of violence, save between the armed forces of belligerent

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[198] *Brussels Protocol*.
[199] Ibid, Articles 9 to 11.
[200] Ibid, Article 9.
[201] Ibid, Article 10.
[202] Ibid, Article 11.
[203] Nabulsi, K *op cit* note 124 at 8.
[204] See generally Spaight, JM *op cit* note 215 at 51-53.
[205] Scott, J (ed) *Report to the Hague Conferences of 1899 and 1907* (1917) at 137.
[206] Sarkees, MR *op cit* note 12 at 6.
[207] Maogoto, JN *op cit* note 95 at 21.
[208] *The Laws of War on Land*, adopted by Institute of International Law on 9 September 1880 ("Oxford Manual").
[209] *Oxford Manual*, preamble.

States. Persons not forming part of a belligerent armed force should abstain from such acts.[210] The armed forces of a State included bodies other than the regular army which, among other things, wore a uniform or 'fixed distinctive emblem' and carried arms openly.[211] The 'maltreatment' of 'inoffensive populations' was not allowed as the conflict is . . . 'carried on by armed forces only'.[212] These ideas were carried forth in The Hague Laws[213] and consensus on the definition of lawful belligerency was only reached in the 1907 Hague Convention on the Rules and Customs of War on Land.[214]

3.5 The Hague Peace Conference of 1899 - The Hague Peace Conference 1907

From 1899 to 1907 there were 26 recorded armed conflicts,[215] which included 21 NIAC's and 5 IAC's. The Anglo-Boer War of 1899 to 1902 was noteworthy as it brought the issue of irregular fighters to prominence.[216] The laws of war were decided upon, during this time, and until 1977, by the so-called civilized nations. Representatives of twenty-six States, nineteen of which were European States,[217] met in The Hague from 18 May to 29 July 1899.[218] The other States were made up by the United States, the Ottoman Empire, Mexico, China, Japan, Persia and Siam.[219] No African nations were invited to the Conference, although six had already claimed sovereignty. LOAC was suspended in colonial wars during which savages and 'half-civilized tribes' were treated differently in combat.[220]

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[210] Ibid, preamble, Article 1.
[211] Ibid, Article 2. The definition of armed forces further incorporated the inhabitants of non-occupied territory who took up arms spontaneously to resist invading enemy troops.
[212] Ibid, Article 7.
[213] Nabulsi, K 'Evolving Conceptions of Civilians and Belligerents: One Hundred Years after the Hague Peace Conferences*' in* Chesterman, S (ed) *Civilians in War* (2001) at 9-24; Scheipers, S *op cit* note 6 at 50.
[214] Annex to the Convention 'Regulations Respecting the Laws and Customs of War on Land,' § I, Chapter I, Art 1-2, in Roberts, A & Guelff, R (eds) *op cit* note 44 at 73.
[215] Sarkees, MR *op cit* note 12 at 6.
[216] Hays Parks, W *op cit* note 91 at 774.
[217] Namely Germany, Austria, Belgium, Denmark, Spain, France, the United Kingdom, Greece, Italy, Luxembourg, Montenegro, the Netherlands, Portugal, Romania, Russia, Serbia, Sweden, Norway, Switzerland and Bulgaria.
[218] *Hague Convention (II) with Respect to the Laws and Customs of War on Land*, 32 Stat. 1803, opened for signature 29 July 1899 (entered into force 4 September 1900) (1899 Hague Convention) and its Annex, *Regulations Respecting the Laws and Customs of War on Land* (1899 Hague Regulations); *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, 1910 UKTS 9, opened for signature 18 October 1907 (entered into force 26 January 1910) (1907 Hague Convention), and its Annex, *Regulations Respecting the Laws and Customs of War on Land* (1907 Hague Regulations) - Reproduced in Roberts, A & Guelff, R (eds) *op cit* note 44 at 59.
[219] Sarkin, J *op cit* note 90 at 2.
[220] Kinsella, HM *op cit* note 44 at 108.

This Conference was not immediately preceded by serious armed conflict. Many States were, however, disturbed, as the Geneva Convention of 1864 was not observed in the 1864 Franco-Prussian War. Conduct during the Crimean War was also of great concern. Technological and strategic developments displaced the *Clausewitzian* notion of formal Eurocentric warfare[221] and the 'nation at arms' notion emerged.[222] The Hague Conference was thus convened to "humanise war, by which we mean that it must be regularized".[223] The delegates wanted armed conflict to be worthy of civilized nations and governed by appropriate rules of engagement, which included a distinction between members of the armed forces and civilians.[224] Delegates believed, as repeated in later instruments, that civilians' DPH was fundamentally disruptive for all parties.

Von Martens, the Russian delegate at the Hague Conference, and the author of the Martens Clause,[225] argued that civilian participation in armed conflict should not be sanctioned or encouraged.[226] Persons participating in on-going partisan or resistance war in occupied territory were not to be granted combatant status, but were, instead, to be treated according to certain minimum fundamental standards of behaviour, as understood by considerations of 'humanity' and 'public conscience'.[227] This phrase is from the Martens Clause,[228] which was a compromise position to ensure that the stalemate over the question of civilian participation in mass levies and resistance warfare would not disrupt the Conference, and result in the failure to adopt any conventions.[229]

[221] GeiB, R *op cit* note 167 at 760.
[222] Maogoto, JN *op cit* note 95 at 21.
[223] Nabulsi, K *op cit* note 124 at 4.
[224] Gong, GW *The Standard of Civilization in International Society* (1984) at 75.
[225] The Clause was adopted in the 1899 Hague Conference and is contained in its preamble. The same preamble also refers to the need 'to diminish the evils of war so far as military necessity permit'.
[226] von Martens, FF *Contemporary International Law* (1896) at 523.
[227] Preamble to the Hague Conventions. The Martens Clause has been described as a flexible and responsive standard of protection and is accepted as customary law today.
[228] 'Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.'
[229] See Cassese, A 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' 11 *EJIL* 187 (2000) and Meron, T 'The Martens Clause, Principles of Humanity, and the Dictates of Public Conscience' 94 *AJIL* 78 (2000); Hayashi, HM *Legitimate Use of Military Force* (2008) at 136.

The GC's now contain the Martens Clause in the denunciation clauses[230] and it is also incorporated into the AP's to the GC's.[231] APII formulation of the Clause excludes the words 'the principles derived from established custom' as it was thought that State practice had not developed sufficiently in NIAC. It reads that 'in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience'. The International Court of Justice ("ICJ"), has, however, confirmed the customary nature of the Martens Clause 'as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons'.[232] The customary nature of the Clause was later also confirmed by the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[233] as it relates to NIAC.[234] The ICJ, in general, acknowledged that the 'elementary considerations of humanity' pervade LOAC.[235] At the least, the Martens Clause confirms that customary LOAC continues to apply even where a treaty on the same issue has been adopted. At best, the Clause confirms that LOAC consists of treaty and custom, but also of the principles of international law derived from other sources mentioned in the Martens Clause.[236] No court has, however, at any time, held that a rule or principle of LOAC has emerged as a result of 'the laws of humanity' or the 'dictates of public conscience'.[237]

The Hague meetings were shaped by two contrasting approaches. The Prussians represented the interests of the dominant European military powers.[238] They demanded that States employ regular armed forces as the service in a strong military organization "was not only a national, but a humane duty; for the more the war is conducted on both sides by regular and disciplined

[230] GCI, Article 63(4); GCII, Article 62(4); GCIII, Article 142(4); GCIV, Article 158(4).
[231] API, Article 1(2) & APII, Article Preamble.
[232] *Legality of Nuclear Weapons* ICJ NP 8 July 1996 at 84 available at http://www.icj-cij.org/docket/index.php?sum=498&code=unan&p1=3&p2=4&case=95&k=e1&p3=5%3E (last accessed on 30 May 2014).
[233] International Criminal Tribunal for the Former Yugoslavia: http://www.icty.org (last accessed on 1 May 2014) reproduced in Roberts, A & Guelff, R (eds) *op cit* note 42 at 565.
[234] *Prosecutor v Hadzihasanovic, Alagic and Kubura*, IT-01-47-PT (Decision on Joint Challenge to Jurisdiction, November 12, 2002) para 9 & 18; *Prosecutor v Hadzihasanovic, Alagic and Kubura*, IT-01-47-PT (Decision on Motions for Acquittal pursuant to Rule 98bis of the Rules of Procedure and Evidence. September 27, 2004) 98 & 104; *Kupreskic IT-95-16-T* (Judgment 14 January 2000) 527.
[235] *Corfu Channel (UK v Alb.)*, 1949 I.C.J. 4, 22 (April 9). See also the 2004 British Manual stating that the Martens Clause 'incorporates the earlier rules of chivalry that opposing combatants were entitled to respect and honour' – United Kingdom Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict (2004).
[236] Henderson, I 'Contemporary Law of Targeting: Military Objectives, Proportionality, and Precautions in Attack under Additional Protocol I' *International Humanitarian Law Series* Vol 25 (2009) at 30.
[237] Cassese, A *op cit* note 207 at 208.
[238] Spaight, JM *War Rights on Land* 55 (photo. reprint 1975) (1911) at 51.

troops, the less will humanity suffer".[239] The second, less dominant military powers, wanted to guarantee recognition of the patriotic right of all citizens to repel an invader based on the traditional *levée en masse* and the authority of individual citizens to resist invading forces.[240] As a result, the Hague deliberations concluded in a limited compromise and the resulting Regulations provided belligerent status to armies, and to militia that are under responsible command, have a fixed distinctive emblem recognizable at a distance, carry arms openly and conduct their operations in accordance with the laws and customs of war.[241] The less dominant military powers also achieved confirmation of a provision of belligerent status to inhabitants of a territory which was not occupied, "who on the approach of the enemy, spontaneously take up arms to resist . . . without having time to organize themselves".[242]

The Hague Peace Conference in 1907 resulted in thirteen conventions and a declaration.[243] The delegates at the 1907 Conference, however, did not foresee the circumstances that future conflicts would produce.[244] These Conventions also did not specifically provide for the immunity of civilians from direct attack as opposed to the Oxford Manual and the Brussels Protocol.[245] The Brussels Declaration definition of 'belligerent' was, however, reproduced in the Hague Regulations without change.[246] Both the Hague Conventions were considered to be declaratory of the existing rules of customary international law.[247]

These two Conferences mark a turning point in the relationship between States as the intention was to prevent future armed conflicts and to establish means for peaceful settlement of international disputes.[248] Significant efforts were made to codify existing rules of LOAC and to further humanise the effects of war. The Hague Conference therefore marks a critical point in the development of LOAC towards a more limited justification for military necessity

[239] Quotation from Rolin-Jacquemyns, G 'War in its Relations to International Law' in Watkin, K *op cit* note 69 at 20.
[240] Spaight, JM *op cit* note 215 at 51.
[241] Hague Regulations, Article 1.
[242] Ibid, Article 2.
[243] Roberts, A & Guelff, R (eds) *op cit* note 44 at 5.
[244] von Glahn, G & Taulbee, JR *op cit* note 84 at 606.
[245] See Oxford Manual, Article 7.
[246] See 1899 Hague Regulations, Article 1; cf. Brussels Declaration, Article 9. See Ipsen, K 'Combatants and non-combatants' (1995) in Fleck, D (ed) *The Handbook of International Humanitarian Law in Armed Conflicts* (1995) § 308 at 76.
[247] von Glahn, G & Taulbee, JR *op cit* note 84 at 606; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004 I.C.J. 136, 172 (July 9); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 I.C.J. 226. See also in general the *Nuremberg Tribunal 1 Trial of the Major War Criminals before the International Military Tribunal* 254 (1947).
[248] Maogoto, JN *op cit* note 95 at 21.

in favour of humanity.[249] The *Declaration of St. Petersburg* and the 1899 *Hague Convention* incorporate the suggestion that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.'[250] The two Hague Conferences noted '[t]he rights of belligerents to adopt means of injuring the enemy is not unlimited.'[251] The GC's and API and APII still, however, retain and provide for military necessity in numerous formulations.[252] Necessity, after the conclusion of these instruments may now be interpreted as a restraining factor which prohibits violence when it is unnecessary.[253] *The* Hague Conventions would, however, demonstrate a marked inability to regulate the total wars of the future. Spaight stated in 1911 that the delegates to the 1907 Conference had 'almost shirked their task, a task of great difficulty, it must be admitted'[254] in attempting to define combatant status. The belligerency provisions of the Hague Regulations on contemporary military operations are, however, significant and reflect customary international law. These provisions form the basis for determining POW status under the GC's and continue to affect interpretations of API.

3.6 The Hague Peace Conference 1907 - The Geneva Conventions of 1949

From 1907 to 1949 there were 120 recorded armed conflicts,[255] which included 94 NIAC's and 26 IAC's. During the period leading up to 1910, Britain was the global power but the economies of the United States and Germany outgrew that of Britain in 1872 and 1901 respectively. Japan also became industrialised and developed into the supreme power in northeast Asia by 1890.[256] These States started building a military force that could project their power and prestige.[257] Tension grew as Britain sought to maintain its dominant position, while Germany perceived France and Russia as obstacles to its continued development.

[249] Hayashi, HM *op cit* note 207 at 136.
[250] Sarkin, J *op cit* note 90 at 8.
[251] Article 22.
[252] GCI, Articles 8, 33, 42; GCII Articles 8, 28; GCIII, Articles 8, 126; GCIV, Articles 9, 18, 49, 53, 143; API, Article 52(2) & (5).
[253] Hayashi, HM *op cit* note 207 at 143.
[254] Spaight, JM *War Rights on Land* 55 (photo. reprint 1975) (1911) in Watkin, K *op cit* note 69 at 3.
[255] Scheipers, S 'Fighting Irregular Fighters. Is the Law of Armed Conflict Outdated?' *Parameters* 43(4) (Winter 2013-14) at 6.
[256] Morris, I *War, What is it Good For* (2014) at 241.
[257] Ibid at 240.

The Bryan Treaties[258] of 1913 represented a further attempt to limit the freedom of States to resort to war. Second generation war, however, started in 1914, with the so-called Great War and comprised of gathered manpower and stalemated trench warfare aimed at the destruction of the enemy's fighting force through massed firepower.[259] States were under the illusion[260] that the new technology would curtail the duration of war and its impact on civilians.[261] The destructive nature of this armed conflict was, however, not anticipated[262] and States were forced to question the viability of war as an instrument of national policy as the benefits of conquest were outweighed by the costs thereof.[263] This was the impetus for the development of the League of Nations which was intended to prevent future wars and the unjustified use of force.[264] *The* League of Nations Covenant was followed by the Draft Treaty of Mutual Assistance of 1923, which subsequently failed; thereafter States drafted the 1924 Protocol for the Pacific Settlement of International Disputes.[265] This Protocol all but produced a general prohibition on aggressive war.[266] The most noteworthy achievement of the League of Nations was produced in the Kellogg-Braind Pact of 1928,[267] which was informed by the liberal internationalist view that armed conflict could be eliminated through diplomacy and collective action.[268] Aggressive war became illegal for signatories and was recognised as part of general customary international law during the Nuremberg and Tokyo Tribunals.[269] This, however, became an incentive for States to deny the existence of armed conflict.[270]

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[258] Maogoto, JN *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (2013) at 22.
[259] See Rousseau, JJ *The Social Contract* (2004) at 68; Von Klausewitz, K *On War* (1832); Weber, M *The Theory of Social and Economic Organisation* (1915).
[260] Winter, J *Legacy of the Great War: Ninety Years On* (2009) at 40.
[261] von Glahn, G & Taulbee, JR (9th Ed) *Law Among Nations An Introduction to Public International Law* (2010) at 606.
[262] Storey, WK *First World War: A Concise Global History* (2010) at 1.
[263] Maogoto, JN *op cit* note 4 at 23.
[264] Ibid at 24; von Glahn, G & Taulbee, JR *op cit* note 7 at 74.
[265] *Protocol for the Pacific Settlement of International Disputes*, 1924 available at http://www.worldcourts.com/pcij/eng/documents/1924.10.02_protocol.htm (last accessed on 7 July 2014); Williamson, M 'Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan' *Liverpool Law Review* (2010) Vol 31 No 3 at 77.
[266] 'Asserting that a war of aggression constitutes a violation of this solidarity and an international crime.'
[267] *The International Treaty for the Renunciation of War as an Instrument of National Policy* signed in Paris, 27 August 1928, 94 L.N.T.S, 57, 46 Stat 2343. T.S. No 796; Williamson, M *op cit* note 11 at 79 – 80 & 85 - 89.
[268] Nabulsi, K *Traditions of War* (1999) at 12.
[269] See also the League of Nations Covenant, Articles 12-16. Provost, R *International Human Rights and Humanitarian Law* (2002) at 249.
[270] See the Sino-Japanese conflict of 1931-1933.

The Great War resulted in an expansion of the State system due to the destruction of the German, the Austro-Hungarian, the Russian, and the Turkish empires.[271] The new diversity of States resulted in a multiplicity of opinions and achieving consensus became more complicated. It is during this time that the phrase, World War I ('WWI') was coined, acknowledging the likelihood of a second world war.[272] World War II ('WWI') saw no one State emerging as a superpower[273] while the League of Nations was given no coercive powers to effectively police the developing stalemate between the evenly balanced powers. The following twenty years were characterised by internal and external State sanctioned violence and sluggish economic growth for all States, except Russia.[274] The Treaty of Versailles has, at the same time, been criticised for being too harsh, leaving Germany seeking revenge but also and as being too forgiving, thus leaving Germany essentially intact. War, again, seemed inevitable as States either wanted to protect or expand their influence. The League of Nations was terminated, for all practical purposes, as a result of a series of aggressive acts by the Axis powers during the 1930s.[275]

In 1938 Spaight argued that international law should recognise that 'the old clear-cut division of enemy individuals into combatants and non-combatants is no longer tenable without some qualification'.[276] This argument was reproduced in *the* Draft Convention for the Protection of Civilian Populations against New Engines of War and approved, in principle, by the International Law Association in 1938.[277] It protected the 'civilian population', defined as 'all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment', from '[forming] the object of an act of war'. 'Belligerent establishments' were defined as 'military, naval or air establishment, or barracks, arsenal, munitions stores or factories, aerodromes or aeroplane workshops or ships of war,

[271] von Glahn, G & Taulbee, JR *op cit* note 7 at 37.
[272] Neiberg, MS *Fighting the Great War: A Global History* (2005) at 363.
[273] Black, J 'The Western Way of War' *Ashgate Research Companion to Modern Warfare* (2010) at 13.
[274] Morris, I *op cit* note 2 at 261.
[275] Maogoto *op cit* note 4 at 27.
[276] For similar arguments see Hays Parks, W 'Air War and the Law of War' *Air Force Law Review* Vol 32 (1990); see also Guillory, ME 'Civilianizing the Force: is the United States Crossing the Rubicon?' *Air Force Law Review* Vol 51 (2001) at 115–16.
[277] *Draft Convention for the Protection of Civilian Populations Against New Engines of War*, adopted by the International Law Association (29 August – 2 September 1938) (not opened for signature), reproduced in Schindler, D & Toman, J (eds) *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (1988) at 223–229.

naval dockyards, forts, or fortifications for defensive or offensive purposes, or entrenchments'.[278] The Draft was not signed, nor adopted due to the onset of WWII.[279]

Third generation war commenced with WWII in 1939. The roots of WWII may be found in the conflicts that preceded it and the superficial commitment to peace and disarmament following WWI.[280] The focus shifted to the destruction of the enemy's command and control, and was characterised by strategic manoeuvring.[281] Armed conflict moved into densely populated civilian areas. WWII was a humanitarian disaster and at times civilians were exterminated and intentionally targeted[282] based on what is referred to as the 'supreme emergency'.[283] Civilian immunity from attack was susceptible to arguments that military necessity sanctioned their targeting. The arguments were intended to justify the systematic aerial bombing of civilian and industrial targets. Throughout this conflict, most of the existing laws designed to protect civilians and civilian objects[284] were ignored or reinterpreted by all parties to the conflict.[285] The allied military powers, in principle, rejected the idea that military necessity was a legitimate reason to discard humanitarian concerns. These same powers, practically applied the doctrine of *Kriegraison*, and proceeded to firebomb civilian populations and ultimately deployed nuclear weapons against Japan.[286] The widespread bombing of civilians to counteract their general contribution to the war effort or to terrorize them into surrender, substantially influenced the development of API.[287] It is argued here that this action, and the realisation by the allied powers of their own blameworthiness, despite prosecuting various persons for similar offences against civilians, resulted in the exclusion from the GC's of a C-DPH exception. Victor's justice was, however, short-lived and replaced by a more compassionate attitude towards civilians during the drafting of the AP's.

[278] ILA Draft Convention, Article 2.
[279] Noone, GP 'The History and Evolution of the Law of War Prior to World War II' *Naval Law Review* Vol 47 (2000) at 204.
[280] O'Connell, RL *Of Arms and Men: A History of War, Weapons, and Aggression* (1990) at 271.
[281] Mohamedou, MM *op cit* note 20 at 20.
[282] See Rogers, APV (3rd Ed) *Law on the Battlefield* (2012) at 131-133; Greenspan, M *The Modern Law of Land Warfare* (1959) at 335.
[283] Kaufman, F 'Just War Theory and Killing the Innocent' *SUNY Series, Ethics and the Military Profession: Rethinking the Just War Tradition* (2007) at 103 - 110.
[284] See for example *Convention (IV) Respecting the Laws and Customs of War on Land* and its annex: *Regulations Concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907.
[285] See further Maier, CS 'Targeting the City: Debates and Silences About the Aerial Bombing of World War II' 87 *International Review of the Red Cross* (2005) at 429.
[286] Keck, TA *op cit* note 60 at 121.
[287] This is evident in the prohibition of terror bombings in API, Article 51(2).

The three generations of warfare operated within a common traditional war paradigm, wherein war constituted a relationship between men as soldiers, States enjoyed a monopoly over organised violence, and armed conflict occurred between States.[288] As a general rule, inter-State wars were decided by soldiers in recognizable uniforms and the ultimate outcomes of those conflicts were determined by pitched battles between regular forces on battlefields relatively free of civilians.[289] The weapons of the day required a degree of physical proximity between adversaries. Methods of warfare, specifically aerial warfare, which allowed indiscriminate attacks, however, quickly became more sophisticated and the participation of the civilian population increased exponentially in the World Wars. The total war practices of WWII resulted in the principle of distinction becoming "so whittled down by the demands of military necessity that it has become more apparent than real",[290] but the principle continued to be seen as the primary vehicle for the humanizing of war.[291] The atrocities of WWII marked a shift towards a more humanitarian focus. This was confirmed in 1945 when the Charter of the International Military Tribunal was ratified by nineteen States, providing for jurisdiction over war crimes against civilians.[292] Many leaders, including Churchill were initially opposed to war-crimes trials and wanted war criminals to be executed without trial. However, Truman, Attlee and Stalin wanted large-scale trials to be conducted. Victor's justice followed at the Nuremberg trials but many Nazi scientists, engineers, industrialists, spies and bankers were never prosecuted based on their perceived usefulness to the Allies.[293]

The pervasive carnage of WWI and WWII gave rise to many questions as to whether the Hague Conventions had any influence on State practice and behaviour.[294] The ICRC again, in 1946, intended to codify the legal principles for the regulation of NIAC and proposed a draft provision at the Preliminary Conference of National Red Cross Societies. This draft stated that NIAC would see the Convention equally applicable by each of the adverse Parties, unless

[288] Rousseau, JJ *op cit* note 5 at 68; von Klausewitz, K *op cit* note 5; Weber, M *The Theory of Social and Economic Organisation* (1915); Mohamedou, MM *op cit* note 17 at 21.
[289] Kinsella, HM *op cit* note 63 at 115.
[290] Nurick, L 'The Distinction Between Combatant and Noncombatant in the Law of War' *American Journal of International Law* Vol 39 No 4 (1945) at 680.
[291] Spaight, JM *Air Power and War Rights* (1947) at 76 in Watkin, K 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' *Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series Winter* (2005) at 9.
[292] *Charter of the International Military Tribunal at Nuremburg*, Article 6(b)-(c), Augustus 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279; See in general Schmitt, MN *op cit* note 24 at 807.
[293] Sebestyen, V *1946 – The Making of the Modern World* (2014) at 240-242.
[294] Watts, S *op cit* note 139) at 401.

one Party expressly declared they would not conform thereto.[295] The 1947 Conference of Government Experts for the Study of Conventions for the Protection of War Victims[296] initially supported this to a degree and the ICRC thus drafted a new proposal for the 1948 International Conference in Stockholm. This draft required that the principles of the convention be obligatory on each of the adversaries in NIAC, which occurs in one or more of the High Contracting Parties territory. The application of the Convention did not depend on the legal status of the parties to the conflict and did not affect their status. These were amended and approved, at the 17th International Conference of the Red Cross, held in Stockholm in 1948, for submission to the Diplomatic Conference.[297] This draft was, after consideration, brought before the Diplomatic Conference in 1949.[298] This conference was the culmination of several previous attempts to develop LOAC by European States. The earlier attempt included the Geneva Convention of 1864,[299] which was revised in 1906 and replaced with a further convention in 1929[300] after WWI.

At this time the first international treaty containing human rights was adopted.[301] The Universal Declaration of Human Rights of 1948 ('UDHR')[302] influenced the drafting of the GC's, and specifically Common Article 3 thereof.[303] Some argue that the UDHR was intended to operate in times of peace in accordance with the main purpose of the United Nations ('UN'), while others argue that the UDHR also applies during armed conflict.[304]

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[295] Moir, L *Legal Protection of Civilians during Armed Conflict* (2007) at 23.
[296] ICRC, *Convention for the Amelioration of the Condition of Soldiers Wounded in Armies in the Field;* See also ICRC *The Geneva Conventions of 12 August 1949*.
[297] Roberts, A & Guelff, R (eds) *Documents of the Laws of War* (2010) at 195.
[298] Pictet, JS (ed) *Commentary to the Third Geneva Convention Relative to the Treatment of Prisoners of War* ICRC, Geneva (1960) at 31.
[299] ICRC, *Convention for the Amelioration of the Condition of Soldiers Wounded in Armies in the Field*. See for a discussion the ICRC, The Geneva Conventions of 12 August 1949.
[300] *Geneva Convention Relative to the Treatment of Prisoners of War 1929*, 118 *LNTS* 343.
[301] Fortin, K 'Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948 –1968' *IRRC* Vol 94 No 888 (Winter 2012) at 1436.
[302] Droege, C 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' *Isr. L. Rev*. Vol 40 No 2 (2007) 313; *Universal Declaration of Human Rights*, GA Res. 217A (III), U.N. Doc A/810 at 71 (1948).
[303] Ibid at 313; see also the Swiss Federal Political Department, Final Record of the Diplomatic Conference of Geneva of 1949 Vol 2 § B at 536 where the president of the conference noted that 'the Universal Declaration of Human Rights and the Geneva Conventions are both derived from one and the same ideal.' Fortin, K *op cit* note 46 at 1445.
[304] Fortin, K *op cit* note 46 at 1436; see also Pilloud, C 'La Declaration Universelle des Troits de l'Homme et Les Conventions Internationales Protegeant Les Victimes de la Guerre' *IRRC* Vol 364 (April 1949) translated by Fortin, K 'Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law 1948 –1968' *IRRC* Vol 94 No 888 (Winter 2012) at 1441.

Towards the end of WWII, the UN[305] was formed, together with the International Court of Justice ('ICJ'),[306] and many other intergovernmental organizations.[307] The UN Charter was designed to resist challenges to the system of well-defined States;[308] territorial integrity was emphasized and only sovereign States qualified for membership.[309] The legitimate use of force was centralized in States to maintain order[310] but the legal use of force was further restricted.[311] The UN and other international organizations accepted the legally binding nature of the State system in their assessment of conduct in armed conflict.[312] The UN Charter further represents a rejection of just war and this is specifically confirmed in Article 2(3) thereof as States are required to settle disputes peacefully.[313] However, forty days after the UN Charter was signed on 26 June 1945, and even before it came into force on 24 October 1945, the first of two atomic bombs was detonated in Japan.[314] The pursuit of peace now became the principle ambition of the international community.

3.7 The Geneva Conventions of 1949 - The Additional Protocols I and II of 1977

From 1949 to 1977 there were 92 recorded armed conflicts,[315] which included 74 NIAC's and 18 IAC's.[316] The post-WWII era saw a rise in the frequency of NIAC, while IAC's became a rarity,[317] in part, due to the existence of nuclear weapons.[318] Two hemispherical superpowers, who perceived each other as a threat to their continued dominance, emerged. A further world war was, however, unthinkable as both the Soviet Union and the US anticipated their

[305] *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI.
[306] *Statute of the International Court of Justice*, June 26, 1945, 59 stat. 1055, 33 U.N.T.S. 993 set up under the UN Charter in 1945.
[307] von Glahn, G & Taulbee, JR *op cit* note 7 at 37.
[308] Ibid at 38.
[309] Ibid at 37.
[310] Maogoto, JN *op cit* note 4 at 28.
[311] Helmke, B (ed) *Under Attack: Challenges to the Rules Governing the International Use of Force* (2010) at 41. The prohibition on the threat and use of force in the UN Charter, Article 2(4) is a *jus cogens* norm – see the *Vienna Convention on the Law of Treaties* (1969), Article 53 for a definition of *jus cogens*.
[312] See for example United Nations General Assembly, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (September 25, 2009) A/HRC/12/48 available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (last accessed on 1 May 2014). S*ee also* Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (March 31, 2001) available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (last accessed on 1 May 2014).
[313] Maogoto, JN *op cit* note 4 at 36.
[314] Cassese, A (2nd Ed) *International Law* (2005) at 39.
[315] See Sarkees, MR *op cit* note 12 at 6.
[316] For a comparison of the conflict trends according to various conflict models (Correlates of War; Uppsala Conflict Data Project, the Major Episodes of Political Violence and the Conflict Simulation Model), see Williamson, M *Terrorism, War and International Law* (2013) at 16 – 24.
[317] Moir, L *op cit* note 40 at 1.
[318] van Creveld, M *Rise & Decline of the State* (1999) at 337; O'Connell, RL *op cit* note 26 at 296.

mutually assured destruction, should they violently oppose each other.[319] A Cold War developed between the US and the Soviet Union. This conflict was not foreseen when the UN Charter was finalised and, as a result, the mechanism put in place was less effective than expected.[320] The Charter further presupposes that armed conflict will only take place between States and their clearly identifiable regular armed forces.[321] The rise of nationalism in colonial areas and self-determination, however, posed a challenge to this idea. During the 1960s and 1970s, the UN General Assembly ('GA') adopted a number of resolutions regarding the colonial wars taking place in Africa and South East Asia.[322]

Traditional conflicts still occurred on the Korean Peninsula, and between Iran and Iraq. The number of asymmetric conflicts involving guerrilla forces and other armed groups increased[323] as numerous groups sought self-determination.[324] Examples include the Viet Cong that supported the North Vietnamese Army, the FARC in Colombia, the Afghan Mujahedeen and the Tamil Tigers in Sri Lanka. Guerrilla warfare evolved from tactical annoyance to strategic threat and thus, a transformation occurred in the manner in which conflict is channelled, conducted and justified.[325] This fourth generation of war concerned itself with the destruction of the enemy's will to fight. It involved network warfare and was characterized by the transformation of the temporal and spatial elements of conflict, a change of the belligerents' identities, the expansion of the nature of targets to include political, social and cultural symbols, and the systematization of privatized asymmetrical warfare.[326]

In 1949, the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War was mandated only with updating the 'Geneva Law' and not the Hague Regulations.[327] The central concern of the Conference was the protection of the

[319] Morris, I *op cit* note 2 at 281.
[320] Helmke, B *op cit* note 56 at 41.
[321] von Glahn, G & Taulbee, JR *op cit* note 7 at 38.
[322] See in general Crawford, E 'Regulating the Irregular – International Humanitarian Law and the Question of Civilian Participation in Armed Conflicts' *Sydney Law School Legal Studies Research Paper* No 11/46 (August 2011) fn. 41.
[323] See Boot, M *The Evolution of Irregular War*, Foreign Affairs, January 5, 2013, http://www.foreignaffairs.com/articles/138824/max-boot/the-evolution-of-irregular-war?page=show (last accessed on 1 May 2014).
[324] Watkin, K *op cit* note 29 at 24.
[325] *See for example* U.S. Counterinsurgency Manual; see also British Army Field Manual Vol 1 Part 10: Countering Insurgency (2009).
[326] Mohamedou, MM *op cit* note 17 at 25.
[327] See ICRC, *Commentary on the Additional Protocols* of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987 [1829].

victims of war[328] and to rectify, after WWII, the neglect of, and status of the civilian.[329] The conference adopted four GC's, the first three dealing with combatants[330] and the fourth dealing with the protection of civilians.[331] The adoption of the GC's in 1949 documented a more rigorous distinction between combatants and civilians. Combatants formed part of the opposing force;[332] they were permitted to kill and may be targeted, whether or not they were 'materially innocent' or posed 'an imminent threat of harm'.[333] There was a concern after WWII that the concept of 'quasi-combatant' would be reintroduced into LOAC.[334] This resulted in a significantly more restricted idea of combatant status.[335]

The experience and treatment of partisan and resistance fighters, who resisted Nazi occupation in Occupied Europe, again put the issue of civilian involvement in armed conflict on the agenda for the 1949 Diplomatic Conference.[336] States that had been subject to occupation by the Nazis argued that these participants deserved equal treatment to combatants, including full POW recognition and protection if captured. They also argued that less restrictive conditions for fulfillment of combatant status for partisans should be introduced.[337] The French delegation to the Geneva Conference, which included many former members of the resistance, had lobbied for the inclusion of provisions of conditions for lawful acts of resistance against occupying forces, but delegations from the US and the United Kingdom opposed this.[338]

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[328] Roberts, A & Guelff, R (eds) *op cit* note 42 at 195.
[329] Kinsella, HM *op cit* note 35 at 111.
[330] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, of 12 August 1949; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, of 12 August 1949; *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, of 12 August 1949.
[331] *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, of 12 August 1949.
[332] Fletcher, GP & Ohlin, JD *op cit* note 13 at 23.
[333] McMahan, J 'Innocence, Self-Defence and Killing in War' *Journal of Political Philosophy* Vol 2 Issue 3 (September 1994) at 197-198.
[334] See Sassoli, M *'Targeting: The Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts*' in Wippman, D & Evangelista, M (eds) *New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts* (2005) at 201-202.
[335] Spaight, JM 'Non-combatants and Air Attack,' *Air Law Review* (1938) 372 375 ('International law should…classify such [armament] workers as *quasi-combatants.* Unless they are clearly separated from ordinary non-combatants their treatment may set the pace for the treatment of all non-combatants.'). For a contemporary assessment see Doswald-Beck, L 'The San Remo Manual on International Law Applicable to Armed Conflicts at Sea,' *American Journal of International Law* 89 (1995) at 199 - the US Navy definition of military objectives includes 'war-sustaining capability,' and attacks on civilians, who are 'quasi-combatants' are sometimes justified because of the general economic support they gave to the enemy.
[336] Kinsella, HM *op cit* note 35 at 114; See further *GCIII Commentary* 49-50 & 52-64.
[337] See *GCIII Commentary* 52-55.
[338] There was little controversy over including *levee en masse* in the categories of legitimate combatant. The Geneva Conventions included *levee en masse* in Article 13(6) of Convention I, Article 13(6) of Convention II,

The parties agreed that partisans and resistance fighters could enjoy international protections and rights, provided they fulfilled the criteria outlined in Article 1 of the 1907 Hague Regulations.[339] The delegates were aware of the possibility of introducing a tripartite distinction, rather than the current misleading binary distinction and thus a shadow category remains until today. GCIV, however, still only refers to 'protected persons', who are 'individuals taking no active part in hostilities'.[340] Article 4 defined protected persons as those who find themselves in the hands of the enemy of a different nationality and who are not participants in 'active hostilities to the security of the State' as members of a military organisation. Active hostilities to the security of the State were only defined in 1977, although this definition is unsatisfactory.[341] TGCIV only extends protection 'from arbitrary action on the part of the enemy, and not from the dangers of military operations themselves'.[342] The ICRC's Commentary to GCIV,[343] designed to protect the civilian population from the dangers of military operations, was systematically removed during the conference.[344] GCIV demarcates civilians as a separate category of persons entitled to specific protections in war and prohibits civilian reprisals, fines, and the taking of hostages.[345] This is contrary to the earlier codification of the laws of war that were more concerned with the treatment of combatants.[346] It also symbolically separates the civilian from his or her alleged links with irregular fighters.

The GC's aims to achieve the humane treatment of all persons affected by armed conflict. This reflects the inclusion of the Martens Clause into the Conventions, which was also a part of the AP's and an interpretive tool later in the rulings of the ICTY to establish the meaning

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and Article 4(A)(6) of Convention III - *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949, 75 *UNTS* 31; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 1949, 75 *UNTS* 85; *Geneva Convention (III) Relative to the Treatment of Prisoners of War 1949*, 75 *UNTS* 135; See also Pictet, JS *op cit* note 294 at 67-68. Nabulsi, K *op cit* note 14 at 14; Best, G *op cit* note 72 at 18.

[339] See *GCIII Commentary* 53.

[340] Common Article 3, Accordingly, the Geneva Conventions recognise partisan and organised resistance movements, under Article 4(A)(2) of Convention III, providing for treatment as POW status for organised groups, even if they operate in already occupied territory. Kinsella, HM *op cit* note 35 at 116.

[341] Kinsella, HM *op cit* note 35 at 116.

[342] Uhler, OM & Coursier, H *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (1958) at 10.

[343] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, opened for signature 12 August 1949 (entered into force 21 October 1950).

[344] ICRC, Commentary on the Geneva Conventions of 12 August 1949 Vol IV (1952) at 10.

[345] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* of August12, 1949, Part I, Art 4, 13, 33 and 43, in Roberts, A & Guelff, R (eds) *op cit* note 42 at 302, 306, 312.

[346] Roberts, A & Guelff, R (eds) *op cit* note 42 at 299.

of LOAC.[347] In cases of doubt, the clause was used to support an interpretation consistent with the principles of humanity and the dictates of public conscience.[348] The Clause was used to invest the law with moral strength and progressive potential. GCIV, in Article 27, stipulates that "protected persons are entitled, in all circumstances, to respect for their persons, . . ." and "shall at all times be humanly treated, and shall be protected especially against all acts of violence or threats thereof."[349]

The GC's are linked by general principles but also by common articles. The provisions contained in Common Article 3 to the GC's ("Common Article 3") create minimum guarantees[350] applicable in all NIAC and protects 'persons taking no active part in the hostilities' against 'violence to life and person, in particular murder of all kinds'. Until December 1978, only Common Article 3, referred to as a statement of "affectionate generalities",[351] or a "convention in miniature",[352] was applicable to NIAC. The ICJ held that Common Article 3 "constitute[s] a minimum yardstick" in IAC and as representing "elementary considerations of humanity".[353] This is interesting, as on initial reading, Common Article 3 applies to NIAC only. The matters of *Tadic*[354] and *Celebici*[355] further held that Common Article 3 represents customary LOAC.

From the inception of Common Article 3, States resisted the idea that non-State actors could obtain legal privilege to engage in hostilities against regular armed forces.[356] The ICRC was in favour of the development of combatant status for non-State parties as this would forbid States from punishing their own citizens for taking up arms against lawful authority.[357] The irrelevance of legal privilege for non-state Parties in NIAC represents the most noteworthy distinction between the laws of IAC and NIAC.[358] The API, Article 43 definition of

[347] Kinsella, HM *op cit* note 35 at 111.
[348] Meron, T 'The Martens Clause, Principles of Humanity, and the Dictates of Public Conscience' 94 *AJIL* 78 (2000) at 89.
[349] GCIV, Article 27.
[350] Kinsella, HM *op cit* note 35 at 119.
[351] Farer, TJ *The Laws of War 25 Years After Nuremberg* (International Conciliation No 538 197131 in von Glahn, G & Taulbee, JR *op cit* note 7 at 608.
[352] Watts, S *op cit* note 39 at 409. See also *Hamdan v. Rumsfeld*, 548 U.S. (2006) 557, 629-31.
[353] *Military and Paramilitary Activities in and against Nicaragua* (*United States v. Nicaragua*), Merits, Judgement of 27 June 1986, I.C.J. 14, (June 27) at 114.
[354] *Prosecutor v. Dusko Tadic*, Decision on Jurisdiction, 2 October 1995 – Case No 211 (A) at 98-99.
[355] *Prosecutor v Delalic*, Case No IT-96-21-A, Appeals Chamber Judgment (February 20, 2001) at 174.
[356] See Pictet, JS *op cit* note 294 at 43- 44.
[357] Corn, G & Jenks, C 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflict' *U.PA. J. Int'l. L.* [Vol 33:2] at 328.
[358] Ibid.

combatant is thus incompatible with NIAC's due to the fundamental difference in the nature of conflict between these two categories. What is, however, evident is that combat status refers to the right to participate, which should not be directly equated to targeting decisions.

Common Article 3 was the first attempt to create a rule of international law, which required that States treat their own citizens in accordance with the minimum standards agreed on by the nations of the world. APII reaffirms Common Article 3 and rejects the legitimacy of any form of discrimination in its application[359] and includes, *inter alia,* a list of fundamental guarantees for those persons not taking a direct part or who have ceased to take part in hostilities.[360] The formulation of Common Article 3 was intensely debated within GCIV, as it was seen to violate State sovereignty by regulating the conflict within borders of the State.[361] Civil and colonial wars were initially excluded, although this was revisited in the 1977 Protocols.[362] The commentary on GCIV refers to civilians as those who 'by definition do not bear arms,' are 'outside the fighting' and 'take no active part in hostilities'. Protection of combatants results from physical disability (wounds and sickness) and incarceration (POW status), which situations place combatants into dependency and vulnerability.[363]

States, during this period, started acknowledging that human rights applied in armed conflict. The GA appealed to human rights in 1953 with regards to the treatment of captured participants and civilians during the Korean conflict.[364] The Security Council ("SC"), in 1956, requested that the Soviet Union and Hungary "respect [. . .] the Hungarian people's enjoyment of fundamental human rights and freedoms".[365] This was followed by a statement by the SC in 1967 that 'essential and inalienable human rights should be respected even during the vicissitudes of war' with regards to the Six Day War.[366] The SC continued this trend and has cited LOAC continuously in support of its resolution. This trend was evident in Resolution 808 on the conflict in the former Yugoslavia where the *ad hoc* tribunal established

[359] APII, Article 2(1).
[360] Common Article 3 to the Geneva Conventions in Roberts, A & Guelff, R (eds) *op cit* note 42; Scheipers, S op cit note 1 at 50.
[361] Army Council Secretariat Brief for Secretary of State for War, 1 December 1949, quoted in Bennett, H *Fighting the Mau Mau: The British Army and Counter-Insurgency in the Kenya Emergency* (2013) at 68.
[362] Kinsella, HM *op cit* note 35 at 119.
[363] Uhler, O & Coursier, H *op cit* note 338 at 119.
[364] GA Res. 804 (VIII), UN Doc. A804/VIII (Dec. 3, 1953)
[365] GA. Res. 1312 (XIII), UN Doc. A38/49 (Dec. 12. 1958).
[366] GA Res. 237, 2, Preambular 2, UN Doc. A237/1967, (June 14, 1967).

by the SC prosecuted those 'responsible for serious violations of humanitarian law . . .'[367] and the SC resolutions on Iraq's occupation of Kuwait.[368]

The 1954 to 1962 French-Algerian War altered the manner in which wars of national liberation and decolonisation were identified and understood. This conflict was characterised by insurgency and counter-insurgency as the primary military strategy on both sides. This strategy fully and purposefully politicised the entire population of Algeria and everyone was thus a suspect at all times in a war without spatial or temporal boundaries.[369] The participants successfully advocated for the legitimacy of their struggle in the UN and internationally.[370] The UN Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 accordingly contained the right to self-determination.[371]

After the completion of the 1949 GC's, the ICRC, during 1955, proposed a set of articles published under the title Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War.[372] These Draft Rules confirmed some principles of customary law and presented a response to challenges flowing from changes and developments in weaponry. The Draft Rules were intended mainly to achieve the protection of 'civilian populations efficiently from the dangers of atomic, chemical and bacteriological warfare'.[373] This Project was rejected during the 19th International Conference of the Red Cross in 1957 in New Delhi.[374] The Draft Rules were never implemented but they constituted an essential document in the development of a respected revision of LOAC and constituted an attempt to compel parties to limit their military operations to the destruction of military resources, and to protect the civilian population from armed attacks. [375] Interestingly, the persons qualifying for civilian immunity under the 1956 Draft Rules were significantly less

[367] *International Criminal Tribunal for the Former Yugoslavia*: http://www.icty.org (last accessed on 1 May 2014). See also SC Resolution 780 (1992).
[368] SC Resolution 670 (1990) & 674 (1990).
[369] Trinquier, R *Modern Warfare - A French View of Counterinsurgency*, trans Daniel Lee (1964) at 26.
[370] Uhler, O & Coursier, H *op cit* note 338 at 127.
[371] API, Articles 1(4) & 96; See Provost, R *op cit* note 15 at 253.
[372] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, approved by the International Conference of the Red Cross, 1956 (no entry into force) (1956 Draft Rules).
[373] ICRC, *Introduction to the Draft Rules* available at www.icrc.org/LOAC.nsf/INTRO/420?OpenDocument (last accessed on 1 May 2014).
[374] Spoerri, P *From the 1907 Hague Conventions to the Additional Protocols of 1977 and beyond Historical Evolution of the Law on the Conduct of Hostilities in* Gian L Beruto *The Conduct of Hostilities. Revisiting the Law of Armed Conflict 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols* (2007) at 38.
[375] ICRC Commentary on Additional Protocols at 1832.

than those later protected under API, Article 51(3). The ICRC's 1956 Draft Rules would have denied civilian status to all persons who participated in armed conflict.

The forfeiture of civilian immunity remained problematic during the US war in the Republic of Vietnam from 1961 to 1965, although there were rules of engagement to protect civilians.[376] The Cuban Missile Crisis in 1962 brought the world to the brink of nuclear war.[377] The ICRC thereafter offered a detailed set of regulations to States for their approval which was intended to reaffirm certain fundamental principles. The 20th International Conference of the Red Cross and Red Crescent in Vienna in 1965 resulted in the adoption of Resolution 28, which declared that all governments and other authorities responsible for armed operations should abide by a set of minimum rules during the armed conflict.[378] This resolution provided that distinction must be made at all times between persons taking part in hostilities and members of the civilian population. During this time the GA adopted Resolution 2675 (XXV) which requires that a distinction must be made between "persons actively taking part in hostilities and civilian populations . . .".[379]

The Tehran International Conference on Human Rights[380] in 1968 further entrenched the application of human rights in armed conflict when a resolution entitled Respect and Enforcement of Human Rights in the Occupied Territories relating to the application of the UDHR and the GC's in the occupied Palestinian territories was adopted.[381] Resolution 2444, Respect for Human Rights in Armed Conflicts,[382] which affirmed the principle of distinction, was also adopted at this conference.[383]

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[376] Hays Parks, W 'Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect' *International Law and Politics* (2010) Vol 42:769 at 777.
[377] Copeland, DC *The Origins of Major War* (2000) at 186.
[378] *Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare*, Res. XXVIII, adopted by the XXth International Conference of the Red Cross, Vienna (1965), reproduced in Schindler, D & Toman, J (eds) *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (1988) at 29–30. Spoerri, P *op cit* note 370. The Conduct of Hostilities, Revisiting the Law of Armed Conflict, 100 Years after the 1907 Hague Conventions and 30 Years after the 1977 Additional Protocols. *Current Problems of International Humanitarian* Law (2008) at 8.
[379] Robertson, HB 'The Principle of Military Objective in the Law of Armed Conflict' *Journal of Legal Studies* at 35.
[380] Human Rights in Armed Conflicts, UN Res. XXIII, International Conference on Human Rights, UN Doc.A/Conf. 32/41 (Sales No, 68.XIV.2) (1968), reproduced in Schindler, D & Toman, J (eds) *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (1988) at 261–2.
[381] *Final Act of the International Conference on Human Rights*, UN Doc. A/Conf.32/41 (April 22 May, 1968).
[382] Respect for Human Rights in Armed Conflicts, GA Res. 2444, UN GAOR, 23rd session, Supp No 18 (A/7218) (1968), [1(c)]. The resolution affirmed resolution XXVIII of the XXth International Conference of the Red Cross.
[383] See Doswald-Beck, L & Vite, S *op cit* note 76 at 1.

The GA passed a resolution in 1968 requesting the secretary-general to report on the implementation of the law of armed conflict and the possible need for further instruments of the law, as well as the possibility of outlawing certain methods and means of warfare.[384] This led to three reports which showed the need for further development of LOAC.[385] This resulted in the ICRC, in 1969, '[proposing], as soon as possible, concrete rules which could supplement the existing humanitarian law'.[386] The concept of human rights was accepted by 1973 by the participants in the Preparatory Conference. The relationship between human rights and self-determination was further strengthened by the introduction of the 1966 International Covenants.[387] In 1970 the Declaration on the Principles on International Law Concerning Friendly Relations and Co-operation amongst States in Accordance with the Charter of the United Nations also solidified self-determination as an essential human right.[388] The concept of the extension of protection for combatants and civilians was now linked to human rights in order to protect the human person and safeguard essential human values in the interest of civilization.[389]

The ICRC then, in 1971, organized a series of Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Principles in Armed Conflicts. The aim of these conferences was to establish a process for the codification of LOAC, whereby the GC's were to be reaffirmed, as opposed to being amended.[390] In 1973 mention was made of the status of "wars of national liberation" as IAC's in GA Resolution 3103 (XXVIII), which contains the "[b]asic principles on the legal status of combatants struggling against colonial and alien domination and racist regimes".[391]

At this time it had become apparent that States were not going to consent to a specific protocol wherein guerrilla warfare could be addressed *sui generis*. It had, however, also

[384] Droege, C *op cit* note 47 at 315.
[385] Gardam, JG *Non-Combatant Immunity as a Norm of International Humanitarian Law* (1993) at 174.
[386] See *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts*, ICRC, Res. 13, 21st International Conference of the Red Cross, Istanbul (1969), 98, [1], reproduced in Suter, K *An International Law of Guerrilla Warfare: The Global Politics of Law-Making* (1984) at 102.
[387] *International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights*, both 1966.
[388] Article 1(4), API.
[389] 21st International Committee of the Red Cross, Istambul, Reaffirmation and Development of the Laws and Customs Applicable to Armed Conflicts (1969) 21.
[390] ICRC, Report on the Work of the Conference of Government Experts (1971) 18 quoted in Suter, K *An International Law of Guerrilla Warfare: The Global Politics of Law-Making* (1984) at 110.
[391] 1973, adopted 83:13:19.

become evident that Common Article 3 required elaboration and completion.[392] This resulted in two draft protocols, in 1973, which expanded on the GC's and which addressed the question of guerrilla warfare alongside the other forms of warfare.[393] The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts held from 1974 to 1977 confirmed the inclusion of 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination' in API.[394] APII, in turn, regulates only certain NIAC's and internal disturbances and tensions are not regarded by APII, Article 1(2) as being armed conflicts. There are, accordingly, internal armed conflicts which fall below the threshold set by APII, but which comply with the requirements of Common Article 3.[395] The AP's were negotiated by 150 delegates, 11 national liberation movements[396] and 50 IGO's who met from 1973 to 1977, as opposed to approximately 62 nations from primarily European nations who met over three months in 1949 to negotiate the GC's.[397] This, however, reflects the trend in international developments whereby only 66 States existed in 1946, 122 in 1964, 164 in 1982, and 187 from 1994 to 2001.[398]

[392] 'When put to the test . . . the rules of protection in [common] Article 3 had been shown to require elaboration and completion. Government and Red Cross experts consulted by the ICRC since 1971 had confirmed the urgent need to strengthen the protection of victims of NIAC's by developing international humanitarian law applicable to such situations' – Official Records of the Diplomatic Conference on the Reaffirmation and Development of LOAC Applicable to Armed Conflicts, Geneva (1974-1977) (Berne, 1978) CDDH/I?SR.22; VIII, 201 at 201 cited in Lindsey, M *op cit* note 291 at 89.

[393] ICRC, First Draft Additional Protocol to the Geneva Conventions of 12 August 1949, 1973 (Draft Protocol I), reproduced in Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Official Records); ICRC, Second Draft Additional Protocol to the Geneva Conventions of 12 August 1949, 1973 (Draft Protocol II) (on internal armed conflict), reproduced in Official Records Vol 1–2. On the context surrounding the Draft Protocols, see ICRC, Commentary on Draft Additional Protocols to the Geneva Conventions of 12 August 1949, 1973 (ICRC Commentary on Draft Protocols).

[394] API, Article 1(4). Some has maintained that API, Article 1(4) should have been contained in APII but these conflicts of national liberation are now beyond the scope of APII as it explicitly states that conflicts listed in API, Article 1 are beyond its scope of application – Moir, L *op cit* note 40 at 90.

[395] For example where more than one armed groups are involved in the territory of a State but the State itself is not involved in the armed conflict or where the armed conflict is between factions within a State but none of these armed groups may be regarded as the government of the State.

[396] See in general Higgins, N 'The Regulation of Wars of National Liberation under International Humanitarian Law – the *Jus in Bello*' *International Humanitarian Law Series: Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime: A Study of the South Moluccas and Aceh* Vol 28 at 91 – 130.

[397] Sandoz, Y; Swanarski, C & Zimmerman, B *Commentary on the Additional Protocols I & II of 8 June 1977* (1987).

[398] Gleditsch, NP *op cit* note 9 at 39, 615, 621.

API and APII were adopted by consensus on 8 June 1977 and entered into force on 7 December 1978.[399] The AP's were designed to curtail or prevent violence against civilians by precisely defining the principle of distinction.[400] The AP's reflect an attempt to update LOAC to address new types of armed conflict[401] and have resulted in numerous manuals on the Law of Armed Conflict at Sea, the Law of Air and Missile Warfare and the Law of Cyber Warfare.[402] The AP's acknowledge the application of human rights in armed conflict and the ICRC Commentary states that '[h]uman rights continue to apply concurrently [with LOAC] in time of armed conflict.'[403] API supplements the GC's, but APII only supplements Common Article 3. API effectively united the 'Hague' and 'Geneva' law regarding the norms that address the conduct of hostilities and the protection for persons and objects.[404]

APII lost its impetus when wars of national liberation were included in API[405] but it was a noteworthy achievement which deviated from previous LOAC instruments. LOAC generally incorporates a contradiction whereby States cooperate in times of armed conflict between them, and reciprocal entitlements are created as a result.[406] Civilians are thus generally protected from the reciprocal risk of killing that governs the relations between combatants. This immunity from attack may be opportunistically manipulated by civilians who engage in attacks without subjecting themselves to the reciprocal risk normally inherent therein. This creates a motivation for combatants to not identify themselves, as this would reveal them to the opposing forces. It is for this reason that LOAC denies protected status to civilians who directly participate in the armed conflict.[407] Military necessity and humanity therefore influence all the parties to the conflict uniformly.[408] In NIAC at least one of the parties is acting unlawfully under domestic law, notwithstanding any treaty. The reciprocity inherent in

[399] von Glahn, G & Taulbee, JR *op cit* note 7 at 607.
[400] Geneva Convention IV & API, Articles 48, 51(2) & 52(2).
[401] See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* ('AP I'), 1125 UN Treaty Ser 3 (1977) and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (AP II), 1125 UN Treaty Ser 609 (1978).
[402] Boothby, WH *The Law of Targeting* (2012) at viii.
[403] Sandoz, Y; Swanarski, C & Zimmerman, B *Commentary on the Additional Protocols I & II of 8 June 1977* (1987) at 4429.
[404] Schmitt, MN *op cit* note 24 at 809.
[405] Kinsella, HM *op cit* note 35. The national liberation movements that were requested to attend the conference reflected a political agenda, which is now incorporated into API, Article 1(4).
[406] Gordon, S 'Civilian Protection – What is Left of the Norm?' *Geneva Conventions under Assault* (2010) at 81.
[407] See International Committee of the Red Cross, *Customary International Humanitarian Law (*2005) Vol I at 19-24.
[408] Michael N Schmitt *op cit* note 38 at 810.

LOAC treaties on IAC is thus absent in NIAC. APII therefore represents a self-imposed limitation by States on military necessity in favour of humanity.[409] States have required, based on self-interest and issues of sovereignty, that all the requirements for an armed conflict in APII be present before acknowledging that the provisions thereof apply.[410] Arguably only the Spanish Civil War of 1936 to 1939, the conflict in El Salvador during the 1980s and the Bosnia-Herzegovina conflict have achieved the threshold in APII.[411]

3.7 The Relevant Events after 1977

From 1977 to 2007 there were 128 recorded armed conflicts,[412] which included 110 NIAC's and 18 IAC's. A 2002 study conducted by the Department of Peace and Conflict Research at Uppsala University[413] categorized and analysed all armed conflicts following WWII. Of the 225 armed conflicts, 163 were internal armed conflicts and only 42 qualified as IAC's. The remaining 21 were categorized as 'extra-State', which is defined as a conflict involving a State and a non-State group acting from the territory of a third State.[414] The study excludes the ground wars in Afghanistan in 2001 and in Iraq in 2003. Further important events were the establishment of the ICTY, the International Criminal Tribunal for Rwanda ('ICTR')[415] and the Rome Statute of the International Criminal Court of 1998.[416] The Rome Statute defines the direct attack against civilians as a war crime.[417] The *ad hoc* tribunals and the ICC have invigorated LOAC.[418] These developments have resulted in numerous LOAC provisions in IAC becoming applicable to NIAC's.[419]

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[409] Ibid at 811.
[410] Provost, R *op cit* note 15 at 264.
[411] Ibid.
[412] See Sarkees, MR *Defining and Categorizing Wars*, in Sarkees, MR & Wayman, FW *Resort to War: A Data Guide to Inter-State, Extra-State, Intra-State, and Non-State Wars 1816–2007* (2010) at 6.
[413] The Study was conducted in conjunction with the Conditions of War and Peace Program at the International Peace Research Institute in Oslo.
[414] See Gleditsch, NP *op cit* note 9 atp 615.
[415] 8 November 1984, *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian law in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States* (UNSC Res. 955, as Amended by UNSC Res. 1165, 30 April 1998 and Res. 1329, 30 November 2000. Reproduced in Roberts, A & Guelff, R (eds) *op cit* note 42 at 615 available at http://www.un.org/ictr/ (last accessed on 1 May 2014).
[416] Reproduced in Roberts, A & Guelff, R (eds) *op cit* note 42 at 667.
[417] Article 8(2)(b)(i) of the Rome Statute.
[418] Robinson, D & Oosterveld, V *The Evolution of International Humanitarian Law* (2001) in McRae, RG *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (2001) at 161.
[419] Ibid at 163.

Recent armed conflicts have proven that a resort to armed force has become less successful with the general failure of armed conflict to achieve the desired results for States.[420] LOAC was further elevated following the events of 11 September 2001 and the US led '*war on terror*' thereafter.[421] This event has seen many argue that LOAC should acknowledge unlawful or non-privileged combatants. The ICRC rejects this category on the basis that it was never intended in the basic instruments of LOAC and argued that creating such a category would jeopardize the protections accorded to 'innocent' civilians.[422] Nonetheless, unlawful combatants are referred to in some military manuals,[423] national legislation[424] and case law.[425] These sources generally define 'unlawful combatants' as persons who actively participate in hostilities without adhering to the laws of war.[426]

The nature of contemporary armed conflicts has resulted in the development of new strategies of targeted killings[427] and technologies to effectively target irregular fighters directly participating in NIAC's. Here the US unmanned aerial vehicles ('UAV's'), as weapons platforms, have been at the forefront of these innovations since 2002.[428] On the other hand, regular armed members of the US and UK forces in Afghanistan have been limited in their targeting decision by rules of engagement, which require positive identification[429] of a threat and what is referred to as courageous restraint in conflict before an open fire order may be

[420] Black, J *op cit* note 19 at 16.
[421] Kinsella, HM *op cit* note 35 at 14.
[422] Dorman, K 'The Legal Situation of Unlawful/Unprivileged Combatants' 85 *IRRC* 45 (2003); See also Shlomy Zachary 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong' 38 *ISR. L. Rev.* 378 (2005).
[423] The U.S. *Army's Operational Law Handbook* Ch. 2. 6 (2002); Lauterpacht, H *(The War Office), the British Manual of Military Law: Part III - The Law of War on Land* (1958) n. 9; Even-Khen, HM 'Case Note: Can We Now Tell What Direct Participation in Hostilities Is? HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel*' *ISR. L. Rev.* Vol 40 No 1 217 at 2007.
[424] Hahukim, S *The Law for Imprisonment of Unlawful Combatants* (2002) SH 1834 at 192.
[425] *Osman Bin Haj Mohamed Ali v. Public Prosecutor* [1969], 1 A.C. 430 (P.C); United States ex rel Quirin v. Cox, 317 U.S. 1 (1942); Israel Military Court sitting in Ramallah, *Military Prosecutor v. Omar Mahmud Kassem and Others* (April, 13 1969), reprinted in 42 Int'L L. Rep., 479 (1971).
[426] Yoo, JC & Ho, JC 'The Status of Terrorists' 44 *Vir. J. of Int'L L.* (2003) at 217; Dinstein, Y *Conduct of Hostilities under the Law of International Armed Conflict* (2010) at 29-30; Dinstein, Y 'Unlawful Combatancy' *ISR. YB on HR* 249 (2002) at 32.
[427] See in general McBride, DW 'Who is a Member? Targeted Killings against Members of Organized Armed Groups' *Australian Year Book of International Law* Vol *30 available at* http://ssrn.com/abstract=2261128 (last accessed on 1 May 2014); Melzer, N *Targeted Killing in International Law* (2008) at 283.
[428] See in general Cline, DR 'An Analysis of the Legal Status of CIA Officers Involved in Drone Strikes' *INT'L L.J.* Vol 15: 51 (2013); *US National Security Strategy* (2010) available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (last accessed on 1 May 2014).
[429] United States Marine Corps Field Medical Training Battalion – East Camp Lejeune FMST 1304 Ethical Considerations for the Hospital Corpsman available at www.tecom.marines.mil/.../FMST%20Manual/Ethics_FMST_1304.doc (last accessed on 1 May 2014).

given.[430] It thus seems that UAV's resulted in pilot immunity, but the rules of engagement for regular forces have had the opposite effect as it places the ground forces in a less favourable position.

Western States have, accordingly, developed military strategies, doctrines, tactics and technology to effectively target irregular forces.[431] This had the direct and opposite effect as irregulars creatively found ways to intentionally place 'innocent' civilians in danger and to multiply the moral and human costs of armed conflict. This is done to discourage military superior forces from taking military action or to inflict such political costs as to make State involvement in the conflict intolerable. Today there is a high level of media attention and commentary concerning armed conflict and the civilian population is more informed about combatant and civilian deaths than in the past.[432] Deaths in armed conflict affect media reporting and public attitude and this has been exploited by irregular forces. Regular armed forces have also realised that civilian casualties generate anti-war sentiment and limit their ability to elicit intelligence from the local civilian population.[433] There is thus a real benefit to the military in the form of the potential intelligence available from the civilian population and to ensure support for the armed conflict politically.[434] Civilians are again seen as an asset, based on their usefulness to the regular armed forces.

The Second Persian Gulf War of 1991 is regarded as a defining moment in US military thinking on so-called cyberwar. This type of conflict marked a new generation of conflict where success is not dependent on physical force only, and adversaries must also pursue information dominance.[435] A new form of armed conflict is thus developing with specific reference to 'information warfare',[436] now referred to as 'information operations',[437] where technologically advanced States act against less developed States or non-State armed

[430] See the US Army / Marine Corps Counter Insurgency Field Manual - U.S. Army Field Manual (FM) 3-24, *Counterinsurgency* (Washington, DC: U.S. Government Printing Office [GPO] (December 2006) at 1-21; Spiszer, JM 'Counterinsurgency in Afghanistan Lessons Learned by a Brigade Combat Team' *Military Review* (January 2011) available at www.dtic.mil/cgi-bin/GetTRDoc?AD=ada535377 (last accessed on 1 May 2014).
[431] Larson, EV *Misfortunes of War. Press and Public Reactions to Civilian Deaths in Wartime* (2006) at 1.
[432] Ibid at 16.
[433] Ibid at 208.
[434] Ibid.
[435] Cavelty, MD 'Cyberwar' *Ashgate Research Companion to Modern Warfare* (2010) at 126.
[436] Consisting of actions intended to protect, exploit, corrupt, deny or destroy information or information resources with the object of achieving a significant advantage, objective or success over an adversary - Katlin-Borland, N 'Cyberwar: A Real and Growing Threat' *Cyberspaces and Global Affairs* (2012) at 3.
[437] Cavelty, MD *op cit* note 429 at 129.

groups.[438] Technologically advanced States pursue 'immaculate war' where brevity and the bare minimum loss of manpower and assets of the advanced State are the only satisfactory results while pursuing their military objectives.[439]

4. Summary

Historically, people have created rules in an attempt to minimise the suffering caused by armed conflict.[440] St. Augustine articulated a theory that granted moral legitimacy to armed conflict and the Just War theory was expanded upon by Aquinas to include discrimination and proportionality in the legitimate use of force. The medieval codes of chivalry further refined the idea to exclude the intentional targeting of the vulnerable. This was followed by the Treaty of Westphalia in 1648 which established the nation-State. This development was important as it formed collectives, which were identified on the basis of their relationship to a State, further facilitating the deployment of legitimate collective power on behalf of the State. In recent times this trend has changed, with many participants acting on behalf of an armed group with ultra-nationalist, ethno-centric, religious and cultural motives; and the lack of a relationship with the State is accordingly interpreted from an illegitimate perspective.[441]

The further evolution of armed conflict may be classified by evaluating the manner in which the progress in industrial technology, command and control structures an communications have been incorporated into military thinking and action.[442] The evolution in the first to third generations of armed conflict was mainly characterised by developments in mechanised war, but improved technologies and communications changed in fourth generation warfare to focus on better weapons and on information dominance.[443] Targeting issues developed as armed conflict moved to a public, State-sponsored activity with professional participants wearing uniforms. The codification of the modern rules of warfare thus started after the establishment of States. The Lieber Code started the development and this eventually resulted

[438] Gilbert, P 'Civilian Immunity in the 'New Wars' *in* Igor Primoratz (ed) *Civilian Immunity in War* (2007) at 201.
[439] Cook, ML 'Non-combatant Immunity and the Force Protection Imperative' *in Ethics and the Military Profession: Mora; Warrior: Ethics and Service in the U.S. Military* (2004) at 117; see also Cook, ML 'Transcending Westphalia*' Ethics and the Military Profession: Mora; Warrior: Ethics and Service in the U.S. Military* (2004) at 151-152 regarding the reliance on airpower alone to achieve this goal of immaculate war in territories like Kosovo.
[440] Ishoy, R 'The Law of War*' in Towards New Global Strategies: Public Good and Human Rights* (2007) at 183.
[441] Addington, LH (2nd Ed) *Patterns of War Since the Eighteenth Century* (1994) at 325.
[442] Deakin, RS *Battlespace Technologies: Network Enabled Information Dominance* (2010) at 2 – 3.
[443] Ibid at 3.

in the Hague Conventions of 1899 and 1907 which created restrictions in armed conflict and the criteria to qualify as a combatant was defined. LOAC developed exponentially after the advent of nuclear weapons and the accompanying threat to civilians from State action.[444] After WWII, the GC's divided armed conflict into IAC and NIAC. Targeting again changed to exclude persons taking no active part in hostilities, including members of the armed forces who are *hors de combat*. The final step in the evolution of LOAC regarding targeting is contained in the AP's, which introduced the concept of 'DPH'. Armed conflict changed dramatically after the codification of the APs, with specific reference to weaponry and the actors involved therein.

Armed conflict has changed significantly over time, but more so from 1949, when States drafted the GC's. The main developments in the *jus in bello* after 1945 were instigated by the ICRC.[445] The GC's predominantly regulate IAC but the AP's of 1977 represent a response from the international community to acknowledge the increased attacks on civilians in NIAC. The GC's represent the first real attempt to develop the norms of LOAC by way of a democratic process and pluralist norms. The decision-making process was more transparent than in the past, resulting in the inclusion of more popular opinions into the conventions. In more recent times, the developments in LOAC reflect an attempt to regulate specific weapons that have developed as a result of technological advancements. Fifth generation warfare will see new dimensions and perspectives regarding the options available to military and political commanders and will be decidedly influenced by information dominance through sustained cyber technologies and military force.[446]

[444] Wallach, EJ 'Pray Fire First Gentlemen of France: Has 21st Century Chivalry been Subsumed by Humanitarian Law?' *Harvard Law School National Security Journal* (2013) at 434.
[445] Higgins, N *op cit* note 140 at 92.
[446] Deakin, RS *op cit* note 187 at 4.

Chapter 3

Contemporary Perspectives on Civilian Direct Participation in Hostilities

1. Introduction

Armed conflict, by its very nature, entails sacrifice, loss and misery.[1] This results from the fact that the fundamental aim in armed conflict is to achieve a desired outcome by forceful means.[2] This outcome is normally to overcome the adversary's military potential or its will to continue with the hostilities. The Law of Armed Conflict ("LOAC") thus generally dictates that all means and methods of warfare in armed conflict are permitted unless specifically prohibited by the law.[3] LOAC, however, ultimately attempts to create a balance between military necessity and humanity, taking into account that the nature of armed conflict dictates that humanitarian considerations can never totally displace the prescriptions of military necessity.[4] LOAC is, as a result, an ideal which is developed outside of armed conflict for application within armed conflict. Decisions in armed conflict are often instinctive, and time sensitive without the benefit of perfect intelligence.[5] LOAC thus has to consider the realities of armed conflict and incorporate realistic alternatives to achieving military objectives, failing which the law will be ignored in practice. LOAC must, accordingly also be flexible to react to new realities in armed conflict, but any development thereof must be adequately reasoned and in keeping with the basic principles of LOAC. This argument excludes the claim that armed conflict is, by its very nature, a failure of the law, and thus that there is no law in armed conflict. I do not agree with this sentiment but LOAC must be very sensitive to the realities of war. This is to ensure that a best case scenario is achieved and that suffering of participants and non-participants is minimised. My evaluation of general direct participation in hostilities ("DPH") and civilian direct participation in hostilities ("C-DPH") will generally be based on the above reasoning.

[1] See in general Gat, A *War in Human Civilization* (2006) at 662.
[2] Francis, D *Rethinking War and Peace* (2004) at 55.
[3] Henderson, I 'Contemporary Law of Targeting: Military Objectives, Proportionality, and Precautions in Attack under Additional Protocol I' *International Humanitarian Law Series Vol 25* (2009) at 39. It is further submitted that this statement is qualified by the operation of the Martens Clause and other general rules of LOAC that may prohibit certain conduct.
[4] Dinstein, Y *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) at 1.
[5] Ibid at 1-2. Corn, G & Jenks, C 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflict' *U.PA. J. Int'l. L. [Vol 33:2]* at 314.

States, in developing LOAC, essentially created a system of reciprocal entitlements between them during armed conflict.[6] LOAC therefore functions as intended where it is grounded in an expression and an assumption of equality of the parties involved. This system, *inter alia*, addresses the protection of civilians, in various international instruments and by way of customary LOAC.[7] This protection is now articulated in the Geneva Conventions of 1949[8] ("GC's") and clearly expressed in the two Additional Protocols of 1977 ("AP's").[9] Civilians will, however, forfeit their immunity against intentional attack for as long as they directly participate in hostilities. The C-DPH exemption has been included in international instruments, the military manuals of several States,[10] and has been referenced in "official statement[s] and reported practice".[11] C-DPH and general DPH is not often evaluated together. This creates the impression that the two concepts are similar. DPH, in my view, refers to the actions of combatants in international armed conflict ("IAC") and possibly that of members of the regular armed forces and members of armed groups in non-international armed conflict ("NIAC"), what the International Committee of the Red Cross ("ICRC") refers to as a continuous combat function ("CCF").[12] I will examine this distinction in more detail later in this chapter.

C-DPH is more contentious than DPH, since neither the GV's nor the AP's[13] define what activities trigger the civilian exemption against intentional attack.[14] An agreed upon definition of C-DPH has not developed, and the current practice is to assess the existence

[6] Gordon, S *Geneva Conventions under Assault – Civilian Protection – What is Left of the Norm?* (2010) at 81.
[7] See in general Beruto, GL (ed) *The Conduct of Hostilities. Revisiting the Law of Armed Conflict 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols* (2007) at 62 – 63.
[8] The *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* of August 12 1949, 75 *UNTS* 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* of August 12 1949, 75 *UNTS* 85; *Geneva Convention Relative to the Treatment of Prisoners of War* of August 12 1949, 75 *UNTS* 135; and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* of August 12 1949, 75 *UNTS* 287.
[9] The Additional Protocols comprise *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* of 8 June 1977, 1125 *UNTS* 3, and *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* of 8 June 1977, 1125 *UNTS* 609.
[10] Australia; Belgium; Ecuador; El Salvador; India; Netherlands; United States; and Yugoslavia - Henckaerts, J and Doswald-Beck, L (eds) *Customary International Humanitarian Law* (2005) at 22.
[11] Melzer, N *Targeted Killings in International Law* (2008) at 337.
[12] Melzer, N *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) at 12.
[13] Fenrick, WJ 'ICRC Guide on Direct Participation in Hostilities' (2009) 12 *Yearbook of International Humanitarian Law* 287 at 292.
[14] Melzer, N *op cit* note 12 at 12.

thereof on a case-by-case basis.[15] The ICRC study into customary LOAC, also concluded that a precise definition of C-DPH does not exist in either State practice or international jurisprudence.[16] This is possibly based on the fact that, arguably, the study attempts to inject too many considerations of humanity into LOAC but this is understandable given the ICRC's mandate. It stands to reason that a universal definition of C-DPH would be advantageous. A definition of C-DPH could be developed by finding compromise language between the narrow and liberal interpretations of C-DPH. However, compromise generally leads to vague definitions and this is undesirable. This challenge has allowed some States to exploit the impasse by drastically changing the staffing of their armed forces and their targeting policies and methods. States should, however, interpret C-DPH "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 LOAC".[17] Domestic and international courts have, as a result, been called upon to consider the meaning of C-DPH.

Any attempt to give meaning to C-DPH must be realistic taking into account the international instruments wherein it was created but all the other relevant perspectives and reasoning thereon must also be considered. It is thus submitted that it is beneficial to evaluate the ethical perspectives when attempting to establish the contemporary view of civilian protection and the circumstances when a civilian will forfeit that protection against intentional attack. In this regard the ethical and moral justification of civilian protection and loss thereof will be discussed. The legal perspectives on C-DPH will thereafter be evaluated to clarify the complex issues concerning the immunity of civilians. Relevant judicial reasoning and the Guidance on the Notion of Direct Participation in Hostilities by the ICRC[18]

[15] Memorandum of Understanding on the Application of LOAC between Croatia and the SFRY at para 6; Agreement on the Application of LOAC 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; 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). See also 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 (last accessed on 1 May 2014) at (2006) HCJ 769/02 at para 34.

[16] Melzer *op cit* note 13 at 41; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23. See also See ICRC, *Customary International Humanitarian Law* (2005) Vol I, 173 & Vol II, 114.

[17] Melzer *op cit* note 13 at 41 at 41; See also Van Der Toorn, D 'Direct Participation in Hostilities: A Legal and Practical Road Test of the International Committee of the Red Cross's Guidance through Afghanistan' *17 AUSTL. Int'L L.J. 7, 17* (2010) at 18.

[18] Melzer, N *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).

("the Guidance"), the expert comment thereon and State practice will also be considered. The United States ("US") and Israel have not ratified the AP's[19] and the policies of these States will, without doubt, influence the debate over the meaning of C-DPH.

C-DPH is not defined in LOAC treaty law but the concept forms a part of the principle of distinction. The principle of distinction stipulates that civilians, as opposed to combatants, are, *inter alia,* protected from the effects of military operations "unless and for such time as they take a direct part in hostilities".[20] The rule that civilians, including children, are protected unless they participate directly in hostilities is also part of customary international law. Common Article 3 to the GC's, in the English test, introduces the term 'active participation' in relation to NIAC. It states that "[p]ersons taking no active part in the hostilities…shall in all circumstances be treated humanely…". The term '*direct* participation' is later used with regards to the use of child soldiers in API, Article 77(2) and Article 38 of the *UN Convention on the Rights of the Child*.[21] These provisions stipulate that States or other parties to IAC shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. APII, Article 13(3) uses the word 'direct'. The ICRC Guidance finds that the GC's and the AP's use different words but that the phrase '*participent directement'* is used consistently throughout the French texts of each treaty, which suggests a uniform meaning of the two terms in LOAC. The ICTR in the *Akayesu* Judgment held that 'direct' and 'active' "are so similar that, for the Chamber's purposes, they may be treated as synonymous."[22] I do not agree with this interpretation as, in my view, 'direct' is a more restricted term than 'active'. The International Institute of Humanitarian Law in San Remo's *Manual on the Law of Non-International Armed Conflict*

[19] *See* ICRC, *List of State Parties to the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I) *available at* http://www.icrc.org/LOAC.nsf/WebSign?ReadForm&id=470&ps=P (last accessed on 1 May 2014); Int'l Comm. of the Red Cross, *List of State Parties to the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Conflicts available at* http://www.icrc.org/LOAC.nsf/WebSign?ReadForm&id=475&ps=P (last accessed on 1 May 2014).

[20] Article 51(3), API; Article 13(3) APII.

[21] *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49 available at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en (last accessed on 14 January 2015).

[22] *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment (Sept. 2, 1998) at para 629 available at http://www1.umn.edu/humanrts/instree/ICTR/AKAYESU_ICTR-96-4/Judgment_ICTR-96-4-T.html (last accessed on 15 January 2015).

of 2006[23] does not interpret the terms as having a substantive distinction between them and only requires a "a sufficient causal relationship between the active participation and its immediate consequences". The Manual, however, distinguishes between active or direct participation in hostilities and participation in the war effort. I believe that this is the preferred interpretation and in line with the dictates of interpretation of international instruments to give effect to the text.

2. Philosophical Arguments for the Justification of the Protection of Civilians

The intentional targeting of those persons not directly involved in an armed conflict is inherently wrong and it is morally intuitive that civilians should be protected in armed conflict. The ultimate aim of armed conflict is to overcome the enemy and this violence should, in a perfect world, be directed at those that pose a collective threat. Unfortunately and on closer scrutiny, this justification for the initial impression becomes more controversial. Throughout history, mention has been made of 'innocence' and 'harmlessness' as considerations for civilian immunity to attack.[24] It is, however, submitted that civilian usefulness was also a major reason in determining civilian protection and this represented the self-interest of those who were responsible for policy decisions in armed conflict. The final consideration that influences civilian immunity from attack is the requirements of military necessity, which, at times outweighed moral and legal considerations, and civilian immunity was regularly and intentionally disregarded to achieve military objectives. There are several perspectives which are derived from the literature on war ethics and just war theory relevant to the protection of civilians. These include moral innocence, innocence as harmlessness, responsibility, rights and personal project.

The first notion regards civilians as innocent and therefore those who are not guilty should not be punished. Moral innocence does not, however, confer immunity for combatants from attack in armed conflict, just as much as being morally guilty does not deprive civilians of their protected status.[25] The concept is thus not always useful to distinguish combatants from civilians as there may realistically be innocent combatants who were conscripted into military

[23] Schmitt, MN; Garraway, CHB & Dinstein, Y *The Manual on the Law of Non-International Armed Conflict With Commentary* (2006) at 4-5 available at http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf (last accessed on 4 January 2015).
[24] Shklar, JN *Ordinary Vice* (1984) at 24.
[25] Nagel, T *War and Massacre* (1972) at 69.

service. The distinction between being morally innocent and morally guilty does, as a result, not necessarily coincide with the distinction between civilians and combatants.[26] Innocence can, however, also be interpreted as "currently harmless"[27] and civilians are thus entitled to protection because they are harmless or helpless.[28] Harmlessness is, however, not a valid concept to characterise all civilians and to justify their protection. Civilians are not necessarily harmless in armed conflict, the distinction between the harmless and harmful does not, again, as a result, coincide with the distinction between civilians and combatants.

A further perspective on civilian protection is whether a person is responsible for military action.[29] Hartigan argues that civilian status is attained or lost by establishing whether a person is accountable for military actions.[30] A civilian must thus not be responsible for the conduct of armed conflict, which creates an assumption of non-responsibility. This resonates well with the idea that combatants who participate directly in hostilities are, for their part, responsible for the conduct of armed conflict and they accordingly forfeit their protection from attack. Boothby claims, convincingly, that civilians have a responsibility to comply with their protected status, failing which they forfeit their protection "for such time as they take a direct part in hostilities".[31] Walzer, on the other hand, argues that combatants forfeit their rights to life as they acquire certain rights as combatants and as prisoners upon capture.[32] Civilians, on the contrary, do not have these rights and should thus not be targeted during armed conflict.

Another argument for civilian protection in armed conflict could be made based on the idea that military activities confer meaning to the combatant's life.[33] Combatants may be said to have consented to participate in armed conflict and this creates a mutual right to take military action. It is accepted that opposing parties in armed conflict will target combatants and that their deaths in combat will incur no criminal sanctions for those responsible. This is termed

[26] See Best, G (1994) at 260.
[27] Norman, R *Ethics, Killing and War* (1995) at 69. Rodin, D *War and Self-Defence* (2002) at 84.
[28] Best, G *Humanity in Warfare: The Modern of the International Law of Armed Conflict* (1980) at 55.
[29] Anscombe, GEM *War and Murder in Nuclear Weapons and Christian Conscience* (1961) at 49.
[30] Hartigan, RS *The Forgotten Victims: A history of the Civilian* (1982) at 90.
[31] See Boothby, B '"And for Such Time As": The Time Dimension to Direct Participation in Hostilities' *42 N.Y.U. J. Int'L L. & Pol. 741* (2010) at 742.
[32] Walzer, M *Just and Unjust Wars* (1977) at 136.
[33] Smart, JJC & Williams, B *Utilitarianism: For and Against* (1973) at 116-117.

as 'the legitimate purpose' of attacks in armed conflict.[34] There is thus an internal connection between combatancy and the prospect of being killed in armed conflict, and this could be regarded as a meaningful and foreseeable death. This meaningfulness does not have equal value for a civilian in armed conflict.[35] Civilians, not taking a direct part in hostilities, do not see the prospect of death in armed conflict as part of their personal project. Some civilians may, however, directly partake in hostilities, and may even foresee death in armed conflict as a real possibility. This reasoning is also flawed and does not account for the formal distinction between civilians and combatants exactly because some civilians will commit hostile acts in armed conflict.

It is submitted that the real motive for a general rule of civilian immunity results from the concern of Parties to armed conflict for their own civilians and the harm that will result from direct attacks upon them. Civilians are, in theory, vulnerable and it thus becomes rational to agree that both sides grant immunity to the unarmed citizens of the other.[36] This agreement is thus based on the mutuality of the vulnerability of the civilians on both sides in a conflict. Civilian status and their protection from attack is a complex ethical issue. The challenge is that ethical arguments do not account for the so-called marginal cases where civilians do directly participate in armed conflict or where civilians indirectly make a real contribution to the war effort without actually being involved in combat activities.

3. Juridical Reasoning and State Practice on the Concept of C-DPH

Judicial decisions are strictly speaking, not a source of International Law but they do represent "subsidiary means for the determination of rules of law,[37] which serve as persuasive evidence of the state of the law".[38] These decisions, together with State practice regarding C-DPH would thus be analysed to assess current perspectives on C-DPH in general. The courts, and some experts, have struggled to define C-DPH and to develop an understanding thereof.[39]

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[34] See *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, opened for signature 29 November / 11 December 1868, 138 CTS 297 (entered into force 11 December 1868) preamble, reproduced in Roberts, A & Guelff, R *Documents on the Laws of War* (2000) at 55.
[35] Paskins, B & Dockrill, M *The Ethics of War* (1979) at 225.
[36] Ibid at 62.
[37] See the *Statute of the International Court of Justice*, June 26, 1945, 59 stat. 1055, 33 U.N.T.S. 993, Article 38.
[38] Schmitt, MN 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' *Virginia Journal of International Law Vol 5*, Issue 4 at 817.
[39] See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, at 616 (July 15, 1999); Callen, J *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. Int'L L. 1025 (2004); Jinks, D *The Changing Laws of War: Do We Need a New Legal Regime after September 11?: Protective Parity and the Laws of War*, 79 Notre Dame L. Rev. 1493, 1495–1501 (2004); Kleffner, JK *From "Belligerents" to "Fighters" and Civilians Directly*

The *Stugar case* dealt with DPH and was argued in the *International Criminal Tribunal for the Former Yugoslavia* ("ICTY").[40] The trial chamber defined C-DPH as "acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces".[41] The court further concluded that acts of C-DPH include "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 the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces".[42] The trial chamber earlier held, regarding civilian status that "members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause".[43]

The *Galic Judgment*[44] is also applicable to C-DPH as it considered a sniping incident[45] where the sniper ignored the possible civilian status of his victims. The court held that the sniper either acted with knowledge of the civilian status of the victim, or with awareness of the likelihood of the victim's status.[46] The court also found that a further victim[47] had been targeted without any consideration by the sniper of her possible civilian status.[48] The court concluded that a reasonable person, in the same circumstances, should not have ignored the possibility of a victim's civilian status based on her clothing and the activity in which she was engaged.[49] The court thus indicated that the clothing, activity, age, or sex of the person

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Participating in Hostilities—On The Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference, 54 Neth. Int'L L. REV. 315 (2007); Hays Parks, W *Air War and the Law of War*, 32 A.F. L. REV. 1 (1990); Schmitt, MN *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. Int'L L. 519, 522–36 (2005); Watkin, KW *Combatants, Unprivileged Belligerents and Conflict in the 21st Century*, 1 ISR. Def. Forces L. Rev. 69 (2003).

[40] *Prosecutor v Stugar*, Case No IT-01-42-A, Appeals Chamber Judgment (17 July 2008).
[41] Ibid at para 176-79.
[42] Ibid at para 176-79.
[43] Ibid at para 282.
[44] *Prosecutor v Stanislav Galic*, Case No. IT-98-29-T, Judgment ¶ 144 (Dec. 5, 2003).
[45] *Sniping Incident* 17.
[46] *Prosecutor v Stanislav Galic supra* at 433.
[47] *Prosecutor v Stanislav Galic supra* at 8.
[48] *Prosecutor v Stanislav Galic supra* 41 at 875.
[49] *Prosecutor v Stanislav Galic supra* at 16 & 429.

targeted is factors which should be considered in deciding whether the person is a civilian.[50] The conclusion of the court was that C-DPH means acts of war which by their "nature or purpose are likely to cause actual harm to the personnel or materiel of the enemy armed forces".[51]

The court noted in the *Kupreskic* trial that the "protection of civilian and civilian objects provided by modern international law may cease entirely or be reduced or suspended [...] if a group of civilians takes up arms [...] and engages in fighting against the enemy belligerent, they may be legitimately attacked by the enemy belligerent whether or not they meet the requirements laid down in article 4(A)(2) of GCIII. Combatants and other individuals directly engaged in hostilities are considered to be legitimate military targets."[52]

The Trial Chamber at the ICTY, held in the matter of *Blaskic*,[53] that it was ". . . content to define a civilian as the opposite of a combatant". The court further noted that "a civilian unlawful combatant is one who takes part in hostilities, directly, for such time as he or she does so".[54] This interpretation of API, Article 51(3) is regrettable as it provides little assistance to anyone concerned with targeting decisions in an actual armed conflict. The reference to 'unlawful combatant' is also surprising and it is submitted that no such category of person exits in armed conflict and the moral condemnation associated with the use of the term should be avoided. O'Connell[55] also argues that civilians who directly participate in hostilities are unlawful combatants and may be prosecuted and for such participation. Dorman[56] argues that LOAC does not recognise a right to target unlawful combatants because they are civilians and that the C-DPH rule must be applied to them.

[50] *Prosecutor v Stanislav Galic supra* at para 50.
[51] Ibid at para 48.
[52] *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic & Vladimir Santic*, 14 January 2000 – Case No. 215 at para 12.
[53] See *Prosecutor v. Tihomir Blaskic*, Judgement (Trial), 3 March 2000 – Case No. 216 (A); *Prosecutor v. Tihomir Blaskic*, Judgement (Appeals), 29 July 2004 – Case No. 216 (B).
[54] See *Prosecutor v. Tihomir Blaskic supra*; *Prosecutor v. Tihomir Blaskic*, Judgement (Appeals), 29 July 2004 – Case No. 216 (B).
[55] O'Connell, ME 'Cyber Security without Cyber War Journal of Conflict and Security Law' 17(2) 2012 at 22.
[56] Dormann, K *Applicability of the Additional Protocols to Computer Network Attacks* at 72-73 available at http://www.icrc.org/eng/assets/files/other/applicabilityofihltocna.pdf (last accessed on 4 January 2015).

The International Criminal Court hereafter pronounced on the *Lubanga* matter,[57] which related to whether "the use [of children under 15] to participate actively in hostilities" qualified as a war crime under of the Rome Statute.[58] The main issue of dispute in the eventual judgment relates to the term "use to participate actively in hostilities". The majority held that "[g]iven the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes "active participation" can only be made on a case-by-case basis".[59] The dissenting judgment concluded that it potentially risks leading to divergent assessments of the respective harms suffered by different children. It must be remembered that API states that "[t]he parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities […]",[60] and APII states that "children who have not attained the age of fifteen years shall [not be] allowed to take part in hostilities".[61] This LOAC language was included in the 1989 *Convention on the Rights of the Child*, which commits State-parties to "take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities".[62] The judgment, however, fails to clarify the expression "to participate actively in hostilities" as opposed to the expression "direct participation".[63] The court held that C-DPH cover either direct or indirect participation. The test arrived at by the court found 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".[64] The ICC Trial Chamber, in the *Lubanga* case, interpreted the term 'active participation in hostilities' as used in Article 8(2)(e)(vii),[65] with specific reference to whether sexual violence against children amounted to "active participation in hostilities". The majority held that 'active participation', under this provision of the ICC Statute, is distinct from, and broader than C-DPH. The Court found that "[t]he use of the expression "to participate actively in hostilities", as opposed to the expression "direct participation" (as found in API) was clearly intended to import a wide interpretation to the activities and roles

[57] Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06-2842 14-03-2012 4/624 SL T.
[58] Article 8(2)(b)(xxvi) and 8(2)(e)(vii).
[59] The *Prosecutor v. Thomas Lubanga Dyilo* supra at para 627.
[60] API, Article 77(2).
[61] APII, Article 4(3)(c).
[62] CRC, Article 38(2).
[63] The *Prosecutor v. Thomas Lubanga Dyilo supra* at para 627.
[64] Ibid at para 628.
[65] http://www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/ (last accessed on 28 December 2014).

that are covered by the offence…".[66] The court thus distinguished between 'direct' and 'active'. They Court held that "the use of the expression "to participate actively in hostilities", as opposed to the expression "direct participation"…was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence…" The Court further held that "[t]hose who participate actively in hostilities include a wide range of individuals, from those 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."[67] The Trial Chamber seems to regard 'direct' participation to mean involvement in front-line combat as opposed to 'active', which is a broader concept and includes 'combat-related activities'.[68]

The Israeli Supreme Court case of *Public Committee against Torture in Israel v Government of Israel* ("PCATI")[69] provides a thorough examination of C-DPH. The PCATI decision represented the first judicial attempt to clarify the notion of C-DPH.[70] The court embraced a broad interpretation of "hostilities," "direct," and "for such time."[71] The court's extension of C-DPH reiterates the broad interpretation of C-DPH by the US. The Israeli government implemented a policy of targeted killings as of November 2000, whereby the Israeli military eliminated those who "plan, launch, or commit terrorist attacks in Israel and in the occupied territories against both civilians and soldiers".[72] This was also termed by the government as a "policy of targeted frustration' of terrorism".[73] The government justified targeted killings as a preventative measure based on the past actions attributed to the civilian.[74]

The Israeli parliament passed the *Detention of Unlawful Combatants Law* in 2002[75] which defined unlawful combatants as "anyone taking part, directly or indirectly, in hostilities

[66] The *Prosecutor v. Thomas Lubanga Dyilo supra at* 627.
[67] Ibid at paras 627 & 628.
[68] Ibid at paras 622.
[69] *PCATI judgment* available in English from http://elyoni.court.gov.il/eng/home/index.html (last accessed on 1 May 2014).
[70] Ben-Naftali, O & Michaeli, K *International Decision*, 101 AM. J. Int'L L. 459, 462–63 (2007).
[71] Schondorf, RS Editorial Comment *The Target Killings Judgment: A Preliminary Assessment* 5. J. Int'L Crim. Just. 301, 302 (2007).
[72] *Public Committee Against Torture in Israel v. The Government of Israel*. Isr. L. Rev. Vol. 40, No.1 ("PCATI judgment"). See also Berlin, E 'The Israeli Supreme Court's *Targeted Killings* Judgment: A Reaffrimation of the Rule of Law During War' Mich. ST. Int'L L. Rev. Vol 21 Issue 2 (2013) at 518.
[73] PCATI *op cit* note 69 at para 2.
[74] Ben-Naftali, O & Michaeli, KR *We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int'L L.J. 233* at 250 (2003).
[75] Detention of Unlawful Combatants Law 2002, 1834 Sefer Hahukim [Laws of the Satet of Israel, Hebrew] 192.

against the State of Israel, who is not entitled to a prisoner of war status under GCIII". The US has a similar category of persons termed 'enemy combatants',[76] but this designation has been challenged in the US.[77] It is argued, however, that the term 'enemy combatant' has no meaning in LOAC.[78] The argument over the legality, under LOAC, of Israel's policy of targeted killing, ultimately resulted in this case being heard by the Israeli Supreme Court.

The Israeli government argued that the court should recognize a category of "unlawful combatants" under the laws of war. This, it was argued, is because the members of the terrorist organizations are party to the armed conflict and because they take an active part in the fighting.[79] Their active participation makes them legitimate targets for the duration of the armed conflict but they do not acquire combatant privilege in terms of the *Geneva Convention Relative to the Treatment of Prisoners of War* or *The Hague Regulations*, since they do not differentiate themselves from the civilian population or obey the laws of war. In the alternative, it was argued that C-DPH applies in the situation and that the targeted killings are thus legal.[80]

Israel has not ratified API as it was concerned that this would have awarded the *Palestinian Liberation Organization* combatant status.[81] The court held[82] that the principle behind Article 51(3) of API had attained customary law status.[83] This is interesting as API was determined as applicable to the conflict or the "war against terrorism" as it was described in the judgment. The reasoning was that the armed conflict between Israel and the terrorist organizations was "complex" and unique.[84] It was thus held that the armed conflict between an Occupying Power and rebel or insurgent groups in an occupied territory qualifies as IAC.[85]

[76] See the *US Military Commissions Act* of 2006 which refers to "unlawful enemy combatants" (Pub. L. No 109-366, 120 Stat. 2600 (17 October 2006).
[77] *Hamdi v Rumsfeld*, 542 US 507 (2004); Rasul v Bush, 542 US 446 (2004); Rumsfeld v Padilla, 542 US 426 (2004); *Hamdan v Rumsfeld*, 548 US 557 (2006); Boumediene v Bush, 553 US (2008).
[78] Honigsberg, PJ *Our Nation Unhinged: The Human Consequences of the War on Terror* (2009) 15.
[79] PCATI *op cit* note 69 at 11.
[80] Ibid at para 11.
[81] Ben-Naftali, O & Michaeli, KR *op cit* note 71.
[82] Berlin, E *op cit* note 61 at 521.
[83] PCATI *op cit* note 69 *at* paras 29-30.
[84] Ibid at para 18.
[85] Ibid at para 18-21, referring to Casesse, A (2nd Ed) International Law (2005) at 420.

'Hostilities' was held to mean "acts which by nature and objective are intended to cause damage to the army".[86] The court also took an expansive view of the term 'direct' to persuade civilians to remain uninvolved in conflict. Thus a definition of direct that included only combat and active military options would be too narrow but "expanding it to the entire war effort would be too broad . . ."[87] The Court was mindful of the fact that the whole population indirectly participates in the war effort in modern warfare and therefore C-DPH could not be restricted to combat and active military operations nor could the concept be extended to the entire war effort.[88] This represents a functional approach and identified guidelines and categories of persons who could be regarded as directly participating in hostilities. The court concluded that C-DPH does not only include the person committing the physical attack, but extends to those who ordered that attack, those who decided on the act, and those who planned it.

The Court also pronounced on the duration of C-DPH and held that "[r]egarding the wording 'and for such time' there is no consensus in the international literature . . . with no consensus regarding the interpretation of the wording 'for such time', there is no choice but to proceed from a case-to-case basis".[89] The loss of civilian immunity was therefore held to be forfeited only 'for such time' as a civilian is taking a direct part in hostilities and the assessment thereof must also be done on a case-to-case basis.[90] The test is whether the civilians are "performing the function of combatants," and "[t]he function determines the directness of the part taken in the hostilities".[91] Ben-Nafazi argues that the analysis of the temporal element is unsatisfactory and that the court did not find a standard by which the 'for such time' element is to be measured.[92]

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[86] Ibid at para 11.
[87] Ibid at paras 11, 28, 34 (quoting ICRC, *Commentary on the Additional Protocols to the Geneva Conventions* para. 4789 *available at* http://www.icrc.org/LOAC.nsf/WebList?ReadForm&id=470&t=com at para 1679 (last accessed on 1 May 2014).
[88] *AP Commentary* at 516, para 1679.
[89] PCATI *op cit* note 69 at para 38.
[90] Ibid at para 38.
[91] Ibid at para 35. The U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, Doc. NWP 1-14M/MCWP 5-12.1/COMDTPUB P5600.7A, The Commanders Handbook on the Law of Naval Operations, ch. 8.2.2 (July 2007) cited in Schmitt, MN *op cit* note 38 at 706A also notes that "[d]irect participation in hostilities must be judged on a case-by-case basis.". See also the *Prosecutor v. Tadic*, Opinion and Judgment, IT-94-1-T, ICTY (May 7, 1997) at 616. *See also ICRC International Humanitarian Law* (2005) 173, Vol I, 24. *See* ICRC, *Customary International Humanitarian Law* (2005) Vol II, 117.
[92] Ben-Naftali, O & Michaeli, KR *op cit* note 71 at 329..

For this reason, a comprehensive evaluation of indications of membership in a terrorist group was not undertaken. This, however, also meant that targeted killings are not *per se* illegal under international law.[93] The main consideration in targeting is the identity of the targeted person and a balancing test must be applied between military needs and humanitarian considerations.[94] This determination must be based on "well-based information" before the civilian is susceptible to attack, and the information must be "thoroughly verified . . . regarding the identity and activity of the civilian who is allegedly taking part in the hostilities".[95] The Court concluded that a person who has ceased to take a direct part in hostilities would regain his immunity from targeting.

The Court commented that it was important to differentiate between a sporadic act of C-DPH and those persons who actively joined a "terrorist organization" and, while within that organization, committed a series of hostile acts. Any intervals between hostile acts would not constitute a cessation of active participation and such members did not regain their civilian immunity during these intervals. This is because these intervals constitute transitory interludes preparatory to the participation in the next act of hostility.[96] The Court held that C-DPH included more than just those who are involved in attacks in a single causal step. Once a person had made an armed group his "home" and thereby commits a chain of hostilities, with short periods of rest between them, then he forfeits his protection, until such time as they positively disengage from the group.[97] The rest periods between hostilities was interpreted as preparation for the next hostility.[98] The Court thus classified civilians who "made the organization their home" as "members of organized armed groups" or, for all intentional purposes, 'combatants'. Operational and functional members of an armed group, *in causa* Hamas and Fatah, were therefore legitimate objectives for targeted killings. This suggests that there is no requirement for a hostile act to have a direct link to likely harm, or even a proximate one. The decisive requirement is actual involvement in the armed group's

[93] For a discussion of the US Targeted Killing Policy see Anderson, K *Targeted Killings in U.S. Counterterrorism Strategy and Law in Legislating the War on Terror: An Agenda for Reform* at 365 - 373.
[94] PCATI *op cit* note 69 *a*t para 23.
[95] Ibid at para 40.
[96] Ibid at para 31.
[97] Ibid at para 39.
[98] Ibid at para 39.

operational activities.[99] The expansion of the term direct and the temporal element appears to support a membership approach to C-DPH.[100]

Civilians are, therefore, not absolutely protected under LOAC or domestic Israeli law due to the C-DPH exception.[101] This concept is reflected in international customary law in Rule 6 which holds that civilians are protected against attack unless and for such time as they take a direct part in hostilities.[102] The further requirements are that "if less harmful means can be employed," "a civilian taking a direct part in hostilities" should not be attacked; and "after an attack . . . a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed"; and any harm to "innocent civilians nearby" that results from the targeted killing "must withstand the proportionality test".[103] Targeted killings are therefore only legal where the State is in possession of credible intelligence that the potential target is a civilian directly partaking in hostilities; where less drastic measures cannot feasibly be employed; an independent and methodical investigation must be conducted after the attack to determine whether it was justified; and the state must consider the expected collateral damage against the anticipated military advantage.[104]

The category of unlawful combatant was, however, not recognised in the judgment and the court accepted the definition of "combatants" as per the *Second Hague Convention Respecting the Laws and Customs of War on Land*.[105] This, it was stated, is because terrorist organizations "have no fixed emblem recognizable at a distance," and that "they do not conduct their operations in accordance with the laws and customs of war," "[t]hey do not belong to the armed forces," and "[t]hey do not enjoy the status of prisoners of war".[106]

The Government of Israel, after the PCATI judgment, carried out, amongst others, a targeted killing of Mahmoud al Mabhouh on 20 January 2010 in a hotel room in Dubai. He was

[99] Ibid at para 35.
[100] Eichensehr, KE Comment, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 Yale L.J. 1873, 1875–79 (2007).
[101] PCATI *op cit* note 69 at para 23.
[102] See in general Henckaerts, J & Doswald-Beck, L *Customary International Law* (2005).
[103] PCATI *op cit* note 69 at para 40.
[104] Berlin, E *op cit* note 61 at 545.
[105] *Second Hague Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, § 1, Article 1 (Oct. 18, 1907) *available at* http://www.icrc.org/LOAC.nsf/full/195 (last accessed on 1 May 2014).
[106] PCATI *op cit* note 69 at para 25.

thought to have been involved in the kidnapping and killing of two Israeli soldiers in 1989. His function during that period appeared to be restricted to the procurement and transportation of weapons to Hamas militants in Gaza.[107] The Government of Israel probably accepted that al Mabhouh could be targeted because he was 'making the group his home' within the scope of the ICJ test.[108]

The US interpretation of C-DPH is important as this State has been involved continuously in contemporary armed conflict. The US interprets C-DPH narrowly when considering their own military contractors and civilian employees but interprets the concept broadly when targeting irregular enemy fighters. These two interpretations are equally based on a membership approach.[109] In order to protect the military's civilian employees and contractors, the US has thus argued in favour of a narrow interpretation of C-DPH. The foundation of this opinion is the Commentary to API,[110] which seems to require a "direct causal relationship between the activity engaged in and the harm done," and the acts must be "intended to cause actual harm." In 2000 the US defined C-DPH as "immediate and actual action" in armed conflict likely to cause harm to the enemy.[111] The *US Department of Defense Law of War Working Group* maintained that C-DPH will occur when there is geographic proximity of service provided to units in contact with the enemy, proximity of relationship between services provided and harm resulting to the enemy.[112] The US policy thus seems to create general protection from attack for US members of the armed forces,

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[107] Associated Press, Hamas Aide: Leader Murdered in Dubai Smuggled Weapons', *Gulf News* (online), 3 March 2010 < http://gulfnews.com/news/gulf/uae/crime/hamas-aide-leader-murdered-in-dubai-smuggled-weapons-1.591338> (last accessed on 1 May 2014); CNN World, *Dubai Police Chief: Mossad Should Be 'Ashamed' Over Hamas Killing* available at http://articles.cnn.com/2010-02-28/world/uae.murder.probe_1_mabhouh-mossad-dubai-hotel?_s=PM:WORLD (last accessed on 1 May 2014).

[108] See Lawati, AA 'Israel likely to admit assassinating Al Mabhouh in Dubai' *Gulf News* (online), 27 December 2010 available at http://gulfnews.com/news/gulf/uae/crime/israel-likely-to-admit-assassinating-al-mabhouh-in-dubai-report-says-1.736482 (last accessed on 1 May 2014).

[109] *See* Int'l Comm. of the Red Cross, *Summary Report: Direct Participation in Hostilities under International Humanitarian Law* 11 (2003) *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participationhostilities-LOAC-311205/ (last accessed on 1 May 2014) at 3 ("[I]t was said that treating certain civilians as more 'civilian' than other could eventually undermine the general protection afforded to civilians as such.").

[110] ICRC, Commentaries on the Protocols Additional of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987). See also Sandoz, Y, Swinarski, C and Zimmerman, B (Eds) *Commentary on the Additional Protocols* (1987).

[111] Message from the President Transmitting Two Optional Protocols to the Convention on the Rights of the Child, S. Treaty Doc. No. 106-37 (2000) available at 2000 WL 33366017 at 41.

[112] Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center & School, U.S. Army, 2 Int'l & Operational Law I-10 Civilian Protections in Armed Conflict (Sept. 2006), *quoted in* Cdr. Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, 2007-Jul. ARMY LAW. 82, 89 (2007).

similar to that of UN Peacekeepers, by declaring that there are no lawful combatants in the war on terror, and that all hostile acts against the US armed forces constitute war crimes.[113]

This interpretation, as it relates to C-DPH of civilian employees and contractors, is supported by US Colonel (Retired) W Hays Parks, an LOAC expert, who argues[114] that API requires an act similar to that of military operations or combat to qualify as C-DPH. This is corroborated by Schmitt, who states that the civilian must be informed that his participation was "indispensible to a discrete hostile act or series of related acts." This interpretation sets a high threshold for civilians or contractors to directly participate in hostilities.

The US, however, also desires to justify the targeting of irregular fighters and accordingly also supports a broad interpretation of C-DPH. On June 8, 2006, US armed forces killed Abu Musab al-Zarqawi.[115] Zarqawi was the leader of Al Qaeda in Iraq[116] and was targeted because of his command role and not based on possible future acts of hostilities. This is an expansive interpretation of Article 51(3) of Additional Protocol II of 1977[117] ("APII") as the targeting was done based on status and not behaviour. In November 2002, the United States ("US") used an unmanned aerial vehicle ("UAV") to target Qaed Salim Sinan al-Harethi, an *al Qaeda* leader, in Yemen.[118] The UN Special Rapporteur requested that the US provide justification for the killing of al-Harethi. The US argued that inquiries related to military operations conducted during armed conflict do not fall within the mandate or jurisdiction of the Special Rapporteur."[119]

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[113] *See Rome Statute of the International Criminal Court* op cit note 48, at article. 8(2)(b)(iii) (establishing as a war crime acts of "[i]ntentionally directing attacks against personnel . . . involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations").

[114] Hays Parks, W *Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. Int'L L. & Pol. 769, 828 (2010) at 828.

[115] Knickermeyer, E & Finer, J 'Insurgent Leader al-Zarqawi Killed in Iraq' *Wash. Post* (June 8, 2006) *available at* http://www.washingtonpost.com/wpdyn/content/article/2006/06/08/AR2006060800114.html (last accessed on 1 May 2014).

[116] *See* Finer, J & Shamari, H 'Zarqawi Lived After Airstrike' *WASH. POST* (June 10, 2006) at A01 available at http://www.washingtonpost.com/wpdyn/content/article/2006/06/09/AR2006060900473.html (last accessed on 1 May 2014).

[117] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII), Article 13(3), 1125 U.N.T.S. 609.

[118] Printer, Jr. NG 'The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen' *8 UCLA J. Int'L L. & Foreign Aff.* 331, 335 (2003).

[119] Special Rapporteur on Extrajudicial Executions, *Use of Force During Armed Conflict*, *in* UN Special Rapporteur on Extrajudicial Executions Handbook 11 (2010) (quoting the response of the government of the United States to the letter from the Special Rapporteur, Asma Jahangir, to the Secretary of State dated November 15 2002) available at

In 2010, the legal advisor to the US State Department, Harold Koh, stated that "[w]hile we disagree with the ICRC on some of the particulars, our general approach of looking at "functional' membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on C-DPH. This includes, but is not limited to, whether an individual joined with or became part of *al Qaeda* or *Taliban* forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with *al Qaeda*, or taking positions with enemy forces".[120]
In 2002, a US UAV targeted three men near an abandoned Mujahedeen complex located near Khost in Afghanistan. A Pentagon spokesperson acknowledged that there were no intelligence indicating that the men were al Qaeda members but that there was 'no initial indications that these were innocent locals'.[121] The attack at Zawhar Kili was a 'signature strike' whereby a UAV targets "groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren't known".[122] The accessible evidence suggests that the majority of drone strikes have been signature strikes,[123] as opposed to 'personality strikes' where there is a 'high degree of confidence' concerning the identity of the target.[124]

Civilians found to be participating directly in hostilities against the US are exposed to potential "prosecution for violations of domestic and international law they may have committed".[125] Civilians taking a direct part in hostilities generally do so while "failing to distinguish themselves from the civilian population" in order to benefit from "civilian

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http://www.extrajudicialexecutions.org/application/media/Handbook%20Chapter%201%20Use%20of%20Force%20During%20Armed%20Conflicts5.pdf (last accessed on 1 May 2014).

[120] Koh, HH 'The Obama Administration and International Law' (Speech delivered at the Annual Meeting of the American Society of International Law, Washington DC, 25 March 2010) http://www.state.gov/s/l/releases/remarks/ 139119.htm (last accessed on 1 May 2014). See also Nauman, JP 'Civilians on the Battlefield: By Using U.S. Civilians in the War on Terror, Is the Pot Calling the Kettle Black?' *Nebraska Law Review, Vol 91, Issue 2* at 479.

[121] Sifton, J 'A Brief History of Drones' *The Nation* (7 February 2012) available at http://www.thenation.com/article/166124/brief---history---drones# (last accessed on 1 May 2014).

[122] Klaidman, D *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (2012) at 41.

[123] Cloud, D 'CIA Drones Have Broader List of Targets' *Los Angeles Times* (5 May 2010) available at http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets---20100506 (last accessed on 1 May 2014).

[124] Columbia Law School Human Rights Clinic *The Civilian Impact of Drones* (September 2012) at 8.

[125] Melzer *op cit* note 13 at 83 - 84; Roberts, A *The Civilian in Modern War* (009) at 41. Melzer, N *op cit* note 11 at 329; Telman, DAJ 'Introduction: Targeting in an Asymmetrical World' *46 Val. U.L. Rev. 697* (2012) at 697 – 728 available at http://scholar.valpo.edu/vulr/vol46/iss3/1 (last accessed on 15 July 2014).

protection against direct attack". This is a violation of LOAC prohibition against perfidy.[126] The US accordingly created military tribunals,[127] and through the *Military Commissions Act* ("MCA") of 2006 and 2009,[128] has attempted to criminalize C-DPH. The first attempt by the US to criminalize C-DPH was established via the penal code implementing regulation for the military commissions,[129] which was created by executive order.[130] This early attempt at establishing military commissions was invalidated by the US Supreme Court in *Hamdan v. Rumsfeld* in 2006.[131] The initial attempt was followed by the introduction of the MCA of 2006[132] and thereafter 2009. The US, in this regard, prosecuted and convicted Omar Khadr for C-DPH. He was charged with murder in violation of the law of war for killing a US soldier with a hand grenade during a battle between US forces and *al Qaeda* and affiliated fighters. The charge against Khadr alleged that he used a conventional weapon while he participated in a conventional battle in response to an assault by US forces.[133]

In contrast to US practice, the *UK Manual on the Law of Armed Conflict* states that "[w]hether civilians are taking a direct part in hostilities is a question of fact".[134] It further states that civilians taking an indirect part in hostilities "are at risk from attacks on those objectives since military objectives may be attacked whether or not civilians are present (subject to the rule of proportionality)." The 1998 *Report on the Practice of Zimbabwe* states that "civilians will lose their protection if they actively assist or actively become engaged in military operations . . . A lot, however, will depend on the degree of involvement". *The Report of the Practice of Chile* states that Chile "takes a very broad view of what acts are considered to constitute support to military action, and as a result lead to the loss of civilian status and protection". The Indian Army Training Note of 1995 states "so long as an

[126] Melzer *op cit* note 13 at 85.
[127] Proclamation No 7463, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).
[128] *See* 10 U.S.C. §§ 948a–950w (2006 & Supp. II 2009); *see also* Jonathan Hafetz, *Redefining State Power and Individual Rights in the War on Terrorism*, 46 Val. U. L. Rev. 843, 849 (2012)
[129] 32 C.F.R. at 11.6 (2005).
[130] Proclamation *op cit* note 122.
[131] 548 U.S. 557 (2006).
[132] *Military Commissions Act* of 2006, 10 U.S.C. §§ 948a–950w (2006).
[133] Defense Motion to Dismiss Charge I for Failure to State an Element of the Offenses in Violation of Due Process at 1, United States v. Khadr (Military Comm'n Guantánamo Bay, Cuba July 11, 2008) *available at* http://www.defense.gov/news/Khadr%20D071%20-%20Motion%20to%20Dismiss%20-20Due%20Process.pdf (last accessed on 1 May 2014).
[134] Ministry of Defence, The Manual of the Law of Armed Conflict (2004) at 5.3.3 in Rogers, APV 'Direct Participation in Hostilities: Some Personal Reflections' *Military Law and the Law of War Review 48/1-2* (2009) at 149.

individual, may it be soldier or civilian is directly contributing towards furtherance of the war effort, he is deemed to be at war".[135]

4. Overview of the ICRC's Expert Process

The ICRC has been delegated by State Parties to the GC's and the AP's[136] and the Statutes of the International Red Cross and Red Crescent Movement[137] with the "guardianship" of LOAC.[138] The ICRC is a neutral and independent humanitarian organisation mandated by States to promote and campaign to enhance the understanding and knowledge of LOAC. The ICRC mandate does not include legislative authority as only States enjoy the right.[139] The ICRC,[140] in cooperation with the TMC Asser Institute instigated a multi-year study in an attempt to clarify C-C-DPH. This process comprised of five informal expert meetings in The Hague and in Geneva between 2003 and 2008.[141] The study included 50 academic, military, humanitarian, governmental and non-governmental experts, who all attended in their personal capacities.[142] The project incorporated questionnaires, reports, background papers, and five expert meetings. The study only deals with C-DPH in so far as it has bearing on the evaluation of 'targeting and military attacks'. It does not deal with 'detention or combatant immunity'.[143] The ensuing debate informed the Guidance[144] on the notion of direct participation in hostilities under LOAC.[145]

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[135] Henckaerts, J and Doswald-Beck, L (Eds) *Customary International Humanitarian Law* (International Committee of the Red Cross, 2005) Vol 1 at 3; Melzer, N op cit note 12 at 109.
[136] See Articles 9 of Geneva Conventions I-III and Article 10 of the Geneva Convention IV. See also Common Article 3, CG's.
[137] Adopted by the 25th International Converence of the Red Cross at Geneva in October 1986 and as amended in 1995 and 2006 available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/$File/Statutes-EN-A5.pdf (last accessed 1 May 2014); see also the discussion by Barnidge, RP (ed) *Liberal Way of War: Legal Perspectives* (2012) at 116.
[138] See in general Williamson, JA 'Challenges of Twenty-First century Conflicts: A Look at Direct Participation in Hostilities' *Duke Journal of Comparative & International Law* Vol 20:457 at 458.
[139] Hays Parks, W *op cit* note 110 at 796.
[140] See Fenrick, WJ 'ICRC Guidance on Direct Participation in Hostilities' *Yearbook of International Humanitarian Law Vol 12* (December 2009) 287-300 at 288 and Van der Toorn, D *op cit* note 16 at 22.
[141] The reports of the expert meetings are available at http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-LOAC-feature-020609 (last accessed on 1 May 2014).
[142] Williamson, JA *op cit* note 133 at 463.
[143] Goodman, R and Jinks, D *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum* at 638 available at http://nyujilp.org/wp-content/uploads/2012/04/42.3-Goodman-Jinks.pdf (last accessed on 7 January 2015).
[144] Melzer, N op cit note 12 at 9.
[145] 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 914.

It was already apparent before the meetings started that that the experts held conflicting opinions regarding the interpretation of C-DPH. Some of the experts were partial to a more restrictive interpretation of C-DPH,[146] relating actual combat operations with direct participation in hostilities.[147] The opposing and minority view reflected a more liberal interpretation,[148] which anticipated a view which involves all conduct that functionally corresponds to that of regular armed forces. This conduct incorporates the actual conduct of hostilities and the planning, organising, recruiting and logistical functions.[149] The commentary on API takes the middle road and states 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".[150]

The First Expert Meeting took place in The Hague in June 2003. The meeting intended to provide an overview of the applicable law. The aim was to examine the meaning of 'hostilities' and 'direct participation' and to identify the differences in their content in the context of IAC and NIAC. Further issues related to the challenges in contemporary conflicts including the increased intermingling of armed groups with the civilian population, the lack of identification of those directly participating in hostilities, questions relating to measures that could be taken to ensure the protection of those who do not directly participate in hostilities; the so-called 'privatisation' of armed forces and how the rules apply to outsourced employees of private companies.

C-DPH is traditionally considered as having waived their immunity from attack, thus becoming legitimate targets of attack for the time of their participation, both in IAC and NIAC.[151] The participants agreed that C-DPH demanded additional analysis and that the

[146] See Ben-Naftali, O & Michaeli, KR *op cit* note 71 at 233; Schondorf, RS 'Are "Targeted Killings" Unlawful? The Israeli Supreme Court's Response: A Preliminary Assessment' May *Journal of International Criminal Justice* (2007) 301.
[147] Melzer, N *op cit* note 11 at 335.
[148] See Schmitt, MN *Direct Participation in Hostilities and 21st Century Armed Conflict* (2004) available at http://www.michaelschmitt.org/images/Schmitfinal.pdf (last accessed on 1 May 2014).
[149] Melzer, N *op cit* note 11 at 338-339.
[150] ICRC, Commentary to API.
[151] See 'Targeting Operations with Drone Technology: Humanitarian Law Implications. Background Note for the American Society of International Law Annual Meeting' *Human Rights Institute, Colombia Law School* (March 25, 2011) at 17 – 21.

responsibility for the Interpretive Guidance would be assumed by the ICRC.[152] Melzer, the legal advisor of the ICRC, prepared the background papers for the meetings.[153]

The Second Expert Meeting took place in The Hague in October 2004, where an extensive questionnaire was evaluated in terms of practical examples and theoretical issues.[154] The meeting addressed specific categories of situations of direct application of means of destruction or injury, and the establishment and exercise of control over military personnel, objects and territory. Further debate concerned intelligence activities, support activities, affiliation to armed forces and groups, civilian employees and contractors, direct participation in NIAC, loss of immunity from attack, membership in armed groups, the "revolving door" approach, nexus to armed conflict and hostile intent. Hostile intent was collectively rejected as an element of C-DPH as intent is subjective and difficult to determine.

The Third Expert Meeting took place in Geneva in October 2005. This meeting concerned itself with complicated legal questions relating to C-DPH. These included membership in organized armed groups during NIAC relative to C-DPH, the duration of the loss of protection, and the issues surrounding private contractors and civilian employees in conflict areas.[155] Issues that were discussed included constitutive elements of C-DPH, membership in organized armed groups, the temporal scope of C-DPH, individual contractors and civilian employees, evolution of policy and law concerning the role of civilians and civilian contractors accompanying the armed forces, private military/security companies and the

[152] See the following materials: Agenda DPH 2003; Background Doc. DPH 2003 (Quéguiner): "Direct Participation in Hostilities under LOAC"; Report DPH 2003.
[153] All materials produced in the course of the expert process have been published online at: www.icrc.org and are also available on a CD attached to the hardcopy publication of the ICRC's Interpretive Guidance.
[154] See the Agenda DPH 2004; Questionnaire DPH 2004; Background Doc. DPH 2004 (Melzer): Direct Participation in Hostilities under LOAC; Executive Summary Background Doc. 2004; Expert Paper DPH 2004 (Bothe): Direct Participation in Hostilities in Non-International Armed Conflict; Expert Paper DPH 2004 (Schmitt): Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees; Report DPH 2004.
[155] See the Agenda DPH 2005; Background Doc. DPH 2005, WS I (Melzer): Residual Issues from the Questionnaire; Background Doc. DPH 2005, WS II (Melzer): Constitutive Elements of Direct Participation in Hostilities; Background Doc. DPH 2005, WS III (Melzer): Direct Participation in Hostilities and Membership in Organized Armed Groups; Background Doc. DPH 2005, WS IV (Melzer): Temporal Scope of Direct Participation in Hostilities; Background Doc. DPH 2005, WS V (McDonald): Individual Contractors and Civilian Employees; Expert Paper DPH 2005 (Parks): Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces; Expert Paper DPH 2005 (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; Report DPH 2005.

status of their staff and their obligations under LOAC, and the responsibilities of states in relation to their operations.

In 2007, the ICRC confirmed that LOAC was not to be developed but it was to be clarified as the law already "reflect[s] a reasonable and pragmatic balance between the demands of military necessity and those of humanity."[156] The organizers then prepared a draft Interpretive Guidance on C-DPH for debate during the Fourth Expert Meeting, which took place in Geneva on 27 and 28 November 2006.[157] This meeting resulted in a revised version of the Interpretive Guidance, which was presented to the experts for written comments thereon by July 2007.

The Fifth Expert Meeting took place in Geneva in February 2008 and concentrated on the main legal questions that still remained contentious within the expert group.[158] The ICRC anticipated consensus and wanted to produce a unified document, but ultimately there were too many areas of disagreement between the experts. Many experts withdrew their names from the document,[159] and the experts failed, *inter alia*, to achieve agreement on when a civilian will lose his immunity from attack[160] and the membership approach of armed groups.[161] Ultimately, the ICRC decided to publish guidance on C-DPH as there was sufficient consensus in key areas on C-DPH.[162] This resulted in the 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' in 2009. [163]

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[156] International Committee of the Red Cross, International Humanitarian Law and the Challenges of Armed Conflicts 4 (2007), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/LOAC-30-international-conference-101207/$File/LOAC-challenges-30th-International-Conference-ENG.pdf (last accessed on 1 May 2014).
[157] See the following materials: Agenda DPH 2006; Background Doc. DPH 2006 (Melzer), N. Draft Interpretive Guidance on the Notion of Direct Participation in Hostilities; Report DPH 2006.
[158] See the Agenda DPH 2008; Background Doc. DPH 2008 (Melzer): Revised Draft Interpretive Guidance on the Notion of Direct Participation in Hostilities; Background Doc. DPH 2008 (Melzer): Expert Comments & Elements of Response Concerning the Revised Draft of the Interpretive Guidance on the Notion of Direct Participation in Hostilities; Report DPH 2008.
[159] Roberts, A *op cit* note 122 at 41.
[160] Schmitt, M 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' 1 *Harv Nat Sec J* 5 (2010) at 6.
[161] See in general Watkin, K 'Opportunity Lost: Organised Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance' 42 *Int'l L and Pol* 641 (2010); Boothby, WH *The Law of Targeting* (2012) at xi.
[162] Fenrick, WJ *op cit* note 135 at 288.
[163] See the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law 20 (2009) *available at* http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (last accessed on 1 May 2014).

Some experts have embraced the Interpretative Guidance for the benefits that it has produced and the renewed interest in the subject, while others, including some experts who participated in the process, have critiqued the Guidance. There has, as a result, been debate on certain aspects of C-DPH, particularly what actions short of direct attacks on enemy armed forces constitute C-DPH; whether there is an obligation to use the least force necessary when attacking direct participants and when a civilian regains protection after directly participating in hostilities.[164]

The Interpretative Guidance must be evaluated, as a process and document, which was intended to clarify and interpret the existing LOAC relative to C-DPH. It was not intended to change the existing rules of customary or treaty LOAC.[165] The recommendations and commentary[166] therefore only reflect the ICRC's position on C-DPH.[167] The Guidance is not a legally binding document but it is a comprehensive legal analysis of C-DPH.[168] It provides persuasive recommendations and has 'substantial persuasive effect'on C-DPH.[169] The ultimate purpose, however, was to provide greater protection for the civilian population by clarifying the standard distinction between civilians and combatants, and to refine C-DPH under existing LOAC.

The Guidance dealt with three main questions under LOAC applicable in both IAC and NIAC. These concerned the concept of 'civilian'; the conduct that qualifies as C-DPH; the modalities governing the suspension of civilian immunity against attack; the duration and loss of protection; precautions and presumptions in situations of doubt; restraints on the use of force against legitimate targets and the consequences of regaining civilian protection after

[164] *See* Boothby, B *op cit* note 28; Goodman, R & Jinks, D 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum' *42 N.Y.U. J. Int'L L. & Pol. 637* (2010); Melzer, N *op cit* note 140; Meyer, M & Garraway, C 'Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities' *59 Int'L & Comp. L.Q. 180* (2010); Hays Parks, W *op cit* note 110; Schmitt, MN *op cit* note 87; Schmitt, MN *op cit* note 158; Taylor, RS 'The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis when Attacking Civilians who are Directly Participating in Hostilities?' *ARMY LAW* (2010) AT *103*; Watkin, K *op cit* note 156.

[165] The Interpretive Guide drew on customary LOAC**;** treaty LOAC (including the '*travaux préparatoires* of treaties)**;** international jurisprudence; military manuals and standard works of legal doctrine Melzer *op cit* note at 9).

[166] Fenrick, WJ *op cit* note 135 at 288.

[167] Melzer *op cit* note 13 at 9.

[168] Fenrick, WJ *op cit* note 135 at 300.

[169] Ibid at 300; Melzer, N op cit note 12 *a*t 10.

acts of C-DPH. There was general consensus that there is no difference between 'direct' and 'active' participation in hostilities.[170]

The Guidance resulted in ten recommendations, which must be interpreted with the commentary therein. The first recommendation defines civilians in IAC as "all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levee en masse*".[171] API[172] labels all persons, who are neither members of the armed forces of a party to the conflict, nor participants in a *levee en masse*, as civilians. Civilians, regular armed forces, and organised armed groups of the parties to the conflict are thus mutually exclusive categories. This implies that States and even non-State parties have armed forces detached from the civilian population.

Membership of regular armed forces is regulated by domestic law and is expressed through formal integration into permanent units. The *Hague Regulations* and the GV's stipulate that members of militias and volunteer corps, other than the regular armed forces, recognised as such in domestic law, must possess a responsible command, display fixed distinctive signs recognisable at a distance, carry arms openly and operate in accordance with the laws and customs of war. API defines armed forces as all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.[173] It is submitted that membership in the armed forces, although usually described as a status, is essentially determined with reference to the requirements of wearing a uniform, the display of a fixed emblem recognizable at a distance, and the carrying of arms openly. These components are all based, in the ultimate consideration, on actions.

The second recommendation defines civilians in NIAC as "all persons who are not members of the State armed forces or organised armed groups of a party to the conflict and are therefore entitled to protection against direct attack unless and for such time as they take a direct part in hostilities".[174] The meaning of civilians in NIAC is derived from Common

[170] Rogers, APV *op cit* note 129 at 147.
[171] Melzer, N *op cit* note 12 at 20. See also the *Geneva Convention Relative to the Treatment of Prisoners of War* Article 4(6).
[172] Article 50[1] – this definition reflects customary LOAC. See ICTY *Prosecutor v Blaskic*, Case No IT-95-14-T, Judgment of 3 March 2000 at 180. See also Report DPH 2005 pp 43f, 58, 74; Report DPH 2006 at 10, 12ff, 19ff & Report DPH 2008 at 35, 37.
[173] API, Article 43(1).
[174] Melzer, N *op cit* note 12 at 27.

Article 3[175] and APII, which acknowledge, but do not authorize participation in armed conflict. This means that there is, in LOAC, no distinction between 'combatant' and 'civilian' in NIAC.

The third recommendation asserts that private contractors and civilian "employees of a party to an armed conflict who are civilians . . . are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities".[176] These civilians are, however, exposed to a greater risk of targeting due to their proximity to military objectives. The expert's consensus was that there must be a link between the act of C-DPH and the foreseeable harmful consequences or the intent to harm for the act to qualify as C-DPH.

The fourth recommendation reveals that C-DPH refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.[177] DPH influence targeting decisions and the Guidance firstly deals with a specific hostile act[178] as a restricted act which qualifies as DPH.[179] The determination of the specific activities which amount to C-DPH do not depend on a person's "status, function, or affiliation", 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".[180] It was agreed that hostilities implied something narrower than "armed conflict", but broader than an attack. A narrow interpretation thereof would arguably prevent many civilians from losing their immunity from attack but a broad interpretation may protect civilians by encouraging them to avoid hostilities.

[175] Common Article 3 to the Geneva Conventions of 1949.
[176] Melzer, N *op cit* note 12 at 37.
[177] Ibid at 43-45.
[178] Ibid at 45.
[179] Ibid at 46.
[180] "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" (Melzer, N *op cit* note 12 at 10); See Targeting Operations with Drone Technology: Humanitarian Law Implications. Background Note for the American Society of International Law Annual Meeting, Human Rights Institute, Colombia Law School. March 25, 2011 at 21 - 25.

Galvin suggests that a narrow interpretation of C-DPH actually increases the risk to the civilian population[181] as it creates confusion and promotes disrespect for LOAC among combatants. He comments that it is illogical to attach participation to the direct release of kinetic force, as non-kinetic force may be more harmful to the opposing forces in modern armed conflict. Activities far removed from the battlefield may conceivably contribute more than the actual combat activities. The actions, of a person performing an indispensable function relative to the application of force, against the opposing force, therefore qualify as C-DPH. Galvin, as a result, proposes that the appropriate test for C-DPH is whether the civilian functions as an integral facet of the uninterrupted process of defeating the enemy.

The fifth recommendation provides three cumulative criteria required for a specific act to qualify as C-DPH.[182] 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); [183] 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);[184] 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).[185]

The three cumulative constitutive elements for C-DPH do not recognise those acts which benefit a party to the conflict.[186] It may very well be argued that persons who engaging in such beneficial actions, directly enhance the military operations and capacity of an armed group. Their exclusion and immunity from attack is thus illogical from a military perspective.[187] Schmitt, the head of the US Naval War College's International Law Department, argues that the threshold of harm determination requires that "the harm

[181] Galvin, JE 'Direct Participation in Hostilities: A Proposition for U.S. Reaction to the ICRC's Interpretive Guidance and Formulation for a Practicable Definition' A Thesis submitted to The Faculty of The George Washington University Law School In partial satisfaction of the requirements for the degree of Master of Laws (May 20, 2012).
[182] Melzer, N *op cit* note 12 *at* 47.
[183] Ibid at 47; Melzer, N *op cit* note 140 at 862; Lesh, M 'Routledge Handbook of the Law of Armed Conflict, Part II: Principle of Distinction' *Routledge Handbook of the Law of Armed Conflict, Part II: Principle of Distinction* at 5 – 7.
[184] Lesh, M *op cit* note 178 at 7 – 10.
[185] Ibid at 10 – 12.
[186] Conducting specialized training, building defensive positions, or repairing military assets.
[187] Schmitt, MN *op cit* note 35 at 833.

contemplated may either adversely affect the enemy or harm protected persons or objects".[188] This standard only requires an 'objective likelihood'[189] that the consequence of the act will cause harm and the actual 'materialisation of harm'[190] is not required. An objective "likelihood" will be present when a civilian exhibits subjective intent to cause the harm which is objectively identifiable.[191] The nature of the intended harm determines whether the threshold of harm is achieved and the 'quantum of harm caused' is immaterial.[192]

Military harm consists of "not only the infliction of death, injury, or destruction on military personnel and objects", but any outcome which negatively affects the military operations or military capacity of a party to the conflict.[193] Military harm or objects which "contribute militarily" are the "most common form[s] of harm inflicted during the conduct of hostilities".[194] This definition of 'military objective'[195] normally excludes political, economic and psychological contributions which might support the realization of a military success. The exclusion, of the requirement of the infliction of military harm, relates to attacks,[196] specifically "directed against civilians and civilian objects".[197] This 'attack'[198] must only, in the alternative, be likely to cause at least death, injury, or destruction of civilians or civilian objects.[199] These attacks will only be harmful when they are an integral part of armed confrontations which must 'in some way be connected to the armed conflict'.[200]

Various experts have criticised the 'threshold of harm' requirement based on its perceived limited scope and challenging application. Jensen notes that the 'actual harm' standard is

[188] Examples of activities which satisfy the threshold of harm requirement are, inter alia, 'acts of violence against human and material enemy forces'; sabotaging or causing 'physical or functional damage to military objects, operations or capacity'; restricting or disturbing military 'deployments, logistics and communications'; Schmitt, MN *op cit* note 87 at 715; Melzer, N op cit note 12 *a*t 48; Melzer *op cit* note 178 at 859 & 860. Examples of activities which fall short of the threshold of harm requirement are, inter alia, 'building fences or roadblocks'; interrupting 'electricity, water, or food supplies'; appropriating cars and fuel; manipulating computer networks; etc. - Melzer, N *op cit* note 12 at 48; Schmitt, MN *op cit* note 87 at 719.
[189] Melzer, N op cit note 12 at 47.
[190] Ibid at 33; Schmitt, MN *op cit* note 87 at 724.
[191] Schmitt, MN *op cit* note 87 at 724
[192] Ibid at 716 - He observes that the word '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'.
[193] Melzer, N op cit note 12 at 47.
[194] Melzer, N *op cit* note 178 at 858. See also Schmitt, MN *op cit* note 87 at 717.
[195] Schmitt, MN *op cit* note 87 at 717.
[196] Melzer, N *op cit* note 178 at 860.
[197] Melzer, N *op cit* note 178 at 860.
[198] See Article 49 of API; Schmitt, MN *op cit* note 87 at 723.
[199] Melzer, N op cit note 12 at 49; Melzer, N *op cit* note 178 at 861-862; PCATI *op cit* note 69 at para 33.
[200] Schmitt, MN *op cit* note 87 at 723.

excessively restrictive as it does not deal with non-members of an armed group that is party to the conflict.[201] He argues for some differentiation between hostile civilians and those "who disdain hostilities and comply with their status".[202] His interpretation of C-DPH includes "not only those who cause actual harm, but those who directly support those who cause actual harm . . . this would also 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 tactics".[203] Heaton supports Jensen and argues that the threshold requirement excludes the "essential links in the chain immediately preceding that final step".[204] He argues that the final hostile act depends on the "support personnel", without which the harm cannot be carried out.[205]

Schmitt's misgiving on the issue is that the "strict application of the threshold of harm constitutive element excludes conduct that by a reasonable assessment should amount to direct participation".[206] Schmitt favours military necessity,[207] but concedes that the definition of a military objective only includes harm which is military in nature.[208] Schmitt argues for loss of immunity "for support activities which do not adversely affect the enemy"[209] including "unlawful conduct such as the deportation of civilians or hostage taking".[210] He maintains that any harmful acts directed against protected persons or objects as part of the armed conflict's 'war strategy', or within an obvious relationship with on-going hostilities, should qualify as C-DPH.

Melzer, however, warns against arguments to diminish the required threshold of harm to "extend loss of protection to a potentially wide range of support activities', as he avers that

[201] Jensen, ET "Direct Participation in Hostilities" in Banks WC (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (2011) at 2221-28.
[202] Ibid .
[203] The PCATI judgment endorsed this conclusion in their judgment ((2006) HCJ 769/02 at para 35).
[204] Van der Toorn, D *op cit* note 16 at 37.
[205] Ibid at 37.
[206] Schmitt, MN *op cit* note 87 at 714.
[207] Ibid at 714.
[208] Melzer, N *op cit* note 178 at 859.
[209] Melzer N Ibid - 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' at 861.
[210] Schmitt, MN *op cit* note 87 at 723.

this will weaken the generally recognised distinction between C-DPH and mere involvement in the general war effort".[211] This supports a humanitarian approach to the requirement.

The Guidance stipulates that "direct causation should be understood as meaning that the harm in question must be brought about in one causal step" and thus excludes activities that indirectly cause harm.[212] The reasonable conclusion is accordingly that "temporal or geographic proximity cannot on its own, without direct causation, amount to a finding of direct participation in hostilities".[213] The Guidance does, however, appreciate that "the resulting harm does not have to be directly caused by each contributing person individually, but only by the collective operation as a whole".[214] A specific act may not "on its own directly cause the required threshold of harm, their actions might still amount to C-DPH where the individuals are part of a collective operation".[215] Where an individual act "constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm" the participant will still forfeit immunity.[216] The Guidance defines the word "direct" in the legal standard as referring to direct causation as opposed to indirect causation.[217] As a result, a direct causal result implies that the "harm in question must be brought about in one causal step".[218] This one-step idea requires that the causal contribution must be operational and on the battlefield.[219] Temporal and geographic proximity may imply causal proximity, but they do not wholly determine it, since an action could directly cause a particular harm even when far removed in time and space.[220]

The direct causation test deals with the debate on whether the general 'war effort'[221] and 'war sustaining activity' qualify as C-DPH. It is accepted that 'war sustaining activities'[222] are

[211] Melzer, N *op cit* note 178 at 877.
[212] Melzer, N op cit note 12 at 54 and 55; Melzer, N *op cit* note 178 at 866. This view was endorsed by the PACTI judgment which held that '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' at para 35.
[213] Melzer, N op cit note 12 at 56.
[214] Melzer, N *op cit* note 178 at 866.
[215] Melzer, N *op cit* note 12 at 55.
[216] Ibid at 55; Kalshoven, F & Zegveld, L (4 Ed) *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (2011) at 102.
[217] Melzer, N op cit note 12 *at* 1021.
[218] Ibid *at* 1021.
[219] Ibid *at* 1021.
[220] Ibid *at* 1023.
[221] Ibid at 53.
[222] Ibid *at 52.*

essential to the war effort[223] but the experts at the ICRC's expert meetings "agreed on the centrality of a relatively close relationship between the act in question and the consequences affecting the ongoing hostilities".[224] Schmitt articulates this in terms of the requirements of military necessity which outweighs humanitarian considerations where the casual connection between the act and the harm is clear. This requires that there must be "a sufficiently close causal relation between the act and the resulting harm" for the civilian to lose their protected status.[225] The ICRC differentiates between acts which form part of the 'general war effort' or are 'war sustaining', and acts which amount to C-DPH. C-DPH requires that there must be a 'direct causal link' between the act said to constitute C-DPH and the requisite harm that is caused. The ICRC asserts that "the requirement of direct causation is satisfied if either the specific act in question, or a concrete and coordinated military operation of which that act forms an integral part, may reasonably be expected to directly, in one causal step, cause harm that reaches the required threshold."[226] This interpretation by the ICRC has escaped much of the criticism that the other conclusions in the Guidance have been subjected to.[227] This interpretation is supported by API as Article 51(3) thereof does not remove immunity from attack where the person has been involved in or contributed to the armed conflict as opposed to taking a direct part in hostilities.

Opposition to the causation requirement assert that it accords disproportionate weight to humanity.[228] The Guidance clearly favours humanitarian concerns as it states that these acts "may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting or detonation of that device, do not cause the harm directly."[229]

[223] The Guidance gives examples of activities that satisfy the direct causation requirement which includes, inter alia, 'bearing, using or taking up arms'; 'taking part in military or hostile acts, activities, conduct or operations'; 'participating in attacks against enemy personnel, property or equipment'; 'coordinated tactical operations which directly cause harm'; etc. – see for the full list: Watkin, K *op cit* note 156 at 707; Schmitt, MN *op cit* note 87 at 708; Melzer, N *op cit* note 12 at 55; PCATI *op cit* note 69 at para 35; Melzer, N *op cit* note 178 at 867; Heaton, R. Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces at 177-8. Examples of activities which fall short of the direct causation requirement are listed as, inter alia, designing, producing and shipping weapons; 'transporting arms and munitions'; purchasing materials in order 'to build suicide vests'; purchasing, smuggling, assembling or storing 'improvised explosive devices'; etc. – See for the full list: Fenrick, WJ 'ICRC Guidance on Direct Participation in Hostilities' at 293; Schmitt, MN *op cit* note 87 at 710; Melzer, *op cit* note 178 at 865 - 867; Solis *The Law of Armed Conflict: International Humanitarian Law in War* at 204; PCATI *op cit* note 69 at paras 34-35.
[224] Schmitt, MN *op cit* note 87 at 725.
[225] Schmitt, MN *op cit* note 87 at 725.
[226] Interpretative Guidance at 58.
[227] Meyer, M & Garraway, C *op cit note* 162 at 180.
[228] Schmitt, MN *op cit* note 87 at 725.
[229] Melzer, N op cit note 12 at 54.

Schmitt states that "acts that directly enhance the military capacity or operations of a party, without resulting in direct and immediate harm to the enemy"[230] certainly would add to ultimate success.[231] According to him "the key is whether the acts in question are sufficiently causally related to the resulting harm/benefit to qualify as directly caused".[232] The one causal step requirement results in the exclusion of indirect capacity-building activities.[233] Schmitt proposes an 'integral part test',[234] which "extend participation as far up and downstream as there is a causal link".[235]

McBride argues that the most practical and legally correct definition of a civilian that has lost his protection from attack is and to be properly categorized as a "member of organized armed group", that person does not have to directly inflict harm in one causal step on a recurrent basis. A more accurate reflection of who is a legitimately targetable member of an organized armed group is based not on the harm the individual causes, but simply on conduct that shows they intentionally enable the operational activities of the group. 'Members of organized armed groups' are part of the 'combatant' class rather the 'civilian' class. The author further submits that a better definition will come from considering whether they form part of the 'armed force', without recourse to formal membership, or indicia such as uniforms.[236] This evaluation is preferable and I will also conclude that continuous direct participation by members of the regular armed forces and members of armed groups should be evaluated accordingly; taking into account the fact that armed conflict should be directed towards the military ability of the enemy.

Brigadier-General (Retired) Ken Watkin was a professor at the US Naval War College and a retired Judge Advocate General for the Canadian Forces. He is of the opinion that the direct causation requirement does not recognise the "role of logistics or the scope of such a function in a military sense".[237] He is more concerned with the capacity of a party to plan and attack in

[230] Schmitt, MN *op cit* note 87 at 736.
[231] Ibid at 725.
[232] Ibid at 736.
[233] Ibid at 727; See Melzer's response in Melzer, N *op cit* note 178 at 865.
[234] Ibid at 729.
[235] Melzer, N *op cit* note 178 at 866 & 867.
[236] *McBride, D* 'Who is a Member? Targeted Killings against Members of Organized Armed Groups' *Australian Year Book of International Law Vol 30 at 5.*
[237] Watkin, K *op cit* note 156 at 684.

the future rather than only on specific acts.[238] Rogers further, in this regard, correctly mentions that it may be impossible to determine the intent of a civilian committing an apparent hostile act which makes this recommendation exceptionally complicated to apply in practice.[239]

Van der Toorn, the Principal Legal Officer Attorney General's Department, Australia recommends that C-DPH should not be restricted to specific operations.[240] He reasons that C-DPH includes "precursor operational activities" that facilitate and are "closely connected with the materialisation of harm".[241] The Guidance, however, equates participation to single, discrete acts, which accept that civilians may interrupt their hostilities with "intervening periods when they are engaged in their peaceful civilian vocations".[242] Van der Toorn thus also believes that the Guidance does not balance military necessity with the protection of civilians.[243]

It is submitted that the use of 'direct' in APII, Article 13 does not mean that 'a single causal step' is required. The Commentary to Article 13 states that "[direct] implies there is a sufficient causal relationship between the act of participation and its immediate consequences."[244] The argument is that the term 'sufficient' is nothing like 'direct'. It is further argued here that persons can be indirectly participating, thus be two or more causal steps away from the actual causing of harm, and that this participation may still qualify as C-DPH. The Commentary to API states 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". This also cannot necessarily be regarded as support for the 'one causal step' requirement. Article 43(2) of API states that "[m]embers of the armed forces of a Party to a Conflict…. are combatants, that is to say, they have the right to participate directly in hostilities".[245] Therefore, even those members of the regular armed forces that contribute

[238] Ibid at 658.
[239] Rogers, APV *op cit* note 129 at 157.
[240] Van der Toorn, D *op cit* note 16 at 39.
[241] Ibid at 40; Watkin, K *op cit* note 156 at 658.
[242] Ibid at 30.
[243] Ibid at 32.
[244] Sandoz, Y; Swinarksi, C & Zimmerman, B (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1143 [4789] available at < http://www.icrc.org/LOAC.nsf/COM/475-760018?OpenDocument> at 1453 [4787] (last accessed on 1 May 2014).
[245] API, Article 43(2).

indirectly to the eventual harm are considered to be combatants. 'Direct' here is thus closer to active than 'in one causal step'.

Melzer cautions against an "extremely permissive" construct of direct causation as this may result in "any act connected with the resulting harm through a causal link" to be direct enough to qualify as C-DPH.[246] Melzer warns against direct attacks against civilians who "causally contribute to the success of a hostile act, no matter how far his action is removed from the potential materialisation of harm".[247] This, according to Melzer, would amount to an "extreme relaxation of the requirement of direct causation" that "would invite excessively broad targeting policies, prone to error, arbitrariness, and abuse".[248]

The last requirement established by the Guidance requires the specific harm to have a link to the hostilities.[249] This excludes criminal activities "facilitated by the armed conflict", and not "designed to support one party to the conflict by directly causing the required threshold of harm to another party".[250] This belligerent nexus[251] 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".[252] An act must only be objectively likely to inflict this harm.[253]

Schmitt argues that the belligerent nexus test should be reworked to incorporate actions "in support of a party to the conflict or to the detriment of another".[254] Melzer maintains that a connected interpretation of the constitutive elements[255] is necessary, failing which the "violence in question becomes independent of the armed struggle taking place between the

[246] Melzer, N *op cit* note 178 at 867.
[247] Ibid at 878.
[248] Ibid at 867.
[249] Melzer, N *op cit* note 12 at 62.
[250] Ibid at 63 and 64. See in general Rogers, APV 'Unequal Combat and the Law of War' in Fischer, H & McDonald, A (Eds) *Yearbook of International Humanitarian Law* Vol 7 (20040 at 19.
[251] Solis, G *The Law of Armed Conflict: International Humanitarian Law in War* at 204-5 - Examples of activities which satisfy the belligerent nexus requirement are the 'preparatory collection of tactical intelligence'; 'transporting personnel'; 'transporting and positioning weapons and equipment'; and loading explosives in a suicide vehicle'. Examples of activities which fall short of the belligerent nexus requirement by 'hiding or smuggling weapons'; and 'financial or political support of armed individuals'.
[252] Melzer, N *op cit* note 178 at 872.
[253] Melzer, N *op cit* note 12 *at* 64; and Kalshoven, F & Zegveld, L *op cit* note 214 at 102; Schmitt, MN *op cit* note 87 at 735; Melzer, N *op cit* note 178 at 873.
[254] Schmitt, MN *op cit* note 87 at 736.
[255] Melzer, N *op cit* note 178 at 873.

parties to a conflict".[256] There must thus be a link between the civilian and a party to the conflict before a person would qualify as a legitimate military target.[257]

The *US Law of War Handbook* states that loss of civilian status will follow for those intending to cause actual harm to the personnel and equipment of the enemy.[258] Intending to cause actual harm has an implication of collective conduct. It has been reported that the US considers drug traffickers, who constantly provide funds to the *Taliban*, to be "members of an organized armed group".[259] These civilians do not directly cause harm but they intentionally enable the Taliban. There has been criticism of this policy but commanders have maintained that they are only targeting members of organized armed groups with links to the drug trade.[260] The US therefore rejects the Guidance's formulation of a member of an organized armed group based on the infliction of harm directly, rather than simply significant and intentional support for the armed group in its collective operational action. This is supported by the *US Rules of Engagement* for the armed conflict in Iraq in 2005.[261] It defined members of organized armed groups[262] as persons providing support to, or a member of specifically named armed groups. This recognises that the purpose of the use of force in armed conflict is to cause the opposing party to submit. Persons who are capable of causing imminent harm may be targeted as much as those not posing an immediate threat. Based on this, it may be argued that a State may legitimately target members of organized armed groups to weaken the structure of group.

The sixth recommendation specifies that "measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act."[263] The loss of protection due

[256] Melzer, N *op cit* note 178 at 873.
[257] Ibid at 873.
[258] Puls, KE (ed) *The Law of War Handbook* (International and Operational Law Department of the Judge Advocate General's Legal Center, 2004) 143.
[259] U.S. Congress, Senate, Committee on Foreign Relations, *Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents*, 111th Cong., 1st sess., 2009, S. Prt.
[260] See, e.g. Akande, D 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?' *(13 September EJIL: Talk! (2009)* available at < http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent/ (last accessed on 1 May 2014).
[261] These rules of engagement were leaked to Wikileaks - See *SECRET//REL TO USA, IRQ, MCFI//20151003 Display Only To IRQ* (2005) Wikileaks < http://wlstorage.net /file/us-iraq-rules-of-engagement.pdf> (last accessed on 1 May 2014).
[262] While the ROE does not mention the legal framework, it would seem that the US treated this conflict in 2005 as a NIAC, with specifically designated 'organized armed groups'.
[263] Melzer, N *op cit* note 12 at 65.

to individual acts of participation consists of "measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act."[264] Civilians should not exploit their immunity as LOAC allows for the temporary suspension of civilians immunity against direct attack.[265] Military necessity is thus presumed to supersede humanitarian considerations for such time as a civilian directly participates in hostilities.[266]

The Guidance, however, appreciates that civilian hostile activities and "unarmed activities which adversely affect the enemy"[267] may amount to C-DPH. The duration of the execution phase of a specific act will qualify as C-DPH and will result in temporary loss of immunity from attack.[268] It therefore appears that civilians will again attain immunity as soon as they are considered to desist from their unauthorised participation.[269] The transitory suspension of civilian immunity is only reserved for "civilians who participate in hostilities in a spontaneous, unorganised or sporadic basis".[270] The temporal limitation in both the AP's[271] is necessary as it maintains the entire system of civilian and combatant distinction and the principle of distinction requires straightforward distinctions in terms of which legitimate targets may be identified.[272] This creates the "revolving door" of civilian protection.[273] The Guidance rationalizes the "revolving door" position as being necessary[274] as it provides protection to the "civilian population from erroneous or arbitrary attack".[275] This interpretation aims to reduce the risk of arbitrary targeting of innocent civilians,[276] but it is submitted that it amounts to military legal contortion and serious practical challenges for those tasked with targeting decisions.

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[264] Ibid at 1031.
[265] Ibid at 70.
[266] Melzer, N *op cit* note 11 at 331.
[267] Melzer, N *op cit* note 178 at 882.
[268] Melzer, N op cit note 12 at 65. Melzer, N *op cit* note 263 at 880-881.
[269] Ibid at 70.
[270] Ibid at 71.
[271] API, Article 51(3) and APII, 13(3) respectively.
[272] Orakhelashvili, A 'The Interaction between Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' *European Journal of International Law* Vol 19 (2008) at 167.
[273] Melzer, N *op cit* note 12 at 70; Hays Parks, W *op cit* note 36 at 32:1 *Air Force Law Review* 1 at 87-88; Watkin, K *op cit* note 156 at 686; Melzer, N *op cit* note 263 at 883.
[274] Boothby, B *op cit* note 28 at 757.
[275] Jensen, ET *op cit* note 199 at 2235-41.
[276] Melzer, N *op cit* note 263 at 886.

Harm is frequently caused "in conjunction with other acts"[277] and "measures preparatory[278] to the execution of a specific act . . . as well as the deployment to and the return from the location of its execution"[279] will be regarded as "constituting an integral part of the specific hostile act".[280] This interpretation was also acknowledged in the PCATI judgment.[281] Preparations for a specific hostile act must be distinguished from preparatory activities which are part of a widespread "campaign of unspecified operations"[282], or general "capacity building to undertake military activity"[283] which only establish "the general capacity to carry out hostile acts".[284] Where the execution of a specific hostile act involves earlier geographic deployment[285] or extraction, [286] that process will constitute an integral part of the act.[287] Deployment implies 'a physical displacement'[288] with the intent of executing the specific hostile act.

Watkin[289] states that the 'revolving door' challenge[290] "creates a significant operational advantage for civilians who alternate between civilian life and engagement in hostilities".[291] This advantage arises from their non-compliance with LOAC and from their adversary's compliance with the law.[292] Irregulars benefit from this by "repeatedly claim[ing] the protection associated with that status",[293] whilst also being able to attack others in an unstructured and unpredictable manner.[294] This ability to persistently make use of this benefit provides an incentive for the protection to be abused by non-State actors.[295] It is, however,

[277] Ibid at 882.
[278] Boothby, B *op cit* note 28 at 750; Melzer, N *op cit* note 263 at 880-881.
[279] Melzer, N *op cit* note 12 at 65.
[280] Melzer, N *op cit* note 263 at 882-883; Boothby, B *op cit* note 28 at 747.
[281] PCATI *supra* at para 34: "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".
[282] Melzer, N op cit note 12 at 66.
[283] Ibid at 66.
[284] Melzer, N *op cit* note 263 at 881.
[285] Melzer, N *op cit* note 12 at 67.
[286] Ibid at 68.
[287] Ibid at 68.
[288] Ibid at 68.
[289] Watkin, K *op cit* note 156 at 687.
[290] Roberts, A *op cit* note 122.
[291] Van der Toorn, D *op cit* note 16 at 24 & 45.
[292] Rosen, RD 'Targeting Enemy Forces in the Law of War on Terror: Preserving Civilian Immunity' *42 Vand J Transnat'l L683* (2009) 691.
[293] Watkin, K *op cit* note 156 at 682.
[294] Boothby, B *op cit* note 28 at 757 & Roberts, A *op cit* note 122 at 41.
[295] Van der Toorn, D *op cit* note 16 at 45.

accepted that "the fact that one side in a conflict violates humanitarian law does not justify its adversary in disregarding the law".[296]

Boothby,[297] the retired Deputy Director of Legal Services of the RAF argues that 'the ICRC interprets the concepts of preparation, deployment, and return too restrictively'.[298] Boothby insists that customary law does not acknowledge the 'revolving door' of protection and that interpretation of "participates" by the ICRC in the treaty rule greatly restricts the notion of C-DPH by incorrectly excluding continuous participation[299] and refers to the idea of a "persistent civilian participator". He argues that a distinction should be made between "isolated and sporadic acts by civilians", and "repeated or persistent acts" of C-DPH. He recommends that the temporal element to the rule must allow the direct targeting of both a member and non-member of an irregular armed group who elects to participate on a persistent or recurring basis in the conflict. He is of the opinion that neither the US nor Israel would allow protection for 'unorganised but regular direct participation by a civilian', and 'while such persistent or repeated involvement in hostilities continues'. [300] Jensen comments that the 'for such time' requirement incorporates the entire duration of directly participating as opposed to only the period that result in actual harm.

Chesney argues that "members of organised armed groups who perform a continuous combat function[301] in a NIAC are not civilians and may be targeted in a manner comparable to that of a combatant, not just when engaged in specific acts of direct participation".[302] Chesney then argues that the US will probable interpret the category of targetable persons in armed conflict in a broader manner than what the Guidance provides for.

The Guidance maintains that "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

[296] Greenwood, C 'Historical Development and Legal Basis' in Fleck, D (ed) *The Handbook of International Humanitarian Law* (2008) 1 at 12.
[297] *Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance*, 1 International Humanitarian Legal Studies 143,163-64 (2010).
[298] Boothby, B *op cit* note 28 at 743.
[299] Ibid at 743.
[300] Ibid at 763.
[301] See also Lewis, MW *The War on Terror and the Laws of War A Military Perspective* (2009) at 47.
[302] Chesney, R *Is DPH the Relevant Standard in Pakistan? An Important Element in the Debate Missing from BIJ's Report in Lawfare* (blog) (6 February 2012) available at http://www.lawfareblog.com/2012/02/is-dph-the-relevant-standard-in-pakistan-an-important-element-in-the-debate-missing-from-bijs-report/ (last accessed on 1 May 2014).

future conduct" and that it would thus 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".[303] Melzer further argues that reliable guidance exists on the method to be used to distinguish between "sporadic" and "repeated" hostile acts in practice.[304] However, it is submitted that it does seem counter intuitive to allow for only intermittent targeting of a civilian who consistently participates in hostilities.[305] Boothby[306] interprets the term 'participate' to include civilian involvement in "groups or sequences of activity spread over a period". This participation would produce the loss of protection for its entire duration thereof.[307]

The 'revolving door' of protection was anticipated to relate to spontaneous and unorganised acts of participation in the Interpretative Guidance and does not extend to the organised and planned activities of "members of organised armed groups belonging to a non-State party".[308] Rogers[309] concurs that a civilian who becomes a member of an irregular armed group in an armed conflict will forfeit immunity for the duration of his participation in the activities of the group.[310] Rogers supports a narrow interpretation of direct participation based on the fear that the rule of distinction and civilian immunity may be diminished otherwise.[311] Rogers supports the finding in the PCATI judgment and concludes that there are combatants, combatants *hors de combat*, civilians and civilians directly participating in hostilities. This excludes non-combatants, being members of the armed forces who are medical or religious personnel.[312] He further comments that delegates at the expert process seem to fall into either the military school of thought, the patriotic school, who are concerned about the militarily weak state's ability to defend themselves and the humanitarian school, supported by

[303] Melzer, N *op cit* note 12 at 71; Watkin, K *op cit* note 156 at 687-688.
[304] Melzer, N *op cit* note 263 at 892.
[305] Jensen, ET *op cit* note 199 at 2108-16.
[306] Boothby, B *op cit* note 28 at 797.
[307] Melzer, N *op cit* note 263 at 886.
[308] Melzer, N op cit note 12 at 71.
[309] Rogers, APV *op cit* note 246 at 158. Rogers is the Honorary President of the International Society for Military Law and the Law of War, Senior Fellow of the Lauterpacht Research Centre for International Law, University of Cambridge, and a former Director of Army Legal Services, United Kingdom and York Distinguished Visiting Fellow at the faculty of Law, University of Cambridge; former Vice-President of the International Fact-Finding Commission and author of Law on the Battlefield in 2004.
[310] Rogers, APV *op cit* note 246 at 19.
[311] Ibid at 19.
[312] Rogers, APV *op cit* note 129 at 148.

politicians, which regards the protection of victims of armed conflict as vital. The arguments of the military school are, as a result, often ignored.[313]

Watkin criticised the Guidance's definition of membership of organized armed groups. He suggests that membership should be defined to accord with that of a regular State armed force[314] and this should incorporate components of an armed force normally separated from operational activities, such as caterers, warehouse operators, pay clerks and a number of different medical disciplines.[315] His main criticism of the Guidance relates to the different treatment of regular State armed forces to 'irregular' armed forces and is accordingly of the opinion that all armed forces should be treated in a similar manner when membership is determined.[316] Watkin qualifies this determination to incorporate 'all those carrying out a combat function (combat, combat support and combat service support functions) operating under a command responsible for its subordinates.'[317] He rejects the 'continuous combat function' test and supports a functional approach. He concludes that a combat function implies a comprehensive assortment of activities including the performance of a logistics function as an integral part of an organized armed group.[318] Watkin argues that terms like 'revolving door of protection', 'continuous combat function', and 'persistent recurring basis' introduce unusual, confusing, and indefensible concepts into the vocabulary of LOAC.[319]

The seventh recommendation, which should be read with recommendation two, confirms that "[c]ivilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-state party to an armed conflict cease to be civilians and lose protection against direct attack for as long as they assume their continuous combat function".[320] The Commentary uses the phrase 'belongs to' to define membership of armed groups. The test for civilian loss of protection depends on current 'danger to the adversary'. On the contrary, combatants do not need to present harm before they are attacked. The Guidance thus regards

[313] Ibid at 149.
[314] Watkin, K *op cit* note 156 at 641.
[315] Ibid at 691.
[316] Ibid at 690.
[317] API, Article 43; See also *Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention*, opened for signature 18 October 1907, (1910) UKTS 9 (entered into force 26 January 1910), Article 1; Watkin, K *op cit* note 156 at 691.
[318] Ibid at 683.
[319] Ibid at 693.
[320] Melzer, N *op cit* note 12 at 70-73.

'members of organized armed groups' differently from combatants in IACs. The Guidance therefore determines membership in an armed group of a non-state party to a NIAC conflict based on whether the person serves in a "continuous combat function".[321] The practical significance of this distinction is to create a category that regards fighters of the armed group of a non-state party to a NIAC as combatants in the regular armed forces. The concepts behind C-DPH and 'members of organized armed groups' are different.[322] Combatants have no protected status in armed conflict, not because they individually pose a threat, but because the armed force, which they form a part of, pose a threat.

Continuous combat function was first defined in the Guidance[323] as ". . . lasting integration into an armed organised group acting as the armed forces of a non-state party to the armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.[324] A person is thus considered to function in a continuous combat role when he is involved in the preparation, execution, or command of acts or operations amounting to C-DPH. This term reaffirms the Israeli Supreme Court's finding that organizational members who perform combat functions do not reacquire their civilian immunity during "rest intervals".[325]

The agreement at the expert meeting was that a need existed for a particular legal regime applicable to organised armed groups who participate in hostilities in a structured and continuous manner.[326] Such participation could be equated to informal and erratic membership in an irregular armed group[327] and should result in forfeited immunity against

[321] Ibid *at* 1007.
[322] McBride, D 'Who is a Member? Targeted Killings against Members of Organized Armed Groups *Australian Year Book of International Law Vol 30 available at* http://ssrn.com/abstract=2261128 (last accessed on 1 May 2014).
[323] Prior to the Guide, the term 'continuous combat function' did not appear in any LOAC treaties (Watkin, K *op cit* note 156 at 655).
[324] Melzer, N *op cit* note 12 *at* 1007-1008.
[325] Ibid at 1007-1008.
[326] Fenrick, WJ *op cit* note 135 at 209.
[327] Melzer, N *op cit* note 263 at 845.

attack "for as long as they remain members" of the organised group, by virtue of their continuous combat function.[328]

Continuous combat function is thus a method to determine status as opposed to focusing on action. It results in possible status-based targeting authority.[329] Continuous combat function can therefore only apply to a member of the 'armed forces' or organized fighting forces of a non-state party. It is intended to make a distinction between status-based membership of the armed forces of a non-state party and civilians who directly participate in hostilities on a sporadic basis or who assume exclusively political, or administrative or other non-combat functions.[330] Membership in the armed forces is usually expressed as a status but that status is determined with reference to the component requirements of wearing a uniform, the display of a fixed emblem recognizable at a distance, and the carrying of arms openly.

Armed conflict is fundamentally a struggle between two or more armed groups. The principle of distinction is also premised on two, or more, opposing armed forces. Armed conflict is thus essentially collective in nature and therefore a combatant, and for that purpose, an irregular fighter, represents a legitimate target.[331] Non-state armed groups cannot be treated as a conglomeration of civilians taking a direct part in hostilities without acknowledging the nature of the structures that exist in armed groups. Irregular armed groups have a collective nature and to regard the group as a collection of civilians individually directly partaking in hostilities neglect to recognize the nature of the organization of armed groups. The armed group generally displays elements of subordination to leadership or group objectives. The group, as with regular armed forces, creates the hostile threat through the individuals participating therein. This is the reason for targeting the individual as a representative of the group and in the execution of his mandate from the group. This reality is acknowledged in the continuous combat function test. The PCATI judgment held that '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, with

[328] Melzer, N *op cit* note 12 at 71; Melzer, N *op cit* note 263 at 883.
[329] Corn, G & Jenks, C *op cit* note 5 at 337.
[330] Melzer, N *op cit* note 12 *at* 1007.
[331] Article 21 General Orders, no. 100: Instructions for the Armies of the United States in the Field, approved 24 April 1863 (Lieber Code) (reproduced in Richard Shelly Hartigan, Lieber's Code and the Law of War (1983).

regard to a civilian, the rest between hostilities is nothing other than preparation for the next hostility.[332]

A membership approach would resolve all disputes over the temporal element of C-DPH but the experts could not reach agreement on this issue. The combat function is a contentious concept[333] based generally on the belief that C-DPH must be determined on a transitory action based criteria[334] and that the principle of military necessity should receive more attention.[335] The continuous combat function standard was intended to resolve the differentiated targeting determination and treatment of regular armed forces and irregular armed forces in NIAC. The ICRC's proposal, however, may be interpreted to create a separate legal regime which affords an unreasonable and unjustifiable benefit to irregular armed groups.[336]

A number of the experts were sceptical of a membership approach to C-DPH[337] due to evidentiary issues of affirmative disengagement from the armed group in order to reacquire protection from targeting. Some experts have criticised the continuous combat notion as the treaty language refers to the loss of protection only 'for such time' as they participate directly in hostilities.[338] Watkin argues that the notion "creates a bias against State armed forces"[339] in that the regular armed forces may only target members of the organised armed group who have a continuous combat function. He correctly states that a member of the armed forces cannot 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".[340] He maintains that the standard for attaining "membership in an organised armed group" is so qualified that the probability of a civilian forfeiting

[332] At para 39.
[333] Melzer, N *op cit* note 263 at 834.
[334] Ibid at 835.
[335] See for example Watkin, K *op cit* note 156 at 641.
[336] See for example Schmitt, MN *op cit note* 146 at 23. See also Roberts, A 'The Equal Application of the Laws of War: A Principle Under Pressure' 90 *International Review of the Red Cross* (2008) at 931.
[337] Int'l Comm. of the Red Cross, *Second Expert Meeting: Direct Participation in Hostilities under International Humanitarian Law* 20 (2004) *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-LOAC-311205/ (last accessed on 1 May 2014).
[338] Alston, P 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.
[339] Melzer, N *op cit* note 263 at 837.
[340] Watkin, K *op cit* note 156 at 662; Melzer, N *op cit* note 263 at 855.

immunity is doubtful.[341] This fails to acknowledge the wider understanding of combat function adopted in case law and other academic writings.[342] Watkin applies the continuous loss of protection 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.[343] Van der Toorn argues that the "continuous participation requirement" creates a high threshold and it excludes those who sporadically conduct 'substantial and continuing integrated support functions for such groups'.[344] He proposes lowering the stringent continuous combat function test to require only "regular participation" or a "predominate function" test.[345]

Watkin argues that the first involvement of a civilian will set the tone for "any subsequent act demonstrating direct participation". This would require the identification of "patterns of conduct that reflects an intention to regularly engage in the hostilities".[346] Recurrent participation would result in a finding of continuous engagement in hostilities.[347] This assessment has merit as a wide interpretation of the continuous combat test may very well result in exceptionally lenient targeting of civilians under LOAC.[348] This will be counter to the aim of LOAC to allow an "unacceptable degree of error and arbitrariness".[349]

Fenrick also is of the opinion that "members of organised armed groups are treated more favourably than members of State armed forces, in so far as a smaller percentage of them may be lawfully subjected to direct attack".[350] Protection from attack is afforded to civilians that perform an integral part of the combat effectiveness of an organised armed group but members of the regular armed forces who perform an equivalent function have no immunity.[351] Melzer acknowledges this concern relative to the benefits that the test provides to irregularly constituted members. Melzer, however, argues that "the actual practical effect

[341] Melzer, N *op cit* note 263 at 835.
[342] Watkin, K *op cit* note 156 at 683.
[343] Melzer, N *op cit* note 263 at 913.
[344] Watkin, K *op cit* note 156 at 664. See also Melzer, N *op cit* note 140 at 837.
[345] Melzer, N *op cit* note 263 at 837.
[346] Melzer, N *op cit* note 263 at 856.
[347] Watkin, K *op cit* note 156 at 692.
[348] Melzer, N *op cit* note 263 at 913.
[349] Ibid at 913.
[350] Fenrick, WJ *op cit* note 135 at 291.
[351] Watkin, K *op cit* note 156 at 664 and 675; Melzer, N *op cit* note 140 at 837.

will have very little consequence,[352] as the very same person normally performs numerous roles within an organised armed group, which generally includes a continuous combat function".[353]

Hampson reasons that the Interpretive Guidance has only succeeded in complicating the already confused issue. He maintains that human rights bodies will not accept a status-based test in low-intensity armed conflicts as proposed by the Guidance with regard to members of organized armed groups exercising continuous combat functions. States have obligations under both LOAC and International Human Rights Law. He concludes that the Guidance should have limited status-based targeting to situations in which APII is applicable.[354]

The eighth recommendation addresses the precautions that must be taken before and during attacks and the restraints that must be exercised during the use of force.[355] All feasible measures must be taken in determining the legal status of a person and the level of participation of a civilian. Feasible precautions comprise "those that are practicable or practically possible taking [account of] all the circumstances ruling at the time, including humanitarian and military precautions".[356] In case of doubt, the person must be presumed to be a protected civilian.[357] This is intended to avoid the erroneous or arbitrary targeting of civilians. All feasible precautions must thus be taken to ensure that the proposed target is a legitimate military target.

Rogers asserts that this recommendation amounts to the introduction of a new rule of doubt concerning the loss of civilian protection as opposed to the loss of protection.[358] He confirms that there is no presumption of non-participation in API. Schmitt questions the Guidance's presumption of civilian status to assessments of C-DPH. He supports a liberal interpretation in favour of finding direct participation.[359] He argues that this interpretation "is likely to enhance the protection of the civilian population as a whole, because it creates an incentive

[352] Melzer, N *op cit* note 263 at 851.
[353] Ibid at 852.
[354] Hampson, FJ in Pedrozo, RA & Wollschlaeger, PD 'Interoperability of the Law of Armed Conflict and Human Rights Law' *International Law Studies Vol 87 International Law and the Changing Character of War*.
[355] Melzer, N *op cit* note 12 at 74-82.
[356] Ibid at 69.
[357] API, Article 50(1): 'In case of doubt, the person must be presumed to be protected against direct attack' (Melzer, N *op cit* note 12 at 74).
[358] Rogers, APV *op cit* note 129 at 156.
[359] Schmitt, MN *op cit* note 146 at 505 and 509; Melzer, N *op cit* note 263 at 875.

for civilians to remain as distant from the conflict as possible".[360] Melzer disapproves of this interpretation as a liberal approach to targeting is contrary to the philosophy of LOAC and in violation of several of its fundamental provisions.[361] He further states that there is "no support in State practice and jurisprudence"[362] for such an approach to the presumption of civilian status. Melzer concludes that an obligation exists to assess the proportionate result of the imminent attack.[363] Boothby criticizes the feasible precautions formulation as the "implicit assumption embedded" therein is that the functions of members of organised armed groups and civilians never change. He asserts that it is the civilians' decision to directly participate that renders them liable to attack.[364]

The ninth recommendation further describes the precautions and states that "[i]n 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 that is permissible against persons [who are] not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances".[365] The ICRC justifies this recommendation on the basis of humanity[366] and advocates that the least permissible force required be employed "against persons not entitled to protection against direct attack" taking into account what is necessary "to accomplish a legitimate military purpose in the prevailing circumstances".[367] Melzer endorses the concept and argues that the kind and degree of force used against persons, not entitled to protection against direct attack, must not exceed what is necessary to accomplish a legitimate military purpose in the prevailing circumstances.

[360] Ibid at 505 & 509; Melzer, N *op cit* note 140 at 505 and 875.
[361] Melzer, N *op cit* note 263 at 875.
[362] Ibid at 876.
[363] Gasser, H 'Protection of the Civilian Population' (1995) in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* (2008) at 211.
[364] Boothby, B *op cit* note 28 at 755.
[365] Melzer, N *op cit* note 12 at 77.
[366] Ibid at 82.
[367] Ibid at 77-82; See also Melzer, N *op cit* note 12 at 82 (quoting Pictet, J *Development and Principles of International Humanitarian Law* 75 (1985)).

There is no treaty provision explicitly providing for restraints on the use of force, except maybe the provisions on superfluous injuring and unnecessary suffering in API.[368] The ICRC study therefore relies on general principles of humanity, general principles of necessity, and interpretation by inference.[369] Schmitt maintains that "the deficiencies identified demonstrate a general failure to fully appreciate the operational complexity of modern warfare".[370] He asserts that the recommendation is purely an invention of the Guidance.[371] Hays Parks argues that this recommendation attempts to introduce a law enforcement paradigm to targeting decisions for C-DPH based on the human rights "right to life" standard.[372] This recommendation followed the PCATI judgment, which Hays Parks describes as "a single case by a national court operating in one of the most uncommon situations in the world".[373] He concludes that the ICRC intentionally rejected the advice of the experts[374] and the recommendation contradicts treaty law, State practice and court decisions.[375] Pomper also remarks that defence ministries will probably not find the reasonable force requirement realistic or grounded in existing LOAC.[376]

In evaluating the two divergent views between military necessity and humanity, cognisance must be taken of the initial development of military necessity. The formulation of military necessity was developed in the Lieber Code[377] as consisting of "the necessity of those measures which are indispensible for securing the ends of the war, and which are lawful according to the modern law and usage of war". The second part pertaining to military necessity confirms that only such action, including attempts to capture, should be taken that would result in "minimum expenditure of life and resources" of the attacking force.[378] Armed forces are thus allowed to achieve legitimate military objectives "with the minimum

[368] API, Article 35. This is supported by Van Schaack, B The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory. Santa Clara University School of Law Legal Studies Research Papers Series Accepted Paper No. 02-12, January 2012 at 31-32.
[369] Goodman, R 'The Power to Kill or Capture Enemy Combatants. Public Law and Legal Theory' *Research Paper Series Working Paper No. 13-2 European Journal of International Law Vol 24* (2013) at 7 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213960 (last accessed on 6 January 2015).
[370] Schmitt, MN *op cit* note 87 at 699.
[371] Schmitt, MN *op cit* note 140 at 42.
[372] Hays Parks, W *op cit* note 113 at 797.
[373] Hays Parks, W *op cit* note 110 at 829.
[374] Ibid at 827.
[375] Ibid at 828.
[376] Remarks by Pomper, S in Melzer, N *Direct participation in Hostilities: Operationalizing the International Committee of the Red Cross Guidance. ASIL Proceedings* (2009) at 310.
[377] Lieber Code, Article 14.
[378] Melzer, N *op cit* note 12 at 80.

expenditure of life and resources".[379] Ohlin suggests that modern precedents support the historical meaning of military necessity.[380] The principle of humanity restricts "suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes".[381] API, Article 57(2) requires the taking of "all feasible measures in the choice and means and methods of attack with a view of avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects". This may be interpreted to mean that more precautions should be taken to prevent harm to civilians, which would include situations of C-DPH. API, however, only applies in IAC and was designed to prevent the suffering of innocent civilians and should not be applied to C-DPH. This formulation supports the argument that C-DPH should be treated as functionally equivalent to members of the regular armed forces for purposes of targeting based on their acceptance of this risk resulting from their self-incorporation in the armed conflict.[382]

The targeting of an enemy fighter, who has surrendered, would constitute a war crime under the *Rome Statute*[383] and therefore combatants and civilians directly participating in the hostilities must be *hors de combat* before there is an obligation to capture them.[384] There is no obligation on a combatant to ascertain whether enemy fighters want to surrender before they target them. This responsibility rests with the participant who desires to surrender.[385] There must accordingly be a clear expression of the intent to surrender,[386] which must

[379] Ibid at 79.
[380] Ohlin, JD 'The Duty to Capture' *Minnesota Law Review Vol 97* (2013) 1268-1303 Paper 567 at 1308 available at http://scholarship.law.cornell.edu/facpub/567 (last accessed on 1 May 2014). In United States v. List, Case No. 7 (Feb. 19, 1948), at 1230 the court confirmed that military necessity permits "any amount and kind of force to compel the complete submission of the enemy with the least expenditure of time, life, and money."
[381] Practice relating to Rule 14, Proportionality in Attack available at http://www.icrc.org/customary-LOAC/eng/doc/v2_cou_us_rule14 (last accessed on 1 May 2014); See also Ohlin, JD *op cit* note 376.
[382] Ohlin, JD *op cit* note 376 at 1308.
[383] *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998), at 95 (Article 8(2)(b)(vi)) *available at* http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf (last accessed on 1 May 2014).
[384] Schmitt, MN 'Targeting Narcoinsurgents in Afghanistan: The Limits of International Humanitarian Law' *12 Y.B. Int'L Human. L. 1, 14* (2009); *see* Corn, GS & Jenks, C *op cit* note 5 (describing affirmative steps members of armed belligerent groups must take to rebut the presumption that they pose a threat by virtue of their belligerent status determination).
[385] *See* Romer, J 'Killing in a Gray Area Between Humanitarian Law and Human Rights: How can the National Police of Columbia Overcome the Uncertainty of Which Branch of International Law to Apply?' *113–14 (2010)*; Glazier, D '*Assessing the Legality of Osama bin Laden's Killing Miller-Mccune.Com* (May 20, 2011) available at http://www.miller-mccune.com/legal-affairs/assessing-the-legality-of-osama-bin-ladens-killing-31441/ (last accessed on 1 May 2014); Milanovic, M 'When to Kill and When to Capture?' *EJIL: Talk* (May 6, 2011), http://www.ejiltalk.org/when-to-kill-and-when-to-capture/ (last accessed to 1 May 2014).
[386] *See* Dinstein, Y *op cit* note 4 at 145 (noting that combatants need to manifest an intent to surrender in order to exempt themselves from being targeted); Schmitt, MN 'The Interpretative Guidance on the Notion of Direct

thereafter be accepted by the opposing forces. The implication of this is that LOAC does not demand an actual threat to the attacking force before targeting may occur.[387] It is only outside of armed conflict that a person must pose an imminent threat before targeting may legitimately be resorted to.

The tenth recommendation maintains that the loss of protection from direct attack is temporary, based on the duration of the C-DPH, or on the continuous combat function in an organised armed group.[388] Persons, who so cease to directly participate, will recapture their civilian immunity, but may be prosecuted for violations of domestic or international law.[389] Boothby states that the civilian who has directly participated in hostilities will have to accept the risk that reasonable precautions by the opposing party may not uncover their secession of participation and direct targeting may follow as a result.[390] Van der Toorn classifies this as a moral and not a legal obligation and that no such a customary rule exists.[391]

In evaluating the Guidance in general, Melzer insists that the Guidance represents a neutral, impartial and balanced approach.[392] He, however, concedes that some experts would not agree with the Guidance's definition of C-DPH as it may be read as too generous, based on the possibility of civilians being targeted even at a time that they do not pose an immediate threat to the enemy.[393] Melzer's prediction proved true, as various experts maintain that the interpretation of C-DPH in the Guidance is excessively restrictive.[394] Most of the negative comments regarding the Guidance relates to its perceived failure to satisfactorily equate humanitarian issues to military necessity in a manner which "adequately reflect[s] the key object and purpose of the Geneva Conventions and Additional Protocols".[395] US Major Richard Taylor, states that "the ICRC has lost sight of its role as trusted advisor and has

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Participation in Hostilities: A Critical Analysis' *Harvard Journal of National Security Law* at 42 (May 2010) available at http://harvardnsj.org/2010/05/the-interpretative-guidance-on-the-notion-of-direct-Participation-in-hostilities-a-critical-anyalysis/ (last accessed on 1 May 2014).

[387] Corn, GS 'Self Defense Targeting: Conflict Classification or Willful Blindness?' *88 Naval War C. Int'L L. Stud.* at 15 (2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1947838 (last accessed on 1 May 2014).

[388] Melzer, N *op cit* note 12 at 83-85.

[389] Williamson, JA *op cit* note 133 at 471.

[390] Boothby, B *op cit* note 28 at 761.

[391] Van Der Toorn, D *op cit* note 16 at 27 See also Hays Parks, W *op cit* note 110 at 769.

[392] Melzer, N *op cit* note 263 at 914.

[393] Melzer, N *op cit* note 263 at 835.

[394] Van der Toorn, D *op cit* note 16 at 45; Schmitt, MN *op cit* note 87 at 698.

[395] Schmitt, MN *op cit* note 87 at 698.

assumed the position of international legislator",[396] as the ICRC was attempting to legislate on a subject in which States had not agreed upon.[397]

Schmitt states that there are deficiencies in each of the constitutive elements which results in an under-inclusive[398] notion of C-DPH. He thus concludes that the Guidance's concern favours humanitarian issues to the detriment of "the realities of 21st century battlefield combat".[399] Melzer, however, refers to a number of safeguards in the constitutive elements. This was done to prevent "erroneous or arbitrary targeting of civilians".[400] This, in my view, effectively introduces more safeguards that are contained in the GC' and the AP's relating to the precautions to be taken into account during targeting. The consensus, regardless of the criticism, is that the 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".[401] Boothby concludes that State battlefield "practice and views of States will be ultimately determinative in forming an enduring interpretation" of C-DPH.[402]

The objections to the Guidance therefore essentially amount to critique on the balance between military necessity and humanity.[403] The predisposition of the ICRC to extend the protection of LOAC as far as possible is understandable but this complicates the operational effectiveness of combatants. Compliance with LOAC will, however, flow mainly from practical and reasonable legal guidance.[404] The Guidance includes members of organized armed groups in the concept of armed forces, regardless of whether they comply with the requirements for combatant status, and treatment as prisoners of war, under the GCIII.[405] The Guidance confirms that it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population because they fail to distinguish themselves from that population, to carry their

[396] Taylor, RS 'The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?' *The Army Lawyer 103, 104* (June 2011) at 111.
[397] Taylor, RS *op cit* note 392 at 104.
[398] Schmitt, MN *op cit* note 87 at 739.
[399] Ibid at 739.
[400] Melzer, N *op cit* note 263 at 877.
[401] Melzer, N *op cit* note 263 at 877.
[402] Boothby, B *op cit* note 28 at 768.
[403] Rogers, APV *op cit* note 129 at 160.
[404] *op cit* note 129 at 160.
[405] Schmitt, MN *op cit* note 35 at 832.

arms openly, or to conduct their operations in accordance with the laws and customs of war.[406]

Finally, it is useful to look at normal treaty interpretation, which requires a good faith analysis of the ordinary meaning of the treaty language in its context, with specific reference to the object and purpose of the instrument.[407] Boothby states that the dictionary meaning of participation is to "be involved in, take part" and he concludes that this relates to individual acts and sequences of activities over a period of time.[408] He thus maintains that the ordinary interpretation of C-DPH would include both isolated acts and continuous loss of protection for a persistent participant. He disputes the Guidance's conclusion that repeated acts of direct participation are no indication of future conduct, as experience has proven that the rest periods between hostile acts are more often than not used to prepare for the next hostile act. The protection of the participant would only be restored when the civilian demonstrably disengages from the series of acts.[409]

5. Summary

States have, in general, created LOAC as a system of reciprocal entitlements between them during armed conflict. This system, *inter alia*, addresses the protection of civilians and C-DPH in various international instruments and in international customary law. It has, however, been submitted that C-DPH in modern armed conflict has created a challenge that is beyond the scope of LOAC, especially in NIAC, where the reciprocal nature of LOAC is generally absent. C-DPH is thus a complicated concept to define and even more problematic to comprehend in practice. There is no settled definition thereof and the current practice is to assess the existence of an act of C-DPH on a case-by-case basis. LOAC is complicated and the burden of a mistake in judgment may have serious consequences. Military targeting decisions should, from a moral and legal perspective, not be made more difficult and combatants should only be required to make decisions which are possible in the prevailing circumstances. In combat, simple tasks become difficult and complicated matters become impossible. It is incumbent on LOAC to adapt and evolve in line with the situations it seeks

[406] Melzer, N *Int'l Comm. of the Red Cross, Interpretive Guidance on the Notion of Direct Participation under International Humanitarian Law* (2009) at 22.
[407] *Vienna Convention on the Law of Treaties*, Article 31(1), May 23, 1969, 1155 U.N.T.S. 331; See Van Der Toorn, D *op cit* note 16 at 19.
[408] Boothby, B *op cit* note 28 at 765.
[409] Van der Toorn, D *op cit* note 16 at 21.

to regulate. LOAC cannot just be seen to restrict military operations as participants will ultimately regard it as unrealistic and theoretical.

Ethical perspectives on C-DPH, although helpful in furthering the understanding of civilian protection, do not account for marginal cases where civilians do directly participate in armed conflict or where civilians indirectly make a real contribution to the war effort without actually being involved in combat activities. Judicial decisions, together with State practice, show a diverse understanding of C-DPH. The elusiveness of a complete definition of C-DPH makes it possible for States and other role players to implement a choice of interpretations of C-DPH based on their particular requirements, objectives, and capability. The narrow interpretation of C-DPH produces a high threshold, making it complex for civilians to directly participate in hostilities[410] and even more problematical to justify the targeting of civilians who participate in hostilities.[411]

The negative consequence of the narrow interpretation is that it promotes conditions whereby irregular fighters may elect to conceal themselves within civilian populations. The liberal interpretation of C-DPH, in contrast, produces a low threshold, which makes C-DPH easy. States may elect to follow this approach as it will be less challenging to justify the targeting of irregular fighters. The positive effect is that this interpretation of C-DPH may convince civilians to avoid actions that may be perceived as C-DPH.[412]

The Interpretative Guidance has been received with enthusiasm but also with criticism on the process and the results thereof. It has been criticized mainly for attaching too much emphasis to humanitarian concerns to the exclusion of military necessity and the realities of modern armed conflict. It is submitted that this criticism is misdirected as the ICRC would, based on its function, display a propensity to favour humanity. One could not expect the ICRC to propose a Guidance in which military necessity prevails over humanity. The efforts of the ICRC herein are therefore admirable. The Guidance is intended to assist States in their good faith interpretation of C-DPH. The Guidance has further resulted in debate on the issue of C-

[410] Int'l Comm. of the Red Cross, *Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities* 60 (2005) *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-LOAC-311205/ (last accessed on 6 June 2014).
[411] Ibid.
[412] Schmitt, MN *op cit* note 36 at 534–35.

DPH and has, in that regard, succeeded in furthering the understanding of the concept. In the final analysis it may be said that the main failure of the Guidance results from its complicated legal terminology and the inability of a member of the armed forces to apply the recommendations in practice. This said, the Guidance could influence legal reasoning as the teachings of highly qualified publicists.[413] Ultimately the Guidance did reveal the difference of opinion between the notions of 'military necessity' and 'humanity' in targeting decisions based on C-DPH. The Guidance has been opposed by LOAC experts and will probably generate rigorous debate, which may potentially benefit the current impasse, but will also lead to continued focus and hopefully better insights on this matter, resulting in reform on the issue.

Taking into account the contemporary perspectives on C-DPH, it appears that a fundamental reinterpretation thereof may be necessary. This process may create several different categories of civilians.

[413] It has been referred to in the matter of *Al-Bihani v Obama* US Court of Appeals for the District of Colombia Circuit, 5 January 2010, No. 9-5051 at 4-6; 590 F.3d 866 (2010).

Chapter 4

The Nature of Armed Conflict and Its Participants

1. Introduction

This chapter will focus on the legitimate intentional and permanent targeting of mandated participants, legal and otherwise, based on their affiliation to a party to an armed conflict, as opposed to those that participate directly but only independently and sporadically. All armed conflict, to state the obvious, is adversarial, based on two or more opponents who collectively resist each other. The Law of Armed Conflict ("LOAC")[1] acknowledges this and allows for a party to an armed conflict to apply force to compel the complete submission of its adversary as a collective, with the least possible expenditure of its own resources. The collective nature of armed conflict is also revealed, with regards to the existence of a non-international armed conflict ("NIAC"), in Additional Protocol II[2] of 1977 ("APII"), Article 1(2), which requires sustained and concerted military operations as opposed to isolated and sporadic acts.

The law of targeting specifically concerns itself with the attempts between adversaries to overcome the military potential of their opponents or with their will to continue with the armed action.[3] This is based on the nature of the participants and the eventual military goal of achieving a successful outcome by way of the systematic attack of military objectives. Traditional targeting theory is therefore based on attrition and targets are progressively attacked to cumulatively weaken the adversary's military forces.[4] It may be argued that

[1] The terms 'law of war', 'law of armed conflict' ("LOAC") and 'International Humanitarian Law' ("IHL") are not used as synonyms herein. The difference between these terms is not regarded as academic. LOAC will be used to refer to the totality of the system of law that regulates armed conflict. One of the main functions of LOAC is to confirm that one may do all that is required to overcome the enemy, be that by overpowering the adversaries military potential or their will to continue being involved in the conflict. The exception to this rule requires the humane treatment of persons during armed conflict. The exception cannot determine the manner in which the law is referred to and LOAC is thus, in my view, the appropriate terminology to refer to this area of international law. The constant use of the term 'LOAC' may thus create confusion and an impression that LOAC favours an interpretation of DPH which is premised on humanitarian principles as opposed to military necessity.

[2] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts*, UN DOC. A/32/144 (1977); 16 ILM 1391 (1977) ("APII").

[3] "The reference to the complete submission of the enemy, written in the light of the experience of total war in the Second World War, is probably now obsolete, since war can have a limited purpose . . .". Rogers, APV *Law on the Battlefield* (2004) at 5; Ohlin, JD 'Targeting and the Concept of Intent' *Michigan Journal of International Law Vol 35, Issue 1* (2013) at 79 – 130 available at http://resiprosity.law.umich.edu/mjil/vol35/iss1/4 (last accessed on 17 July 2014).

[4] Schmitt, M 'Targeting and Humanitarian Law: Current Issues' *34 Israel Yearbook on Human Rights* (2004) at 60; see also Henderson, I 'Contemporary Law of Targeting: Military Objectives, Proportionality, and Precautions in Attack under Additional Protocol I' *International Humanitarian Law Series, Vol 25* (2009) at 8.

contemporary targeting is moving to what is known as 'effects-based' operations, where targets are attacked for systematic effect. The central idea remains that the military forces are attacked cumulatively to achieve military objectives,[5] taking into account the ideals of humanity.

The principle of distinction must also be evaluated in this context to establish whether 'combatant' and 'civilian' were intended to be the only categories of persons in armed conflict. The traditional view of distinction operated to tell adversaries apart; later the principle also differentiated combatants from civilians.[6] It is submitted that two further categories of mandated participants in NIAC are acknowledged by State practice, and at the least not excluded by LOAC in NIAC. These comprise of members of the regular armed forces and members of organized non-State armed groups. The assumption is that the rules of IAC should also apply in NIAC.[7] The rules of customary LOAC relative to NIAC, such as the principles of distinction and proportionality, are, accordingly, also applicable to non-State armed groups.[8]

Combat status, direct participation in hostilities ("DPH"), civilian direct participation in hostilities ("C-DPH") and legitimate targeting authority must not be confused with one another. Combat status results in certain privileges and obligations for members of the regular armed forces in international armed conflict ("IAC"), which includes the right to directly participate in the IAC.[9] The Inter-American Commission on Human Rights stated in 2002 that "the combatant's privilege . . . is in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives".[10] C-DPH, when carried out by civilians, does not award any status or rights and only results in the loss of civilian protection from intentional attack. Combat status and C-DPH thus have a bearing on targeting authority and

[5] See Henderson, I *op cit* note 4 at 8.
[6] See in general Watkin, KW 'Combatants, Unprivileged Belligerents and Conflicts in the 21st Century' *Program on Humanitarian Policy and Conflict Research at Harvard University* available at www.hsph.harvard.edu/hpcr (last accessed on 17 July 2014).
[7] *Prosecutor v. Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 at para 119.
[8] United Nations Human Rights, Office of the High Commissioner, International Legal Protection of Human Rights in Armed Conflict HR/PUB/11/01, United Nations Publication, SALES No. E.11.XIV.3 (2011), United Nations at 24.
[9] See Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002 at 68.
[10] *Inter-American Commission on Human Rights* (2002) Report on Terrorism and Human Rights OEA/Ser.L/-V?II.116Doc.5rev.1corr. at para 68.

the only contentious issue, subject to the determination of the status or the actions that constitute C-DPH, relates to the temporal scope of such targeting authority. The collective nature of NIAC should, for that reason, be interpreted to exclude rights for members of organised armed groups participating in armed conflicts and to authorise permanent legitimate targeting authority for such participants. The right to participate in the NIAC originates from domestic law and will normally only authorise the participation of the regular armed forces in armed conflict.

2. The Nature of Armed Conflict

Armed conflict is connected to everything including, in general, the development of humans.[11] Armed conflict is organised violence[12] and constitutes a collective human activity[13] which requires military operations on the part of all the parties involved.[14] It is a dynamic, complex and chaotic, adversarial and destructive process, specifically when the impacts of religion and culture are evaluated, as well as their influences on the principles of necessity and proportionality in targeting decisions. Training does not prepare a person for actual combat and any attempt to do so is usually unrealistic.[15] Combat can only be understood when human behaviour is appreciated, specifically human behaviour under extremely stressful circumstances, which may reduce the ability of a person to make rational choices.

Conflict, not only violent conflict, may be defined as a struggle between people with incompatible subject positions, leading to opposing needs, ideas, beliefs, values or goals.[16] This definition focuses on the incompatibility and does not identify the nature, as individual or collective, of these incompatibilities. It is also important to acknowledge that conflict could be productive and may result in new organisational forms, such as changes in social and political administration. Such conflict can, however, only exist "between parties that are sufficiently organized to confront each other with military means"[17], failing which the

[11] Gat, A *War in Human Civilization* (2006) at ix; Francis, D *Rethinking War and Peace* (2004) at 55-62.
[12] Walzer, M *Arguing about War* (2004) at ix.
[13] See the requirement in APII, Article 1(2), which requires sustained and concerted military operations as opposed to isolated and sporadic acts, this reveals the collective nature of armed conflict.
[14] Provost, R *International Human Rights and Humanitarian Law* (2002) at 266.
[15] See Storr, J *Human Face of War* (2011) at 38.
[16] Bonacker, T; Diez, T; Gromes, T; Groth, J & Pia, E 'Human Rights and the (De)securitization of Conflict' in Tocci, N & Marchetti, R (eds) *United Nations University Staff Civil Society, Conflicts and the Politicization of Human Rights* (2011) at 14.
[17] *Prosecutor v. Ramush Haradinaj et. al*, Case No. IT-04-84-T, Judgement of 3 April 2008 at paras 49 and 60.

thresholds required in LOAC instruments will not be attained.[18] State governmental authorities have been presumed to possess armed forces that satisfy this criterion, as opposed to all armed groups. The Trial Chambers, with regard to armed groups, have relied on several indicative factors, none of which are, in themselves, essential to establish whether the 'organization' criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory and thus constitutes the *de facto* government;[19] the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; its ability to speak with one voice and negotiate and conclude agreements such as cease-fires or peace accords.[20] Armed conflict, therefore, requires hostilities between two States or on-going, persistent, widespread and organised hostilities between a State and an organised armed group, or between such groups.[21]

The organisation of armed conflict requires physical effort and coordination to produce the violence required for the situation to qualify as an armed conflict.[22] Armed conflict thus constitutes cooperative action and movement which involves various violent and non-violent events. Effectively, armed conflict requires at least two adversaries who recognize each other as a legitimate enemy and who direct violence against each other. This, accordingly, requires organisation and discipline.[23] Armed conflict is thus collective and individuals, except perhaps for those who independently and sporadically participate, are involved based on a mandate that is derived from a connection to a group, regular or otherwise, which is a reflection of the fact that armed conflict involves at least two Parties with their own armed

[18] See GC's, Common Article 3 and the AP's, Articles 1(4) and 1(1) respectively; see Anderson, K *op cit* note 14 at 357.
[19] Andreopoulos, GJ *On Accountability of Non-State Armed Groups in Non-State Actors in the Human Rights Universe* (2006) at 145.
[20] *Prosecutor v. Boškoski & Tarčulovski*, Judgement, Case No. IT-04-82-T, T.Ch.I, 2008 at paras 194-206.
[21] Anderson, K 'Targeted Killings in U.S. Counterterrorism Strategy and Law in Legislating the War on Terror: An Agenda for Reform' *American University - Washington College of Law; Stanford University - The Hoover Institution on War, Revolution and Peace; Brookings Institution - Governance Studies* at 358 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415070 (last accessed on 6 January 2015); See, for a discussion of the US policy on the nature and scope of armed conflict – Targeting Operations with Drone Technology: Humanitarian Law Implications. Background Note for the American Society of International Law Annual Meeting, Human Rights Institute, *Colombia Law School* (March 25, 2011) at 5 - 6.
[22] Price, SB *Brute Reality: Reality: Power, Discourse and the Mediation of War* (2010) at 52.
[23] Ibid at 53; Escorihuela, AL 'Humanitarian Law and Human Rights Law: The Politics of Distinction' *Michigan State Journal of International Law Vol 19:2*: 299 – 407 at 333.

forces. It must be accepted that members of organized armed groups do not act as atomised individuals, but as part of a controlled collective whose objective is to make use of armed force. This approach results in status-based continuous targeting of members of armed groups in an attempt to reduce their collective military capability. The obligation to obtain the necessary intelligence to determine the status of a person results from the requirement that Parties to an armed conflict do everything feasible to verify that targets are military objectives in armed conflict.[24] In cases of doubt, the general presumption of civilian status[25] will apply. It will be argued that Additional Protocol I of 1977 ("API"), Article 50, relates to immunity from prosecution for direct participation and that it does not grant any authority or permission to participate.[26]

Armed conflict is then engaged in, with the intent of bringing about the disintegration of the adversary's system by eroding its will to continue to engage in armed conflict or to destroy its physical integrity[27] while preserving the party itself. Armed conflict is, therefore, essentially an assault on the adversarial force as a whole with the object of cumulatively reducing and weakening its ability or will to commit violence and to participate in the conflict.[28] The existence of a threat to the adversary is thus not required as participants comprise a component of the military potential of the adversary and their intentional targeting is done to weaken the cumulative military potential of the adversary.[29]

The traditional understanding is that this notion of continuous targeting only relates to combatants, but it is argued that this also refers to all other mandated participants in armed conflict. Traditionally, since the evolution of the nation State, armed conflict was conducted by agents or "organs" of the State. This results in "the privilege of the combatant" or

[24] Rule 16 of Henckaerts, JM and Doswald-Beck, L (eds) *Customary Law Study* (2005) at 51, 55 available at http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng (last accessed on 1 May 2014). See also the judgment in the *Targeted Killings case* of the Israel Supreme Court Sitting as the High Court of Justice, *The Public Committee against Torture in Israel et al v. The Government of Israel* et al, HCJ 769/02, judgment of 11 December 2005.
[25] API, Article 50(1); Moir, L *The Law of Internal Armed Conflict* (2002) at 59.
[26] Baxter, R So-Called 'Unprivileged Belligerency' *28 British Yearbook of International Law* (1951) at 323-24.
[27] Gordon, S *Civilian Protection – What is Left? In Geneva Conventions Under Assault* (2010) at 82.
[28] *St Petersburg Declaration*, preamble (emphasis added); reprinted in Schindler, D & Toman, J (eds) *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents* (2004) at 91.
[29] Sassòli, M & Olson, LM 'The Relationship between International Humanitarian Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' *IRRC Vol 90, No. 871* (September 2008) at 606 available at http://www.icrc.org/eng/resources/documents/article/review/review-871-p599.htm (last accessed on 1 May 2014).

"combatant immunity."[30] The combatant does not participate in a private enterprise but is involved on behalf of a State[31] and in representation of the sovereign. Armed conflict takes place between "public persons".[32] This is also reflected in the definition of 'military necessity' which refers to measures to secure the submission of the enemy.[33] These conflicts are usually not settled by the incapacitation of individual members or by individual battles; these events occur regularly in armed conflict as a means to an end.[34] The individual participant is normally involved in these distinct events, as opposed to the higher level characteristics and aims that are dealt with by commanders of the armed forces or groups.[35]

3. The Function of Status in the Law of Armed Conflict

The classification of armed conflict and its participants are central in LOAC as it determines whether a person may legitimately be intentionally targeted during the armed conflict.[36]A proper understanding of LOAC and its application necessitates an appreciation of the manner in which LOAC makes use of status. The determination and allocation or denial of status is an intermediary for more significant legal outcomes in LOAC. The law incorporates various categories of legal relationships including, *inter alia*, categories that relate to conflicts,[37] prohibited categories of weapons,[38] and persons. LOAC, accordingly, awards or denies status in various circumstances to various states of affairs, persons and items in terms of which humanitarian objectives are pursued.[39] This complex system sometimes precludes a logical,

[30] Kutz, C 'The Difference Uniforms Make: Collective Violence in Criminal Law and War' *33 Phil. & Pub. Aff.* (2005) at 148.
[31] Escorihuela, AL *op cit* note 26 at 325.
[32] Ibid at 328.
[33] For a discussion on the definition of military necessity see Doswald-Beck, L & Vite, S 'International Humanitarian Law and Human Rights' *IRRC, No. 293 30-04-1993* at 2.
[34] The possession of nuclear weapons by some States since 1945 has, however, severed this relationship between eventual military success and self-preservation in some armed conflicts as a defeated adversary or one with nuclear capability could inflict massive destruction on the victorious party - Van Creveld, M *Rise & Decline of the State* (1999) at 337 available at http://www.libertarianismo.org/livros/mvcradots.pdf (last accessed on 6 January 2015). War was previously defined as relating to IAC only and thus as "a contention between two or more States through their armed forces for the purpose of overpowering each other by imposing such conditions of peace as the victor pleases" – see Provost, R *op cit* note 18 at 248.
[35] See Storr, J *op cit* note 19 at 40.
[36] See Boothby, B *The Law of Targeting* (2012) in general and Melzer, N *Targeted Killing in International Law* (2008).
[37] See GCI, Article 2.
[38] See *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1524.
[39] Spies and mercenaries. See API, Articles 46-47; Baxter, RR 'So Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs' 28 *British Yearbook of International Law 323* (1951). See also *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment on Appeal, July 15, 1999 paras 164-69.

moral or legally desirable end result and complicates its practical application.[40] Status has been the focus of not only operational, humanitarian, and academic attention, but also some of the most significant criminal litigation to enforce LOAC.[41]

Status regarding conflicts resulted in LOAC differentiating between IAC and NIAC. Status regarding persons results in the classification of who are involved in or affected by armed conflict. Status confers rights, responsibilities, humanitarian protection from hostilities, treatment standards upon capture, obligations, and conditional politically motivated immunity from prosecution for combatants who participate in hostilities. It is submitted that this extension of immunity is derived from State sovereignty.[42] Status must, accordingly, not be interpreted only as a means to legitimate participation in hostilities, but also, for separate reasons, as a means to humanitarian ends.

The status of persons in NIAC has been regarded as insignificant.[43] The "equal application" principle of IAC does not operate in NIAC.[44] The consent of States in NIAC was premised on an explicit guarantee that legal status would form no part of the law on NIAC.[45] APII refers only to a 'civilian population' without specifying qualifying criteria therefore.[46] The term, 'combatant' is not contained in Common Article 3 either.[47] There is, therefore, no prisoner-of-war status in NIAC,[48] while APII refers to "[p]ersons whose liberty has been restricted" to describe captured persons.[49] Persons captured in NIAC are liable to be treated as criminals

[40] See for example see *Prosecutor v. Tadic*, Case No. IT-94-1-A paras 164-71, Jul. 15, 1999.
[41] Ibid at paras 164-69.
[42] Cullen, A at 56 (quoting Eldon Van C 'Greenberg) Law and the Conduct of the Algerian Revolution' *11 Harvard International Law Journal 37* (1970) at 70-71.
[43] McCoubrey, H & White, ND *International Law and Armed Conflict* (1992) at 323 (stating that "[r]eferences to 'prisoner of war' status would be legally and politically inappropriate in a context of non-international armed conflict.").
[44] Roberts, A 'The Equal Application of LOAC: A Principle under Pressure' *90 IRRC* (2008) at 931.
[45] See Commentary, GCIV at 6-7, Pictet, J observes, "Without [the guarantee] neither Article 3, nor any other Article in its place, would ever have been adopted."
[46] See API, Article 43(2) - ("Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities."). "The law relating to internal armed conflict does not deal specifically with combatant status or membership of the armed forces." United Kingdom Ministry of Defence, The Manual of the Law of Armed Conflict at para 15.6.1 (2004).
[47] Solis, GD *The Law of Armed Conflict: International Humanitarian Law in War* (2010) at 191.
[48] 1949 Geneva Convention III, Article 4A(4) - This view accords with the inclusion of these groups in the law-of-war definition of civilian; See API, Article 50.
[49] APII, Article 5. Article 6 echoes this reluctance referring to "those deprived of their liberty for reasons related to the armed conflict."

under the domestic law of the territorial State.[50] The military manuals of some States do deal with NIAC but these manuals are silent regarding the status of government forces.[51] These manuals, in general, conclude that LOAC is of no consequence to the legal status of the parties to an NIAC.[52]

This does not mean that everybody within the geographic scope and affected by an NIAC will qualify to be civilians. Some authors have commented that "[i]n NIAC, civilians are protected from attack unless and 'for such time' as they take a 'direct part in hostilities'.[53] This would imply that, in an NIAC, the only persons who may be targeted are civilians at the time they are taking a direct part in hostilities."[54] This reasoning is rejected as unrealistic and not within the scope of a good faith, objective interpretation of common Article 3 and APII.

4. The Status of Armed Conflicts as International or Non-International in Character

A proper understanding of status as per LOAC requires an accurate comprehension of the meaning of armed conflict. The classification of armed conflict is a complex undertaking due to its nature and the ensuing chaos that results therefrom.[55] LOAC differentiates between IAC and NIAC.[56] These conflicts are defined by Articles 2 and 3 of the GS's respectively and elaborated upon in the AP's.

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[50] See La Haye, E *War Crimes in Internal Armed Conflicts* (2008) at 256; NIAC Manual at para. 3.7 (outlining due process obligations applicable to domestic prosecution for "crime[s] related to the hostilities"); The Handbook of International Humanitarian Law at para.1202.3 (Dieter Fleck, ed., 2008).

[51] *UK LOAC Manual*, at chapter 15; Office of the Judge Advocate General, Chief of Defence Staff, Joint Doctrine Manual, Law of Armed Conflict at the Operational and Tactical Levels, ch. 17 (2001). The German law of armed conflict manual does not treat NIAC in detail. See Federal Ministry of Defence, Federal Republic of Germany, *Humanitäres Völkerrecht in Bewaffneten Konflikten* – Handbuch, paras 210-211 (Augustus 1992). The manual simply instructs German armed forces to apply "fundamental humanitarian provisions of international law embodied in the four 1949 Geneva Conventions (common Article 3, the 1954 Cultural Property Convention (Article 19) and the 1977 Additional APII" to NIAC. Comments by a prominent German legal expert note that the International Criminal Tribunal for Former Yugoslavia interpreted this paragraph as a statement equating the law of IAC and NIAC. Wolff Heintschel von Heinegg, The German Manual, in International Peace Research Institute, Forum for International Criminal and Humanitarian Law, National Military Manuals on the Law of Armed Conflict - Hayashi, N (Ed) (2010) at 211 available at http://www.fichl.org/publication-series (citing International Criminal Tribunal for the Former Yugoslavia, *Tadic Jurisdiction* Decision at para 118) (last accessed on 1 May 2014).

[52] UK LOAC Manual at para 15.6.1; Canadian LOAC Manual at para 1706.1.

[53] APII, Article 13.

[54] Hampson, F 'Personal Scope of LOAC Protection in NIAC: Legal and Practical Challenges. Scope and Application of International Humanitarian Law' *Proceedings of the Bruges Colloquium, No. 43, Autumn 2013*.

[55] Carswell, AJ 'Classifying the Conflict: A Soldier's Dilemma International Review of the Red Cross' *Vol 912 No 873* (March 2009) at 4.

[56] One could argue that other situations of violence are acknowledged but not regulated by LOAC – See APII & Common Article 3 to the Geneva Conventions of 1949; see in general Akande, D 'Classification of Armed

States have always, by persuasive majorities, rejected requests to discontinue the distinction between IAC's and NIAC's in LOAC treaties.[57] This is manifested in the omission from APII of any mention of the "law of nations/international law" and "established custom"[58] and the "usages established among civilized peoples."[59] It has been argued that these omissions were intentional and based on the refusal of States to consign NIAC to LOAC.[60] Many of the norms found in LOAC of IAC could, however, easily be applied to NIAC and some parity is possible. This includes the general use of status but with the exclusion of immunity for participation in armed conflict, which is a political determination. Kretzmer argues that "[s]tates were, and still are, unwilling to grant the status of combatants to insurgents and other non-State actors who take part in [NIACs], as doing so would not only afford them an element of legitimacy, but would mean that they enjoy the two 'privileges' of combatants: immunity from criminal liability for fighting, and prisoner-of-war status when apprehended."[61]

The participants in an armed conflict are expected to identify and self-classify the armed conflict as either an IAC, an NIAC or as internationalised. This is a complex responsibility where an assessment must be made between various states of disturbances and armed

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Conflicts: Relevant Legal Concepts' in Wilmshurst, E (ed) *International Law and the Classification of Conflicts* OUP (2012) available at http://www.ssrn.com/link/oxford-legal-studies.html (last accessed on 16 July 2014).

[57] The ICRC prepared the first draft of what would become the 1949 Geneva Conventions. The most ambitious passage of the draft would have applied the Conventions to all conflicts. Article 2 of the Stockholm Draft would have made the Conventions applicable in their entirety not only to armed conflict and belligerent occupation between states Parties, but also to "armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties." Draft Convention for the Protection of Civilian Persons in Time of War, 1949, reprinted in 1949 Diplomatic Record at 113. States rejected the proposal. 2B 1949 Diplomatic Record at 41-43. Among other conceptual concerns, States noted that applying the Civilians Convention to insurgents would be problematic because the Convention relied on adversary nationality to define the civilian protected person class.

[58] The references to "the law of nations," "international law," and to "established custom" appear, respectively, in the Hague and Additional API versions of the Martens Clause. 1899 *Hague Convention (II) Respecting the Laws and Customs of War on Land with Annex of Regulations*, preamble, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; Convention Respecting the Laws and Customs of War on Land, preamble, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 at Article1(2).

[59] The reference to "usages established among civilized peoples" appears in the 1899/1907 Hague expression of the Clause as well as the 1949 Geneva Convention expression. 1899 Hague Convention II, preamble; 1907 Hague Convention IV, preamble; 1949 Geneva Convention IV, Article 158.

[60] Bothe, M; Partsch, K & Solf, W *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) at 620.

[61] Kretzmer D 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' EJIL Vol 16 No 2 (2005) at 197 available at https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/KretzmerTargetedKillings.pdf (last accessed on 7 January 2015).

conflicts.[62] The applicability of LOAC is basically a pragmatic issue.[63] The existence of an armed conflict, however, does not depend upon the subjective views and declarations of the groups involved, but rather on the existence of objective criteria. The declarations of the parties involved have no legal significance for the application of LOAC.[64]

LOAC applies from the initiation of armed conflicts, extends beyond the cessation of hostilities and until a general conclusion of peace is reached or, in the case of internal conflicts, a peaceful settlement is achieved.[65] This suggests that the application of military force which exceeds the maintenance or restoration of law and order will cause LOAC to become applicable.[66] LOAC will also apply where the Security Council has authorised the resorting to force between the international community and a State even where a Party to the conflict declines to recognise their adversary's government as legitimate.[67] The lawfulness of armed conflict thus has no bearing on the proper conduct of war[68] but attempts, as an alternative, to apply humanitarian principles in armed conflict.

LOAC recognises and/or classifies five different types of armed situations, four of which are regulated by LOAC. Internal disturbances and tensions are excluded from the application of LOAC.[69] IAC, armed conflicts of national liberation, NIAC defined by APII and internal

[62] Carswell, AJ *op cit* note 58 at 4.
[63] Gill, TD *11th of September and the International Law of Military Operations* (2002) at 22.
[64] van Schaack, B 'The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory' *Legal Studies Research Papers Series Accepted Paper No. 02-12* (January 2012) at 24 available at: http://digitalcommons.law.scu.edu/facpubs/166 (last accessed on 10 June 2014; The Colombian Constitutional Court (Colombia, Constitutional Court, Judgement C-291 of 2007) held in 2007 that "the existence of an armed conflict is legally determined on the basis of objective factors, regardless of the denomination or qualification given to it by States, governments or armed groups involved therein." The Court also drew a distinction between 'combatants *stricto sensu'*, that is, combatants who are entitled to participate in hostilities in the context of an IAC and 'combatants in a general sense', which the refers to "persons who, through membership in armed forces and irregular armed groups, or by taking part in hostilities, are not entitled to the protection given to civilians" - Colombia, Constitutional Court, Judgement C-291 of 2007.
[65] Tadic *supra* at para 70.
[66] Gill, TD *op cit* note 66 at 22.
[67] Ibid at 22.
[68] Common Article 2: … the present Convention shall apply to 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." See also Fletcher, GP & Ohlin, JD (2008) *Defending Humanity. When Force is Justified and Why* (2008) at 20.
[69] NIAC may thus, in theory and in practice, be made up of armed conflicts between the regular State armed forces fighting against one or more organized non-State armed groups within the territory of a State; conflicts between two or more organized non-State armed groups occurring within the territory of a State; conflicts between the regular armed forces and one or more organized armed groups in the territory of various States; conflicts in which multinational armed forces are fighting alongside the regular armed forces of a State within its territory and against one or more organized non-State armed groups; conflicts where UN forces, or forces

armed conflicts defined by common Article 3 are regulated to different degrees by LOAC.[70] It will be argued that the main distinction between an IAC and an NIAC essentially relates to the quality of the Parties involved.

4.1 International Armed Conflict

IAC's are defined as "whenever there is a resort to armed force between States".[71] Common Article 2 of the GC's ("Common Article 2") defines IAC as "armed conflict which may arise between two or more of the High Contracting Parties."[72] However, API increased the scope of IAC to incorporate those 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, as enshrined in the *Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations*."[73] The ICRC Commentary to the GC's states that "[a]ny difference arising between two States and leading to the intervention of members of armed forces, is an armed conflict within the meaning of [Common] Article 2, even if one of the Parties denies the existence of a state of war".[74]

A classification as an IAC would result in the GC's, API, the Hague tradition and other conventional and customary international law being applicable to the conflict. However, the protections contained in GCIV[75] and in API do not apply where one or both of the parties to an armed conflict are not contracting states within the meaning of the GC's, Article 2 Common and API, Article 1(1), or as a national liberation movement as per API, Article 1(4).[76] The traditional interpretation of the requirements for the existence for an IAC is

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under the auspices of a regional organization support a government involved in hostilities against one or more organized non-State armed groups within its territory; conflicts where the regular armed forces of a State are engaged in hostilities with an armed non-state group operating from the territory of another State without that state's control or support and conflicts occurring across several States.

[70] See in general Provost, R *op cit* note 18 at 242.

[71] The *Prosecutor v Dusco Tadic*, Case No IT-94-1-AR72, Merits (Appeal Chamber), 2 October 1995 at para 72.

[72] Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3364, at Article 2. The Prosecutor v Dusco Tadic *supra* at para 72.

[73] API, Article 1(4).

[74] See in general Gill, TD *op cit* note 66 at 22; Uhler, OM (et al) 'IV Commentary on the Geneva Convention Relative to the Protection of Civilian Person in Time of War' *62 (Pictet, JS (ed) Griffin, R & Dumbleton, CW trans., 1958)* at 2.

[75] *Geneva Convention ((IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, Article 2(1).

[76] Melzer, N *op cit* note 39 at 248.

currently being and the possibility of insisting on a certain level of intensity of hostilities before an IAC will arise has been discussed. Isolated or intermittent armed conflicts between States would thus not qualify as an IAC. The ICRC, however, does not share this belief and holds that the lack of a requirement of threshold of intensity for the triggering of an IAC should be upheld.[77]

4.2 Non-International Armed Conflict

NIAC is defined as armed conflict between a State and an organised non-State armed group or between two such groups.[78] There are various categories of armed conflicts that qualify as NIAC and it is essential to evaluate these to fully appreciate the challenge that they create for LOAC and specifically the challenge of civilian DPH therein. A substantial amount of LOAC has developed since 1949 to regulate NIAC and to protect civilians during such conflict. The conventional law, which excludes customary international law, applicable to NIAC are Common Article 3 to the GC's ("Common Article 3") and APII to the GC's.[79]

APII, as opposed to Common Article 3, adopts a more complex formula for its scope of application as "[t]his Protocol […] shall apply to all armed conflicts […] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[80] APII "specif[ies] the characteristics of a non-international armed conflict by means of objective criteria so that the Protocol could be applied when those criteria were met and not be made subject to other considerations."[81] This created two different thresholds for the application of common Article 3 and APII. APII thus only applies to conflicts that have achieved a certain level of intensity, while common Article 3 covers all NIAC's.

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[77] Keynote Address by Beerli, C 'ICRC Vice-President Scope and Application of International Humanitarian Law' *Proceedings of the Bruges Colloquium No 43* (Autumn 2013).
[78] Common Article 3, GC's; APII: "[A]rmed conflict not of an international character occurring in the territory of one of the High Contracting Parties."
[79] See in general Schmitt, MN 'The Status of Opposition Fighters in a Non-International Armed Conflict' in Watkin, K & Norris, AJ (eds) 'Non-International Armed Conflict in the Twenty-first Century' *US Naval War College International Law Studies – Vol 88* (2012) at 119 available at http://www.peacepalacelibrary.nl/ebooks/files/356612716.pdf (Last accessed on 7 January 2015).
[80] APII, Article 1(1).
[81] Sandoz, Y; Swinarski, C & Zimmerman, B (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) at para 4453 available at http://www.icrc.org/LOAC.nsf/COM/475-760018?OpenDocument (last accessed on 1 May 2014).

It has been argued that the criteria in APII, Article 1(1), are redundant.[82] APII does not require that the armed group complies with LOAC, but merely that it has the capacity to do so. The ICTY held in the *Tadic* jurisdiction decision that APII, Article 1(1) refers to the intensity of hostilities between the State and the armed groups, and the level of organisation of the armed group.[83] The ICTY Appeals Chamber holds the view that these general criteria are equally applicable to conflicts under common Article 3.[84] It is, however, submitted that the dual threshold for the application of common Article 3 and APII for application is mostly not convenient for the modern LOAC, where the characterisation of armed conflicts is not the ultimate goal, but rather the protection of civilians from the effects of war.[85] The remaining criteria, including territorial control, should be considered to determine the intensity of the hostilities or the organisation of the armed group. The *Boskoski* judgment regarding NIAC lists all the criteria that are used to determine whether a sufficient degree of organisation and intensity has been reached. This includes the existence of a command structure; the ability to undertake organized military operations; a certain level of logistics, such as the ability to recruit or the issuance of uniforms; a certain level of disciplinary enforcement, and the ability to speak with one voice.[86] These criteria determine whether an armed group is sufficiently organised.[87]

It is generally agreed that APII applies to a narrower class of conflicts than Common Article 3.[88] It is asserted that APII is binding on States and non-State groups as it extends the protection of civilians, detainees and medical personnel. Although only States may become

[82] Lozano, GO & Machado, S 'The Objective Qualification of Non-International Armed Conflicts: A Colombian Case Study' *Amsterdam Law Forum Vol 4:1* at 63.
[83] *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, A. Ch, 1995 at para 70.
[84] Ibid at para 561-568.
[85] Crawford, E 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts' *Leiden Journal of International Law* (2007) at 441.
[86] *Prosecutor v. Boškoski & Tarčulovski*, Judgement, Case No. IT-04-82-T, T.Ch.I (2008) at paras 194-206.
[87] Ibid at paras 177 - The court held that in is important to take into account the seriousness of the attacks and whether there has been in increase in armed clashes; the spread of clashes over the territory and over a period of time; an increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict; whether the conflict has attracted the attention of the Security Council; the number of civilians forced to flee from combat zones; the type of weapons used; the besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; the existence and change of front lines between the parties; the occupation of territory, towns and villages; the deployment of government forces to the crisis area; the closure of roads; the existence of cease fire orders and agreements; and other attempts of representatives from international organisations to broker and enforce cease fire agreements.
[88] See Sandoz, Y et al *op cit* note 84 at 1350 (noting that the material application of APII does not affect that of Common Article 3).

party to APII, non-State armed groups may indeed become bound by the provisions of APII. APII would have a legal effect on irregular groups where the High Contracting Parties intended the instrument to bind irregulars and where irregular groups accept the rights and obligations contained in APII.[89]

5. The Character of Organised Armed Groups

There is no universal definition of an organised non-State armed group.[90] Organised non-State armed groups are, to state the obvious, distinct from a State, with its regular armed forces, which is identifiable as an original subject in terms of International Law.[91] Some traditional societies do not have standing professional armed forces that conform to the western categorisation but they have the ability to participate in armed conflict in a collective manner and can display traditional military characteristics, such as effective leadership structures and combat methods.[92] This section will, however, argue that there are mandated direct participants in both IAC and NIAC and that the adversarial nature of all armed conflict dictates that armed conflict can only exist where two or more groups are involved therein.[93] There can thus, realistically and practically, be no armed conflict without identifiable parties to oppose each other and to implement LOAC.[94] It may further be stated that non-State armed groups will constitute the foremost participants in armed conflicts throughout the world in the foreseeable future.[95]

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[89] Moir, L *op cit* note 28 at 97.
[90] Int'l Council on Human Rights Policy, Ends & Means: Human Rights Approaches to Armed Groups 5 (1999) available at http://www.reliefweb.int/library/documents/2001/EndsandMeans.pdf (last accessed on 10 June 2014) ("In this report, by 'armed groups' we mean groups that are armed and use force to achieve their objectives and are not under state control."); 'Armed Non-State Actors: Current Trends & Future Challenges' *DCAF & Geneva Call Horizon* Working Paper No 5 (2015) at 7 available at http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCMQFjAB&url=http%3A%2F%2Fwww.dcaf.ch%2Fcontent%2Fdownload%2F53925%2F812465%2Ffile%2FANSA_Final.pdf&ei=W8WsVPG5OsbsUujygvAB&usg=AFQjCNEwmUV-LU3ddoMrezxj0oNAwBSZYg&sig2=cN_KIuel5wJsJSPeAtAw-g&bvm=bv.83134100,d.d24 (Last accessed on 7 January 2015).
[91] Guiora, AN 'Determining a Legitimate Target: The Dilemma of the Decision-Maker' *Texas International Law Journal Vol 47 Issue 2:* 315 - 336 at 320.
[92] Schultz, SR *Insurgents, Terrorists, and Militias: The Warriors of Contemporary Armed Conflict* (2009) at 262.
[93] Sassoli, M 'Transnational Armed Groups and International Humanitarian Law. Programme on Humanitarian Policy and Conflict Research' *Harvard University Occasional Paper Series No 6* (Winter 2006) at 1.
[94] Rona, G *International Law under Fire – Interesting Times for International Humanitarian Law: Challenges from the War on terror. Fletcher Forum of World Affairs* (2003) at 60-61; See also Gasser H 'Internationalised Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon' *The American University Law Review Vol 33* (1983) at 145.
[95] Schultz, SR *op cit* note 95 at 260.

A basic distinction must be made, for intentional targeting decisions, between the regular armed forces and organized armed groups whose function it is to conduct hostilities on behalf of the parties to an armed conflict, and civilians, who do not, and should not, directly participate, and those civilians who do participate on a spontaneous, sporadic, or unorganized basis. The ICRC holds the view that "non-governmental groups involved in the conflict must be considered as 'parties to the conflict', meaning that they possess organized armed forces."[96] This membership approach requires that the organised non-State armed group displays a sufficient degree of military organisation; "belonging to a party to the conflict"; and a continuous combat function.[97]

These groups are positioning themselves functionally and consciously into the power continuum and have acquired the ability to utilise the full range of kinetic force to influence their adversaries. Non-State armed groups challenge the State's claim over the use of legitimate force. States have, to an extent, lost the monopoly of war and powerful self-forming non-State agents have interjected themselves across spatial and temporal boundaries.[98] Non-State armed groups are generally considered to be illegitimate under international and domestic legal rules. States often attempt to portray these groups as violent and illegitimate to invoke distrust and condemnation amongst the public towards these groups and their activities. This is reinforced by LOAC where the law of NIAC provides no protection to such groups.

Armed non-State actors belong to a specific category of non-State actors who pursue their objectives by violent means. This category requires a basic command structure and it must be outside the effective control of the State.[99] An armed non-State group, as opposed to the regular armed forces, may be described as a party that does not qualify or is not recognised as a contracting State within the meaning of Common Article 2 and API, Article 1(1), or as a

[96] See ICRC *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* available at https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm (last accessed on 7 January 2015)
[97] Melzer, N *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).
[98] Mohamedou, MO (2011) *Understanding Al Qaeda Changing War and Global Politics* at 25.
[99] Miodownik, D & Barak, O (eds) *National and Ethnic Conflict in the 21st Century: Non-State Actors in Intrastate Conflict* (2013) at 3.

national liberation movement[100] within the meaning of API, Article 1(4).[101] Common Article 3 is silent on the issue of targeting, but it is submitted that the principles of targeting generally apply equally to GC's, Article 2, and common Article 3 conflicts.[102] Groups, under common Article 3, must also display a minimum level of organisation and operate under a responsible command. Such a group cannot implement the basic LOAC rules contained in common Article 3 without these characteristics. APII defines organised armed groups as having a responsible command and exercising such control over a part of a State's territory as to enable them to carry out sustained and concerted military operations and to implement APII.[103] The *Tadic* judgment confirmed this observation and required, along with the minimum intensity of the conflict, some organisation of the parties involved before the existence of an NIAC will be acknowledged.[104] Armed attack traditionally only referred to attacks by States but the UN Charter,[105] Article 51, does not exclude the fact that an armed attack can emanate only from States. It is submitted that State practice, jurisprudence and academic writing confirm that the notion of 'armed attack' includes grave armed acts by private actors.[106] The real difference between States and non-State armed groups is thus contained in their legitimacy and not in their use of force.

Non-State armed groups are becoming progressively complex and often have multiple transnational connections. They display an unconventional decentralised network structure

[100] API, Article 96(3) requires that national liberation movements which undertakes to apply API and the GC's must possess the characteristics of an armed force as per API, Article 43. Such a movement must therefore have an organised force under responsible command, have with an internal disciplinary system which, inter alia, will enforce compliance with LOAC. It is argued that non-State armed groups, in general, will possess these characteristics although States and others may argue that these groups do not comply with LOAC. Compliance with LOAC by the adversary is, however, not a requirement when targeting decisions are decided upon and is thus irrelevant for purposes of DPH. The group must further display a degree of organisation and a responsible command. For purposes of APII this relates to the requirements of sustained and concerted military operations and the exercise of control over territory and to implement the provisions of APII. The structure of the group does not need to be similarly hierarchical as compared with the regular armed forces. Provost, R *op cit* note 18 at 262. *Prosecutor v. Musema* (Judgment), 27 January 2000. ICTR-96-130T (trial Chamber, ICTR) at para 257.
[101] Melzer, N *op cit* note 39 at 248.
[102] International Institute of Humanitarian Law *The Manual on the Law of Non-International Armed Conflict* (March 2006).
[103] APII, Article 1(1). See also Margulies, P 'Networks in Non-International Armed Conflicts: Crossing Borders and Defining "Organised Armed Group" The Geography of Armed Conflict' *89 Int'l L. Stud. (Naval War Coll., Wall, A Ed)* (2012) at 3 available at http://www.ssrn.com/abstract=2142851 (last accessed on 7 June 2014).
[104] *Prosecutor v. Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction). 2 Oct. 1995, Case No. IT-94-1-AR72 (Appeals Chamber, ICTY) 37-8 at para 70.
[105] *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI.
[106] Swarc, D *Military Response to Terrorism and International Law on the Use of Force in Turkey, Legal Aspects of Combating Terrorism. Centre of Excellence Defence Against Terrorism* (2008) at 134; see also *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (United States v. Nicaragua), Merits, Judgement of 27 June 1986 – Case No. 153.

with varied territorial and non-territorial aspirations, sometimes even having *de facto* control over territory in their pursuit of objectives.[107] Armed non-State groups may be defined as private, relatively autonomous organisations, which are not subject to direct or total State control and who exhibit considerable and coercive potential for organised violence.[108] They must thus be willing and capable of using armed force to achieve their objectives and cannot be integrated into the regular armed forces or the law enforcement services. These groups display a basic, often hierarchical and accountable, structure of command,[109] reaching levels of organisation that mirror that of States[110] but who are not within a State's control. Such groups use force to achieve their political objectives.[111] They have specific goals and ideologies,[112] possess security objectives and pursue economic benefits or political or other ideological objectives, or a mixture of these goals.[113] These groups normally display a divergence between their command, control and communication structures,[114] and between their political and military organisation;[115] they act strategically and threaten the classical conception of the State system because of their use of violence. To exercise this violence,

[107] Mandel, R *Global Security Upheaval: Armed Nonstate Groups Usurping State Functions* (2013) at 42; Some non-State armed groups, including the Moro Islamic Liberation Front in the Philippines, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, the Sudan People's Liberations Movement and the Communist Party of Nepal-Maoists control territory and operate openly in the international arena.
[108] Mandel, R *op cit* note 109 at 37.
[109] The ICTY held that "some degree of organisation by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation, as no determination of individual criminal responsibility is intended under this provision of the Statute" - *Prosecutor v Limaj*, Case No. IT-03-66-T, Judgment ICTY Nov. 30 2005 at 89 with regards to the status of the Kosovo Liberation Army. In *Haradinaj*, the ICTY held, with regards to organisation, that factors that indicate organisation include "existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords" - *Prosecutor v Haradinaj*, Case No. IT-04-84-T at 60, Judgment, ICTY April 3, 2008.
[110] The organised armed group must therefore exhibit a degree of structure, must be a distinct entity capable of exercising some degree of control over the activities of their members, act in a coordinated fashion, display an ability to plan and execute group activities, collect and share intelligence, communicate among members and provide logistic support to combat operations to display a group character - See in general Schmitt, MN *op cit* note 82 at 129-130.
[111] Armed Non-State Actors *op cit* note *83* at 7.
[112] Dudouet, V 'Intra-Part Dynamics and the Political Transformation of Non-State Armed Groups' *International Journal of Conflict and Violence Vol 6(1)* (2012) at 98.
[113] Mandel, R *op cit* note 109 at 50.
[114] The ICRC Commentary explains that "[t]he existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority" - Sandoz, Y et al *op cit* note 84 at 4663.
[115] Mandel, R *op cit* note 109 at 42-43.

non-State armed groups often have access to the same weapons as States and they are capable of using these military technologies effectively.[116] They also exhibit military training, discipline, coordination and innovation. They may have popular public support and may receive foreign funding. The ICTY in the *Limaj* matter suggested that an organised non-State armed group must have headquarters, a unified command and military police, failing which the group would constitute a criminal band or individuals engaged in civil unrest.[117] The ICRC only requires a "minimum of organisation", which disposed of the rigid, itemized checklist requirements for the existence of an organised armed group.[118]

Some groups do, on the other hand, display few command structures, little discipline and training, and are seldom held accountable for violations of LOAC.[119] They, thus, sometimes deliberately violate LOAC rules as part of their strategy to achieve their objectives. It must be recognised that LOAC instruments hold little incentives for members of armed groups to comply with the law. Some non-State armed groups may, in an asymmetrical conflict, display an organisational structure that is disorganised in order to be successful. This disorganised structure, or an outwardly disorganised structure, will result in making it difficult for an organised adversary to effectively target such a group. These may be referred to as disorganised non-State armed groups. These groups will have a command structure but will operate as autonomous cells with the same mandate and object. These groups, as opposed to regular State forces, may not have the aim of overpowering the military potential of the adversary; it may be to outlast the adversary. Therefore, not losing may be perceived as success.

In the final analysis, it must be recognised that these groups normally have the ability to mobilise quickly and that, as in Afghanistan and Somalia, complex command and control structures exist.[120] These groups may operate within areas that are well known to them but have also, as in Checnia and Mogadishu, developed an ability to operate within urban

[116] Ibid at 45.
[117] *Prosecutor v. Limaj supra* at para 113 – 117.
[118] ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts 10 (2011) at 8 available at http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf (last accessed on 7 June 2014).
[119] Perrin, B 'Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organisations, and the Law' (2012) at 2 – 3; Moir, L *op cit* note 28 at 233-237.
[120] Shultz, RH & Dew, AJ *Insurgents, Terrorists and Militias: The Worriers of Contemporary Combat* (2006) at 263.

environments.[121] Afghan Mujahideen forces attacked Soviet forces, just as the Iraqi irregulars attacked US troops, by way of snipers and guerrilla tactics.[122] These groups have, however, also made use of IED operations, kidnappings, and have attempted to obtain WMD's. This is evident in Chechnya and Iraq. These methods have led to indiscriminate warfare where not only military targets were attacked. *Al-Qaeda* is a goal-driven organisation with strategic goals, some of which are subordinate to their eventual main objective.[123] They have links to governments, influence State policy and desire to obtain State-level power. *Al Qaeda* even has a military manual described as the '*al Qaeda Manual'*.[124] *Al Qaeda* has also displayed the ability to conduct multiple, simultaneous coordinated attacks, as was seen in Kenya, Tanzania, New York, Washington DC, Istanbul, Madrid and London. *Al Qaeda*, even after the September 11 attacks, was of the opinion that a 'balance of terror' existed between them and the US.[125]

The existing rights and obligations in LOAC, applicable to NIAC, afford only basic protection in Common Article 3 and APII.[126] Members of irregular armed groups may be exposed to criminal prosecution under domestic law DPH. It is submitted that the threat of domestic criminal sanctions, or any international criminal sanction for violations of LOAC will probably have no influence on such members, since members of armed groups will already have incurred criminal liability for their participation in the armed conflict.[127]

In general, people are rational beings that can exercise individual expression and thus decide independently to identify themselves with a specific group structure.[128] This decision includes the accompanying acceptance of the risk associated with becoming a member of an organized armed non-State group or the regular armed forces. Affiliation to, or a connection to an armed group, is shaped by a complexity of value commitments, which translates into a collective consciousness within the group structure. This group identity, in turn, establishes a

[121] Ibid at 266.
[122] Ibid at 267.
[123] Libicki, MC & Chalk, P *Exploring Terrorist Targeting Preferences* (2007) at 5.
[124] Ibid at 7.
[125] Osama bin Laden in an interview with Al-Jazeera during 2002, see Libicki, MC & Chalk, P *op cit* note 125 at 20.
[126] See in general Schmitt, MN *op cit* note 82 at 119.
[127] See in general Perrin, B Modern *Warfare: Armed Groups, Private Militaries, Humanitarian Organisations, and the Law* (2013) at 3.
[128] Popovski, V *World Religions and Norms of War* (2009) at 1; Francis, D *Rethinking War and Peace* (2004) at 61-63.

rationale for participation in hostilities through these self-defined collective values.[129] These values reflect shared aspirations to achieve something for the group which transcends the individual members. This connection to the group is what is of importance and although it may be expressed as membership, it is submitted that such a description is too narrow to accurately describe the real nature of a person's connection and reasons for directly participating in armed conflict on behalf of a group, regular or irregular.[130] The end result is group unity based on various characteristics, whether they are racial, ethnic, linguistic, religious, or other qualities.

Membership to a group is thus, in general, a voluntary choice, with certain exceptions.[131] This, however, has little relevance to the right to directly participate in the conflict. The right to participate in armed conflict on behalf of the State, as a member of the regular armed forces, is awarded through domestic law and thereafter LOAC awards certain rights and obligations to 'combatants' where an IAC has commenced. Direct participation in an armed conflict by a person who does not or cannot qualify or possess combat status does not violate LOAC *per se* unless the person violates the norms of LOAC.[132] DPH attracts no domestic law criminal liability, but C-DPH leaves the participant exposed to possible domestic criminal prosecution.

Members of the regular armed forces may be targeted at any time, as opposed to the members of organised armed groups, which are regarded to be civilians, and only targetable under C-DPH in a restrictive sense. This creates a situation where irregular fighters obtain a strategic benefit by not being targetable at all times.[133] It is submitted that the principle of distinction requires that irregular fighters be treated in the same manner as members of the regular armed forces for targeting decisions. The International Institute of Humanitarian Law in San Remo published the *Manual on the Law of Non-International Armed Conflict* in 2006,[134] which

[129] Rothbart, D *Why They Die: Civilian Devastation in Violent Conflict* (2011) at 4.
[130] Ibid.
[131] See in general regarding child soldiers and certain female insurgents: Bjorkhaug, I 'Child Soldiers in Colombia: The Recruitment of Children into Non-state Violent Armed Groups' *Microcon Research Working Paper 27* (June 2010) at 1 – 23 available at http://ssrn.com/abstract=1650250 (last accessed on 21 January 2015).
[132] van Schaack, B *op cit* note 67 at 32.
[133] See Schmitt, MN *op cit* note 82 at 133.
[134] Schmitt, MN; Garraway, CHB & Dinstein, Y *The Manual on the Law of Non-International Armed Conflict With Commentary* (2006) at 4-5, available at http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf

defines members of organised armed groups as fighters. It states that fighters consist of "members of armed forces and dissident armed forces or other organized armed groups, or taking an active (direct) part in hostilities" but "[m]edical and religious personnel of armed forces or groups, however, are not regarded as fighters and are subject to special protection unless they take an active (direct) part in hostilities".[135] The Manual acknowledges that the term, 'fighters' does not appear in any binding international treaty. The definition in the Manual includes both members of the regular armed forces and members of organised armed groups. The Manual therefore uses the term, 'fighters' and not 'combatants' in order to avoid confusion with terms used in IAC's.

This argument will partially exclude the continuous combat function of the ICRC Interpretative Guidance and such participants will lose protection against intentional attack for as long as they remain active members of the organised armed group. Here the Interpretative Guidance, with regards to IAC, stated that "it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war. Therefore, even under the terms of the Hague Regulations and the GC's, all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party".[136]

McBride argues that the most practical and legally correct definition of a civilian that has lost his protection from attack is to be properly categorized as a "member of organized armed group", but that person does not have to directly inflict harm in one causal step on a recurrent basis. A more accurate reflection of who is a legitimately targetable member of an organized armed group is based, not on the harm the individual causes, but simply on conduct that shows they intentionally enable the operational activities of the group. The author further submits that a better definition will come from considering whether they form part of the 'armed force', without recourse to formal membership, or *indicia* such as uniforms.[137]

(last accessed on 4 January 2015).
[135] Ibid at para 1.1.2.
[136] Melzer, N *op cit* note 100 at 22.
[137] McBride, D 'Who is a Member? Targeted Killings Against Members of Organized Armed Groups' *Australian Year Book of International Law Vol 30* at 5.

It is thus submitted that individuals who participate in armed conflict on behalf of a non-State organised group cannot be intentionally targeted only while committing acts of direct participation. Such an interpretation creates an unsustainable advantage for non-State groups in armed conflict, as opposed to the targeting methodology applied to regular armed forces. This interpretation also fails to recognise the interests of non-participating civilians, which in turn undermines observance of LOAC norms. Combatants and members of organised non-State armed groups are military objectives, based on their connection to these groups, and are therefore legitimate targets at all time during armed conflict.[138] This is because these mandated participants are engaged in on-going involvement in the armed conflict on behalf of the armed group for which they act. Liability to attack of mandated participants in armed conflict is collective and based on the connection to the armed group, which in turn qualifies them as military objectives[139]. On the other hand civilians, as a collective, are not liable to direct targeting.[140] Liability to intentional targeting, at any stage during the armed conflict, is, in this way, linked to the participant's connection to the collective threat that the group poses to the adversary. Civilian qualifies the term, 'object' but the term, 'military' does not qualify the 'object'. This rather refers to the "purpose to be achieved by a military operation".[141] The decision to intentionally target a participant thus becomes one of determining a connection to a group rather than assessing if the individual members have met the criteria to be legitimately intentionally targeted. This targeting evaluation reflects a fundamental difference between assessing group characteristics under LOAC and the individual rights-based approach of human rights law.[142]

[138] McMahan, J *Killing in War* (2009) at 39.
[139] API, Article 52(2) states that "[a]ttacks 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 neutralization, in the circumstances ruling at the time, offers a definite military of advantage. API, Article 51(1) states that "[t]he 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 circumstances". API, Article 57(2)(a)(iii) states that "[r]efrain from deciding to launch any 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".
[140] API, Articles 48, 50(1), 51(2) & 52(1); McMahan, J *op cit* note 140 at 208.
[141] Noll, G 'Sacrificial Violence and targeting in International Humanitarian Law' in Engdahl, O & Wrange, P (eds) *Law of War – The Law as it was and the Law as it Should Be* (2008) at 211.
[142] See in general MacDonald, SD *The Lawful Use of Targeted Killing in Contemporary International Humanitarian Law* (2011).

Members of non-State armed groups should thus be bound by domestic law but the imposition of LOAC on them is complicated.[143] However, it may well be argued that non-State armed groups are bound to LOAC as a result of their being active on the territory of a Contracting Party.[144] This is referred to as the 'principle of legislative jurisdiction' in terms of which all agreements which a State enters into are automatically binding on all actors within its jurisdiction.[145] The flaw of this argument relates to consent or the lack thereof by the group and the ability by States to bind those that act against them. A further argument to bind non-State armed groups to LOAC relates to their liability to prosecution under international criminal law for crimes committed during armed conflict. A member of such a group could thus only be liable for criminal responsibility when also bound by the underlying norm of LOAC.[146] The flaw here relates to the lack of collective responsibility of the group to violations of criminal law.

The fact that there is no clear and generally accepted definition of an armed group cannot be a limiting factor to this argument as suggested by the ICRC.[147] It is untenable that a person who voluntarily becomes a member of the regular armed forces would be a legitimate target at all times during armed conflict but that a person who, in general, unlawfully becomes a member of an organised armed group, would be treated more favourably than the former. There must at least be parity of treatment between these members. In NIAC there would thus be a distinction between the members of the regular armed force and members organised armed groups.

The final issue to be accessed is whether such non-State armed groups could conceivably be classified as States within States.[148] This notion is best illustrated in States with failed governance and weakened political authority and administrative capacity. In many States there has been an emergence of political entities that control territory, collect taxes and

[143] See in general Ryngaert, C 'Non-State Actors in International Humanitarian Law' *Institute for International Law Working Paper* (2008) at 5.
[144] Ibid at 3.
[145] Cassese, A 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' *30 International and Comparative Law Quarterly* 416 (1981) at 419.
[146] See in general Ryngaert, C *op cit* note 145 at 5.
[147] Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report at 53.
[148] See in general Kingston, P 'States-Within-States: Historical and Theoretical Perspectives' in Kingston, P & Spears , IS *States Within States: Incipient Political Entities in the Post-Cold War Era* (2004) at 1 – 34.

conduct business with international and transnational actors.[149] This is a growing consequence of the end of the Cold War as the so-called superpowers are no longer providing financial and military support to some Third World regimes, without which these governments have failed to fulfil the basic requirements of a State towards its citizens. These entities do not always conform to the Weberian notion of a State but they do claim effective control over a territory within the jurisdiction of an existing State and a monopoly over the use of force. It is, however, suggested that the ideal form of a State as per the Western tradition cannot be used as a benchmark or as a universal model to establish the significance of these entities, and that the actual practices of these groups must be studied.[150] These Western ideals of the State are rarely reached by many States and strict Eurocentric definitional criteria may effectively exclude more actors than just the organised non-State armed groups from Statehood. One may also not exclude the possible trajectory of these groups to eventually form a State and being recognised as such by the international community, or to eventually make up the government of the State within which they operate. The response of the international community to these new non-State actors has been and is bound to be conservative.[151] The current classification by LOAC of these groups may, however, contribute to the escalation of violence as opposed to the stabilizing effect that recognising them may have. These entities have received different treatment from the international community, with Eritrea receiving international recognition but Somaliland, despite arguably deserving the same, being excluded from such recognition.[152]

The PCATI-judgment confirmed that "[a] state is permitted to respond with military force to a terrorist attack against it. That is pursuant to the right to self-defence determined in Article 51 of the Charter of the United Nations, which permits a state to defend itself against an "armed attack. Even if there is disagreement among experts regarding the question of what constitutes an "armed attack", there can be no doubt that the assault of terrorism against Israel fits the definition of an armed attack. Thus, Israel is permitted to use military force against the terrorist organizations".[153] The existence of an attack then form a baseline requirement for the legality of a policy whereby armed groups may be intentionally targeted during the armed

[149] Ibid at 1.
[150] Ibid at 4.
[151] Kingston, P *op cit* note 150 at 8.
[152] Spears, IS 'States-Within-States: An Introduction to their Empirical Attributes' in Kingston, P & Spears, IS *States Within States: Incipient Political Entities in the Post-Cold War Era* (2004) at 20.
[153] PCATI *op cit* note 24 at para 10.

attack against the State, based on the direct participation of its members in the attack and the direct threat that the members pose but less harmful means must be considered before lethal force is used and proportionality must be observed. Members of the armed group may be targeted at all times where it is evident that further attacks will follow if such measures are not taken. This, therefore, becomes a form of self-defence**.**

6. Intentional Targeting of Persons in Armed Conflict Based on their Connection to a Group

The law of targeting will be used to refer to the law relating to the targeting process, including the process of planning and execution thereof. This includes the consideration of prospective targets, accumulation of information to meet military, legal and other requirements, the determination of which weapon and method to be employed to prosecute the target, the carrying out of the actual attack, and associated activities.[154] The practical characteristics of targeting are meant to include, *inter alia*, weapons and weapons platform characteristics, intelligence, surveillance and reconnaissance capabilities, the targeting cycle, targeting methodologies, collateral damage approximation, patterns of life analysis, etc.

State practice has predominantly resulted in the continuous intentional targeting of adversaries in NIAC by regular armed forces. This is done as military necessity requires that those who qualify as military objectives, based on the threat that the armed group poses as a collective, be targeted to reduce and eventually overcome the group's ability and will to participate in the armed conflict. States that employ their regular armed forces against non-State armed groups, by necessary implication, acknowledge the existence of an organised adversary. By intentionally targeting its members, it is acknowledged that they, based on their membership, are not civilians.

Combatants are lawful targets, with certain important exceptions to this general rule. The first is that it is unlawful to attack a person that is *hors de combat*. This means that the combatant is in the power of an adversary, has clearly expressed an intention to surrender or is unconscious or incapacitated by wounds or sickness. This is qualified by the requirement that these persons abstain from hostile acts or attempts to escape.[155] Henderson argues that the

[154] Boothby, WH *op cit* note 39 at viii.
[155] Henderson, I *op cit* note 4 at 84.

definition of *hors de combat* supports the idea that military necessity does not support harm to a person who is no longer a threat.[156] The customary international law definition of *hors de combat* seems to require a succession of attacks on a person who is no longer capable of resistance.[157] However, the ICRC customary international law study does not support this assertion.[158] Humanity may require that a defenceless combatant be spared but there is no such specific customary rule in LOAC.

The second exception regarding the targeting of combatants relates to invitations or the offering of an opportunity to surrender. Combatants who clearly express an intention to surrender must not be confused with retreating persons. There is no legal obligation to offer an adversary an opportunity to surrender – this is supported by State practice.[159] There is, however, an obligation not to attack a person who has clearly expressed an intention to surrender[160] and there is a positive duty on an attacker to respect the right of an adversary to surrender.[161]

There is, however, no obligation on participants in an armed conflict to inquire whether an adversary wants to surrender before an attack is initiated. It is also submitted that there is no obligation on a party to attempt to capture a participant or to employ non-lethal means against a lawful target. The reasonable assumption is that a participant who wants to submit must make his intent to surrender clear.[162] LOAC thus permits the direct targeting of a legitimate target.[163] The issue that causes a challenge is the actual identification of legitimate targets.

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[156] Ibid.
[157] See Bothe, M *op cit* note 60 at 220.
[158] Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 Vol I (Chapter I) at 164-70.
[159] Ibid at 168.
[160] API, Article 41.
[161] Ibid, Article 40; API, Article 42(1) also prohibits attacking persons parachuting and descending from an aircraft in distress; API, Article 42(2) further requires that such persons, who lands in the territory controlled by an adversary to be given temporary opportunity to surrender before being made the object of an attack.
[162] See Milanovic, M 'When to Kill and When to Capture?' *EJIL: Talk* (May 6, 2011) available at http://www.ejiltalk.org/when-to-kill-and-when-to-capture/ (last accessed on 1 May 2014); See Dinstein, Y *The Conduct of Hostilities Under the Law of International Armed Conflict* (2004) at 145 (2004); Schmitt, MN 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' *1 Harv. Nat'L Security J. 5, 12* (2010) at 42.
[163] AP I, Article 41(1) - A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack. 2. A person is hors de combat if: . . . (b) he clearly expresses an intention to surrender").

The ICRC's original commentary on APII articulated the view that "[t]hose who belong to armed forces or armed groups may be attacked at any time."[164] The ICRC's Interpretive Guidance stated that members of an armed non-State group who have a "continuous combat function" may be targeted at all times and in all places.[165] This approach has received support from various experts,[166] while others have criticized it.[167] The Guidance requires a sufficient degree of military organisation but the term, 'organisation' is never explained.[168] The further requirements relate to "belonging to a party to the conflict" and a "continuous combat function"[169] that must be present before a civilian would forfeit protection on a continuous basis.[170] Melzer, the ICRC's legal advisor, endorses the notion of the 'functional combatant' for all participants in NIAC. He states that this parity to IAC regarding targeting "necessarily entails a distortion of the fundamental concepts of 'civilian', 'armed forces' and 'direct participation in hostilities' and, ultimately, leads to irreconcilable contradictions in the interpretation of these terms".[171] Melser, however, confirms that "even a cursory glance at almost any non-international armed conflict, . . ., is sufficient to conclude that governmental armed forces do not hesitate to directly attack insurgents even when [the latter] are not engaged in a particular military operation. In practice, these attacks are neither denied by the operating State, nor are they internationally condemned as long as they do not cause excessive 'collateral damage.'"[172]

LOAC dictates that in cases of doubt about a person's status, such a person shall be considered to be a civilian.[173] The observer may take into account the potential target's location, clothing, activities, age and sex.[174] However, once it has been determined that a

[164] Sandoz, Yet al *op cit* note 81 at para 4789.
[165] Melzer, N *op cit* note 164 at 66.
[166] Watkin, K 'Opportunity Lost: Organised Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretative Guide' *42 New York University Journal of International Law and Politics* (2010) at 681.
[167] Sassoli, M Targeting: The Scope and Utility of the Concept of "Military Objectives" for the Protection of Civilians in Contemporary Armed Conflicts in Wippman, D & Evangelista, M *New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts* (2005) at 54; Maxwell, M 'Rebutting the Civilian Presumption: Playing Whack-A-Mole Without a Mallet?' in Finkelstein, C; Ohlin, JD & Altman, A (eds) *Targeted Killings: Law and Morality in an Asymmetrical World* (2012) at 56.
[168] Watkin, K *op cit* note 168 at 674.
[169] Melzer, N *op cit* note 100 at 33.
[170] See in general Lesh, M *op cit* note 170 at 19 – 24.
[171] Melzer, N *op cit* note 39 at 316.
[172] Ibid at 317.
[173] Sandoz, Y et al *op cit* note 84 at 1677.
[174] *Prosecutor v Galic*, (Trial Chamber) Case No IT-98-29-T (5 December 2003) at 50. The person responsible for the targeting decision shall also not make a person the object of an attack unless it is "reasonable to believe,

person (or object) is a legitimate target, the person responsible for the targeting must consider the means to be used to target and the method of munitions employment. The person responsible for targeting must have adequate intelligence available but in cases of doubt, the protection of the civilian population must receive preference.[175] The target must thus meet both the nature, location, purpose, or use test, and the "definite military advantage" test.

The above goals and characteristics of LOAC, by necessary implication, suggest the basic principles of LOAC,[176] namely the distinction between civilians[177] and combatants,[178] the prohibition to attack those *hors de combat*, the prohibition to inflict unnecessary suffering, the principle of necessity, and the principle of proportionality.[179]

The civilian exemption is intended to protect civilians and to absolve those targeting directly participating civilians from being charged with murder. It must be remembered that these members of armed groups, like members of the regular armed forces, do not present themselves as civilians uninvolved in the conflict[180] but as persons conducting military operations. In this regard, the determination of a person's status within an armed conflict may be determined by how the person presents himself and not by following the specific criteria embedded in the conventions and customs of LOAC.[181] Cognisance must be taken of Article 4 of GCIII, which provided a narrow definition of 'combatant' but Article 43 of API defined combatants as "all organised armed forces, groups and units", whether under the authority of "a government or an authority not recognised by an adverse party". I will argue that the definition in GCIII, Article 4, allows a combatant to claim civilian status and that a second group of combatants may exist who cannot claim POW status upon capture. This interpretation allows for combatants under GCIII, Article 4, to be rewarded if they comply

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in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target [is] a combatant."

[175] See GCI Commentary at para 2024 available at http://www.icrc.org/LOAC.nsf/1a13044f3bbb5b8ec12563fb0066f226/5f27276ce1bbb79dc12563cd0043499!OpenDocument (last accessed on 1 May 2014).

[176] US Department of the Army, *Field Manual* 27-10: The Law of Land Warfare, app. A-1 (1956) available at http://www.aschq.army.mil/supportingdocs/FM27_10.pdf (last accessed on 1 May 2014).

[177] API, Article 50 regarding the definition of a civilian and Article 31(3) of Additional API regarding the loss of protection by a civilian.

[178] Article 48, API regarding the distinction between civilians and combatants and civilian and military objectives and API, Article 52(2) regarding attacks to be limited to military objectives.

[179] API, Articles 51(5)(b) and 57.

[180] Plaw, A *Political Extremities: The Ethics and Legality of Targeted Killing* (2008) at 141.

[181] Ibid at 142.

with LOAC and at the same time do not reward other persons who do not comply with LOAC by providing them with the additional protection that civilian immunity brings. This may also be defended due to the fact that LOAC is unclear on how to categorise members of organised armed groups and therefore States may claim some margin of appreciation when assessing combat status. It may also be argued that treating such members as civilians is counter-intuitive. An additional issue is that most experts only consider the potential harm that these members pose to other fighters and not the continuing threat that they pose to civilians. The focus should be on the systematic violation of LOAC and therefore a member of an organised armed group cannot claim the protection afforded by the law, both civilian status and POW status. These members violate LOAC by participating in armed conflict and, thereafter, obscuring their status by intermingling with the civilian population, thus exposing those civilians to possible attack. These individuals would not be deprived of all protection under LOAC. These members cannot be unlawful combatants, nor can they be unprivileged civilians, but could be classified as what they are: members of armed groups. Based on this it will be argued, as President Barak did, that each case should be interpreted on a case-by-case basis[182] and thus that specific issues on targeting must be dealt with in the ROA of each conflict.

7. The Law of Targeting, Distinction, Military Necessity, Humanity and Military Objectives

The intransgressible principle of distinction[183] operates on the targeting practices of those responsible, restricting lawful attacks to legitimate military objectives, which, it will be argued, includes the adversary's manpower.[184] The submission of the adversary in armed conflict is achieved by targeting military objectives. This submission is achieved, subject to LOAC, by applying "any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money" in terms of the principle of military necessity.[185] This demonstrated the collective nature of parties to an armed conflict.[186]

[182] PCATI *op cit* note 24 at para 33.
[183] *ICJ Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Report 1996 at para 79.
[184] API, Article 51(4)(b) & Article 52(2).
[185] API, Article 52(2); *Hostages case* (USA v. List et al.) (American Military Tribunal, Nurenberg, 1948), 11 NMT 1230, 1253.
[186] Henderson, I *op cit* note 4 at 35.

7.1 The Principle of Distinction

The principle of distinction[187] originated together with the inception of organized armed conflict itself.[188] The principle derives from the Just War tradition[189] and is applicable in IAC and NIAC.[190] The principle operates as a "cardinal principle"[191] on which the codification of LOAC is premised.[192] It establishes logic, organization and regulation in armed conflict.[193] It cannot be separated from the protection of civilians[194] and it requires that any party to a conflict distinguishes between those who are fighting and those who are not, and to direct attacks[195] solely at the former.[196] It has been recognized as the indispensable means by which humanitarian principles are injected into the rules governing conduct in war.[197] The basic principles of LOAC have developed to achieve a distinction between civilians[198] and combatants,[199] the prohibition against attack of those *hors de combat*, the prohibition against the infliction of unnecessary suffering, and the principles of necessity and of proportionality.[200]

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[187] See in general Lesh, M *op cit* note 170 at 1 – 26.
[188] International Institute of Humanitarian Law, The Manual on the Law of Non-International Armed Conflict, Sanremo, March 2006 at 10. For a discussion see Aytac, O Laws and Rules for Soldiers in Armed Conflicts, Crises and Counter-Terrorism in Centre of Excellence Defence Against Terrorism, Ankara, Turkey, Legal Aspects of Combating Terrorism (2008) at 80.
[189] Maxwell, MD & Meyer, RV The Principle of Distinction: Probing the Limits of Customariness, 2007 Army Law 1 (2007); Hays Parks, W 'Air War and the Law of War' *32 A.F. L. REV. 1* (1990) at 4-8.
[190] Duffy, H 'The *War on Terror" and The Framework of International Law* (2005) at 228-9.
[191] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) (Higgins, J., dissenting on unrelated grounds) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of international humanitarian law); Lesh, M *op cit* note 170 at 1.
[192] Sandoz, Y et al *op cit* note 84 at 4789.
[193] Van Creveld, M *The Transformation of War* (1991) at 90.
[194] API, Article 51(2); Lesh, M *op cit* note 170 at 2.
[195] The meaning of attack is defined in API as "acts of violence against the adversary, whether in offence or in defence." - API, Article 49.
[196] Corn, G 'Targeting, Command Judgment, and a Proposed Quantum of Information Component', 77 *Brooklyn Law Review* (2011-2012) 437-498 at 441. See also Kordic and Cerkez, (Appeals Chamber), December 17, 2004 at para 54: "The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish at all times between the civilian population and combatants, between civilian objects and military objectives and accordingly to direct military operations only against military objectives"; See in general Gordon, S Gordon, S *op cit* note 30 at 74.
[197] See Rosenblad, E 'International Humanitarian Law of Armed Conflict: Some Aspect of the Principle of Distinction and Related Problems' (*Henry Dunant, Geneva*, 1979) at 63-68; See also Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 Rules 1-2, 5-6, and 7-10.
[198] API, Article 50 regarding the definition of a civilian & API, Article 31(3) regarding the loss of this protection.
[199] API, Article 48 regarding the distinction between civilians and combatants and civilian and military objectives and Article 52(2) of API regarding attacks to be limited to military objectives.
[200] API, Articles 51(5)(b) and 57.

Distinction prohibits the direct targeting of civilians not participating directly in hostilities, and of civilian objects.[201] The principle also forbids attacks producing effects that cannot be contained or limited to their intended targets.[202] The obligation to distinguish is considered to be part of the customary international law of both IAC's and NIAC's,[203] notwithstanding the fact that several States have not ratified API. Distinction is specifically cited in API, Articles 48, 51(2), APII, Amended APII and APIII to the Convention on Certain Conventional Weapons, and in the Ottowa Convention. The Rome Statute also specifies that "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities constitutes a war crime in the context of both international and non-international armed conflicts."[204] The GC's and API contain the principle of distinction and participants may "direct their operations only against military objectives."[205] API, Article 51(2), confirms that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."[206] The prohibition on indiscriminate attacks comes from API, Article 51(4), which prohibits attacks that are "not directed at a specific military object" and "those which employ a method or means of combat which cannot be directed at a specific military objective" or "which employ a method or means of combat the effects of which

[201] API, Articles 51(3) and 52. See in general Gordon, S *op cit* note 30 at 74.
[202] API, Article 51(4).
[203] Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 Volume I, Rules (2009) at 3 & (Rule 24) at 74-76 (The Study notes that Article 58(b) was adopted by 80 votes in favour, with none against, and eight abstentions). Nabulsi, K Traditions of War: Occupation, Resistance and the Law (2005) at 1. See ICRC, Customary International Humanitarian Law Database, http://www.icrc.org/customary-LOAC/eng/docs/home,Rule1 (last accessed on 1 May 2014). The General Assembly affirmed in 1970 that . . . [i]n the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations." The U.S., as well as India, Indonesia, Iran, Israel, Malaysia, Myanmar, Nepal, Pakistan, and Sri Lanka, among others, are not part to API. However, Article 58(b) has been deemed, under the ICRC Study on Customary International Humanitarian Law, to be of customary status. See also Best, G 'The Restraint of War in Historical and Philosophic Perspective' in Delissen, A & Tanja, G (eds) Humanitarian Law of Armed Conflict – Challenges Ahead (1991) at 17. This Resolution was endorsed by the ICTY in 1995. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 110 (Oct. 2, 1995). The ICJ, in its Advisory Opinion on the Legality of Nuclear Weapons justify the principle of distinction as "[t]hese fundamental rules are to be observed by all states whether or not they have ratified the convention is that contain them, because they constitute intransgressible principles of international customary law."
[204] ICC Statute, Article 8(2)(b)(i).
[205] See Geneva Convention Relative to the Treatment of Prisoners of War, Articles. 3, 4, 6, Aug. 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135; API, Article 48.
[206] Geneva Convention Relative to the Treatment of Prisoners of War, Articles. 3, 4, 6, Aug. 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135; API, Article 51(2). The US Marine Corps Field Medical Training Battalion (East Camp Lejeune (FMST 1304) refers to the notion of 'Positive Identification' ("PID") which requires reasonable certainty that the object of attack is a legitimate military target. Reasonable certainty is described as "far more than 'maybe' or 'might be' and is greater than 'probably'. 'Very likely' or 'highly probable' better describes the term 'reasonable certainty'. Identifying someone as a military aged male (MAM) is not PID and this term should NOT be used".

cannot be limited as required by API; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[207]

The principle of discrimination is regarded as "an implementation of the principle of distinction."[208] It prohibits attacks which are "not directed at a specific military object" and "those [attacks] which employ a method or means of combat which cannot be directed at a specific military objective" or "which employ a method or means of combat the effects of which cannot be limited as required by this Protocol [API]; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[209]

The prohibition on intentional attacks on civilians is further supported by API, Article 57, which requires that commanders do "everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects"[210] and "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[211] API, Article 85, further declares that virtually all violations of distinction constitute grave breaches,[212] and the Rome Statute likewise criminalizes attacks on civilians and indiscriminate attacks.[213]

Distinction in API, Article 44, demands that combatants "distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack."[214] However, API, Article 44, allows 'unconventional combatants' to only carry

[207] Geneva Convention Relative to the Treatment of Prisoners of War, Articles. 3, 4, 6, Aug. 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135; API, Article 51(4).
[208] Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27.
[209] Geneva Convention Relative to the Treatment of Prisoners of War, Articles. 3, 4, 6, Aug. 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135; API, Article 51(4).
[210] See API, Article 57(2)(a)(i).
[211] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API) 1125 U.N.T.S. at 29 at Article 57.2(a)(ii).
[212] API, Article 85.
[213] See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) at Articles. 8(2)(b)(i), 8(2)(b)(ii), 8(2)(b)(iv), 8(2)(b)(v), 8(2)(b)(vi), 8(2)(e)(i), 8(2)(e)(ii), 8(2)(e)(iv) available at http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf (last accessed on 1 May 2014).
50. GC III at Article 4(A)(2).
[214] See API, Article 44(3).

arms openly during and in preparation for attacks.[215] API, Article 58, describes safety measures against attacks[216] and it generally necessitates that Parties physically separate civilians in their own territory from likely military objectives.[217]

LOAC of NIAC does not require that participants distinguish themselves from the civilian population.[218] Common Article 3 and APII make no mention of "combatants". It is thus submitted that the API, Article 43 definition of 'combatant', is unsuited to NIAC's based on the basic difference in the nature of the conflict between these two categories. This, however, does not result in all the direct and indirect participants and non-participants qualifying as civilians and that none of these actors may be directly targeted unless they directly participate in hostilities. The principle of distinction operates in NIAC, based on the same criteria which define the 'combatant' category in IAC.[219]

States do not want to confer rights on citizens to oppose government forces. However, a distinction must exist in NIAC, as civilian status will only be respected where participants in an armed conflict can accept that civilians do not pose a threat. The argument that everyone in NIAC qualifies as a civilian and that no one may be intentionally targeted unless "for such time" as they actively or directly participate in hostilities thus cannot be accepted. Common Article 3 confers protection on "persons taking no active part in hostilities, including members of armed forces who have laid down their arms or are otherwise *hors de combat*". This indicates that members of armed forces and groups must take additional steps to actively disengage from hostilities to be immune from attack. The Commentary on APII regards persons belonging to the armed forces or armed groups as legitimate targets at any time.[220] There is thus no requirement set for such persons to be a 'threat' when determining whether they may be intentionally targeted. Authority in LOAC "in no way requires manifestation of

[215] See API, Article 44(3); See also Sandoz, Yet al *op cit* note 81 at para 1684. The US does not consider Article 44, para 3 reflective of customary international law and specifically objects to it.
[216] API, Article 58.
[217] Commentary on the AP's at para 2244.
[218] Sassòli, M & Olson, LM The Relationship between International Humanitarian Law where it matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts. IRRC Vol 90, No. 871, September 2008 at 609 available at http://www.icrc.org/eng/resources/documents/article/review/review-871-p599.htm (last accessed on 1 May 2014).
[219] "For purposes of the principle distinction…members of State armed forces may be considered combatants in both international and non-international armed conflicts. Combatant status, on the other hand, exists only in international armed conflicts" – Melzer, N *note 164*; Melzer, N *op cit* note 39 at 313 ("While conventional LOAC applicable in non-international armed conflict does not use the term 'combatant,' it operates the principle of distinction based on the same criteria which define that category in international armed conflict").
[220] Sandoz, Y et al *op cit* note 84 at 1143 [4789].

actual threat to the attacking force."[221] However, it is commonly accepted that civilians forfeit their protected status through specific conduct causing harm or disadvantage to the adversary or other civilians.[222]

Rule 1 of the ICRC Customary Law Study describes the principle of distinction for all armed conflicts by referring to 'civilians' and 'combatants'. The Study explains that "[t]he term "combatant" in this rule is used in its generic meaning, indicating persons who do not enjoy the protection against attack accorded to civilians, but does not mean a right to combatant status or prisoner-of-war status".[223] Members of State armed forces are not considered to be civilians.[224] The Study, however, concludes that State practice is unclear "as to whether members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6".

When interpreting treaties, later agreements should be considered to ascertain the meaning of a provision. Military necessity was again discussed in the 1999 *Diplomatic Conference where the Second Protocol to the 1954 Hague Convention* was adopted. GCIV, Article 53, requires that property, as defined, only be destroyed when "absolutely necessary by military operations". The 1954 Hague Convention required parties to protect cultural property, but the military necessity exception was retained and the obligation required 'imperative military necessity' for exceptions to be made. The AP's, in Articles 53 and 16 respectively, related to the protection of cultural property and API, Article 52(1), regarding civilian objects that should not be made the object of attacks as defined in API, Article 52(2). This must be read together with API, Article 57(3), regarding the taking of all feasible precautions to be taken before an attack is launched. The Second Protocol to the 1954 Hague Convention still retains the 'imperative military necessity' requirement where the property has by its function "been

[221] Corn, GS 'Self Defense Targeting: Conflict Classification or Willful Blindness?' *88 Naval War C. Int'L L. Stud*. (2012) at 15 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1947838 (last accessed on 1 May 2014).
[222] *Targeted Killings* Case [2006] HCJ 769/02 (13 December 2006) at 31.
[223] Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 - Rule 6 at 18.
[224] Ibid at 19.

made into a military objective and no feasible alternatives must be available to obtain a similar military advantage".[225]

7.2 Military Necessity and Humanity

This collective nature of parties to an armed conflict is reflected in the principle of military necessity.[226] This principle allows a belligerent, subject to LOAC, "to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money".[227] It allows "as little violence so as not to cause a momentary excess of suffering, and as much violence, so as not to cause protraction of suffering".[228] Necessity requires that attacks be limited to targets whose destruction would provide a "direct and concrete,"[229] military advantage and serve a legitimate military purpose.[230]

The principle of humanity restricts "suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes".[231] Military necessity is hypothetically tempered by considerations of humanity. The reality is, however, that humanity, from the self-interested view of armed groups, only serves to rationalise civilian casualties as inevitable consequences of armed conflict.[232] The objectives of the military to generate military success in armed conflict are thus primary, while civilian interests are regarded as

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[225] See Chamberlain, K *Military Necessity under the 1999 Second Protocol in International Humanitarian Law Series* (2012). Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict at 43 – 49.
[226] Henderson, I *op cit* note 4 at 35; GeiB, R 'Asymmetric Conflicts Structures' *IRRC Vol 88 Number 864* (December 2006) at 767.
[227] API, Article 52(2). *Hostages case (USA v. List et al*) (American Military Tribunal, Nuremberg, 1948), 11 NMT 1230, 1253; Section 3 of the British Manual of Military Law defines military necessity as ''the principle that a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for the realization of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources, and money …'', quoted in GeiB, R 'Asymmetric Conflicts Structures' *IRRC Vol 88 Number 864* (December 2006) at 767 fn. 34; The US Army Field Manual states that ''[t]he law of war … requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes'' and defines military necessity as ''that principle which justifies those measures not forbidden by international law which are indispensable for the complete submission of the enemy as soon as possible'' - US Army Field Manual, No. 27–10, 1956 at para 3.
[228] Engdahl, O & Wrange, P (eds) *Law of War – The Law as it was and the Law as it Should Be* (2008) at 214.
[229] API, Article 57(2).
[230] Melzer, N *op cit* note 39 at 285; Murphy, R & Radsan, AJ '"Due Process and Targeted Killing of Terrorists"' *31 Cardozo L. Rev.* (2009) 405 at 417.
[231] Practice relating to Rule 14, Proportionality in Attack available at http://www.icrc.org/customary-LOAC/eng/doc/v2_cou_us_rule14 (last accessed on 1 May 2014); See also Ohlin, JD The Duty to Capture. (2013). Cornell Law Faculty Publications. Paper 567 at 1299 available at http://scholarship.law.cornell.edu/facpub/567 (last accessed on 1 May 2014).
[232] Rothbart, D *Why They Die: Civilian Devastation in Violent Conflict* (2011) at10.

secondary. Civilian death and injury are accordingly viewed as unintended consequences of the armed conflict, which results in a trade-off of the secondary to the primary goal in armed conflict. Considerations of humanity may, as a result, condone the intentional continuous targeting of those with the required connection to an armed non-State group as this benefits the civilian population who have no connection to the armed conflict or who only indirectly participate therein.

Military necessity at times allows for non-compliance with a particular rule of LOAC.[233] The rule must allow for non-compliance in the event of military necessity. It may also be argued that military necessity allows for non-compliance of LOAC in general in circumstances of extreme necessity, i.e. where the very survival of the State is threatened.[234] This has been referred to as follows: "the demands of military necessity should always override the obligations of international law".[235] This definition, however, was criticised at the Nuremberg Trials.[236]

7.3 Military Objective

One of the possible legal measures to decide the question of C-DPH can be extrapolated from API, Article 52(2), which states that [a]ttacks shall be limited strictly to military objectives.[237] Combat status "implies being . . . considered a legitimate military objective," and further combatants may be "harm[ed] due to their status as combatants".[238] This is supported by State Practice.[239] Dinstein argues that API, Article 52(2), incorporates combatant in the notion of 'military objective'.[240] It is submitted that C-DPH must be interpreted together with the requirements for military objectives. Military objectives are interpreted to be members of the armed forces, other persons taking a direct part in hostilities who are targetable for the duration of their participation, and "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction,

[233] Henderson, I *op cit* note 4 at 35.
[234] Ibid at 35.
[235] Jochnick, C & Normand, R 'The Legitimation of Violence: A Critical History of the Laws of War' *35 Harvard International Law Journal 49* (1994) at 63 quoted in Henderson, I *op cit* note 4 at 36.
[236] Sandoz, Y et al *op cit* note 84 at 1386.
[237] 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 neutralization, in the circumstances ruling at the time, offers a definite military advantage.
[238] PCATI *op cit* note 24 at para 29.
[239] Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 Vol II (Chapter I) at 190-3.
[240] Dinstein, Y *op cit* note 164 at 84-5.

capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage".[241]

The definition of military objective is generally accepted as part of customary International Law.[242] The definition is thus the starting point for any enquiry into targeting to determine if a specific objective represents a legitimate military objective and therefore a legitimate target.[243] There are differences between the approaches in determining the meaning of military objective based on the variation in international legal obligations accepted by various States. Here, for example, Canada interprets 'military objective' in terms of the definition thereof in API, Article 52(2). This, it is argued, represents the interpretation of all States that have ratified API.[244] The US has, however, not ratified API and their definition is arguably broader than the API wording as various definitions are applied by the different military services of the US. 'Military objective'[245] and "enemy's war-fighting or war-sustaining capability" are used in this regard.[246]

An object must satisfy two cumulative criteria to qualify as a military objective. API states that "[a]ttacks shall be limited strictly to military objectives". API, Article 52, states that a military object is "[t]hose objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[247] Article 52(2) refers to "a definite military advantage" that must be gained from the (total or

[241] Human Rights Watch Report (2003) Off Target: The Conduct of the War and Civilian Casualties in Iraq. Human Rights Watch at 8 available at http://www.hrw.org/reports/2003/usa1203/usa1203.pdf (last accessed on 1 May 2014). See also the 2007 Human Rights Watch Report named Civilians Under Assault: Hezbollah's Rocket Attacks on Israel in the 2006 War available at www://www.HRW.org/reports/2007/iopto807/iopto807webcover.pdf (last accessed on 1 May 2014). This Report incorrectly confused the test for objects as lawful targets with the lawful targeting of natural persons.
[242] Olasolo, H Unlawful Attacks in Combat Situations. From the ICTY's Case Law to the Rome Statute. (2008) at 125.
[243] Boothby, WH *op cit* note 39 at viii & 4. See also the United States Joint Forces Command Glossary at http://www.jfcom.mil/about/glossary.htm (last accessed on 1 May 2014).
[244] Watkin, K 'Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing' *Duke Journal of Comparative & International Law, Vol 15: 281* (2005) at 301.
[245] The US Air Force definition may be found in *The Military Commander and the Law* 550 (2004) available at http://milcom.jag.af.mil/milcom2004-complete.pdf (last accessed on 1 May 2014).
[246] The US Army definition may be found at US Department of the Army, Field Manual 27-10, The Law of Land Warfare, Chap. 2 at para 40(c) (1976) available at http://atiam.train.army.mil/portal/atia/adlsc/view/public/296783-1/fm/27-10/Ch2.html#s4 (last accessed on 1 May 2014).
[247] API, Article 52(2).

partial) destruction, capture or neutralization[248] of the targets. The phrases, "a definite military advantage" and "military objectives" originate from the phrase "a distinct military advantage" in *The Hague Rules of Air Warfare*.[249]

LOAC does not characterize a potential target as a military objective where the target only potentially offers an inconsequential, marginal or speculative advantage to an adversary. Military objectives, military objects and other non-military objects must be interpreted in good faith,[250] meaning those that directly and meaningfully contribute to the adversary's military capability.

The determination of military objectives must incorporate the function of the principle of 'proportionality'.[251] Proportionality in LOAC is considered customary law and has been defined as the launching of 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, is prohibited.[252] Excessive damage must not be equated to disproportionate.[253] Ordinarily, an attack will be proportionate "if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by

[248] The term "neutralization" in this setting means denial of use of an objective to the adversary without destroying it. See Solf, W. Article 52, in New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, at 318, 325 (Bothe, M *op cit* note 60).
[249] Hague Rules of Air Warfare, Article 24(1) at 144. This definition is repeated in a number of later instruments including Protocols II and III, Annexed to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, Documents on the Laws of War at 515; APII on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, id., Article 2(4), at 528; APIII on Prohibitions or Restrictions on the Use of Incendiary Weapons, Article 1(3) at 533); and the 1999 Second Protocol to the Hague Cultural Property Convention (Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, Article 1(f), at 701). It is also reproduced in Doswald-Beck, L 'San Remo Manual of 1995 on International Law Applicable to Armed Conflicts at Sea' (San Remo Manual on International Law Applicable to Armed Conflicts at Sea at 114. Based on this, various researchers consider this definition as representing customary international law (See Meron, T *Human Rights and Humanitarian Norms as Customary Law* (1989) at 64–65).
[250] LOAC includes a degree of flexibility to address an unusual targeting challenge but reasonableness is required when targeting a potential target, especially marginal targets.
[251] Further principles that relate to the targeting process include, inter alia, qualified warning requirements, and the principle that an adversary does not secure immunity from attack by locating military objectives in close proximity to civilians or civilian objects. Walzer, M *Just and Unjust Armed Conflict* (2006) at 153.
[252] See Henckaerts, JM et al "Customary International Humanitarian Law" online: ICRC <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> at 46 (last accessed on 1 May 2014).
[253] This term is used both in API, and in Field Manual 27-10.

it."[254] This rule requires those responsible for targeting decisions to take all reasonable steps to ensure that the objectives are identified as military objectives and that these objectives may be targeted without probable loss of life and damage to property disproportionate to the military advantage anticipated.[255]

Proportionality and distinction are among the "general principles relating to the protection of the civilian population which apply irrespective of whether the conflict is an international or an internal one."[256] The authoritative statement on proportionality is found in API, Articles 51(5)(b) and 57(2)(iii), which oblige an observer to "refrain from deciding to launch any 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."[257] The NIAC Manual provides a good account of the meaning of proportionality.[258] Proportionality applies only to civilians and civilian property[259] and therefore not to military objectives. The rule only affects targeting if the observer anticipates that the attack may cause incidental injury to civilians or damage to civilian property.[260] The observer must then balance the anticipated incidental damage against the anticipated concrete and direct military advantage. The Commentary to API states that "[a] military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces".[261]

[254] PCATI *op cit* note 27 at para 45.
[255] Lewis, MW *The War on Terror and the Laws of War. A Military Perspective* (2009) at 45; API, Article 57(2)(a)(i) requires those who plan or decide upon an attack to do "everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects" and "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."
[256] See Pictet, J *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987).
[257] API, article 57(2)(iii).
[258] International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict* (March 2006) at 2.1.1.4.
[259] Lewis, MW *op cit* note 257 at 53.
[260] Ibid.
[261] See in general Sandoz, Y et al *op cit* note 84. The US Air Force has developed an intricate modelling process for estimating collateral damage that is not available outside of military channels but provides the commander with an accurate picture of the damage a munition will do in a particular scenario - Lewis, MW *op cit* note 257 at 54.

8. The Status of Participants in Armed Conflicts based on their Connection to Groups

It has been argued that the principle of distinction, in both IAC and NIAC, constitutes an implied restraint on those persons sanctioned to take a direct part in armed conflict. States only partially incorporated the API expressions of distinction into the NIAC targeting provisions into APII. APII only provides protection to the civilian population from "the dangers arising from military operations" while the "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."[262] APII, Article 13(3), however, duplicates API, Article 51(3), which denies protection to civilians from direct targeting "for such time as they take a direct part in hostilities."[263] The important qualification here is that the principle of distinction has attained customary international law status in both IAC and NIAC.[264] LOAC has developed three general categories of persons in armed conflict being combatants, non-combatants, and civilians.[265] It is argued that LOAC, however, does not exclude the existence of other categories of participants in armed conflict.

8.1 Members of the Regular Armed Forces in Armed Conflict

Traditional Just War theory designates combatants "as a class set apart from the world of peaceful activity"[266] and are rigorously separate from civilians. This position is codified in API, which stresses that "[t]he civilian population and individual civilians shall enjoy general protections against dangers arising from military operations … [and] … shall not be the object of attack."[267] Traditional Just War theory further dictates that participating in armed conflict on behalf of a State "was one of the defining principles of . . . combatant status."[268]

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[262] APII, Article 13(1) & (2).
[263] APII, Article 13(3) & API, Article 51(3).
[264] See NIAC Manual at para 1.2.2.; Customary International Humanitarian Law at 3.
[265] This distinction resulted from the conflicting interests pursued by States that sought a precise definition for combatants, and, other States that desired a less precise definition to enable them to employ additional human resources flexibly and thereby increase their military power.
[266] Walzer, M *op cit* note 253 quoted in Guard, L 'Targeted Killing and Just War: Reconciling Kill-Capture Missions, International Law, and the Combatant Civilian Framework' *Military Legitimacy Review* Barnes Foundation First Prize for Excellence in Scholarship (2012) at 8.
[267] API, Article 51; API "adopt[s] a bright line interpretation that establishes two privileged classes being combatants and civilians." - Watkin, K 'Opportunity Lost: Organized Armed Groups And the ICRC "Direct Participation in Hostilities" Interpretive Guidance' 42 N.Y.U. J. Int'l L. & Pol. 641, 664-5 (2010) at 665; ICRC - "Clarifying the Notion of Direct Participation in Hostilities" available at http://www.icrc.org/eng/resources/documents/feature/direct-participation-ihl-feature-020609.htm (last accessed on 1 May 2014).
[268] Watkin, K 'Opportunity Lost: Organized Armed Groups And the ICRC "Direct Participation in Hostilities" Interpretive Guidance' 42 N.Y.U. J. Int'l L. & Pol. 641, 664-5 (2010) at 668; ICRC - "Clarifying the Notion of Direct Participation in Hostilities" available at http://www.icrc.org/eng/resources/documents/feature/direct-

Just War theory thus confirms that combatants are "trained to fight, provided with weapons, required to fight on command," and that war is not "their personal enterprise … [b]ut it is the enterprise of their class."[269] This creates the traditional combatant-civilian framework which is the basis for the "set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements".[270]

All members of the regular armed forces of a Party to an IAC become combatants, except medical and religious personnel.[271] State practice has established this rule as a norm of customary international law in IAC. Regular armed forces who profess loyalty to a government or an authority not recognised by an attacking or detaining power[272] and a *levee en masse* also qualify as combatants.[273] In IAC, combatant status comprises the armed forces of a Party to a conflict, but may also include, under certain circumstances, irregular groups that participate together with them.[274] The authority to award the right to directly participate in hostilities is the privilege of domestic law.

The rules governing combatant status are contained in the GV's and API.[275] Article 4A of GCIII describes the persons that are entitled to prisoner-of-war status[276] if captured during an armed conflict.[277] GCIII provides a three-step process to ascertain prisoner-of-war status. The first step involves a classification of the conflict.[278] Only persons captured during an IAC are

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participation-ihl-feature-020609.htm (last accessed on 1 May 2014). "Combatant status [,however,]… exists only in international armed conflicts" - Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 at 11 (Rule 3). Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 4.A.(2) "[B]elonging to a Party to the conflict" is one of six criteria for lawful combatant status.

[269] Walzer, M *op cit* note 253 at 11.

[270] Ibid at 13.

[271] Customary International Law - Rule 3. Definition of Combatants - Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 Vol I at 11.

[272] GCI, Article 13(3) and GCIII, Article 4(A)(3).

[273] GCI, Article 13(6 and GCIII, Article 4(A)(6). API, Article 43 does provide a restricted definition of combatants but it is submitted that this article does not incorporate the sole definition of combatant. API, Article 50(1) excludes a member of the *levee en masse* from the definition of a civilian.

[274] See API, Article 43 (defining who is considered a member of a State's armed forces).

[275] See GCI, Article 13(1)-(2), GC II, Article 13(1)-(2), GC III, Article 4A(1)-(2), and API, Article 43-44.

[276] The GCIII links combatant status to a prisoner of war classification regime. The Convention specifies six classes of POW as opposed to API's negative civilian definition which lists only four of these groups as separate from the civilian status. These four groups include members of the armed forces of a party; militia, volunteer corps, and organized resistance movements belonging to a party; armed forces of parties to the Conventions not diplomatically recognized by their adversary; and citizens who respond spontaneously to invasion, the so-called levée en mass.

[277] Combatant status is determined by way of the criteria in Article 4A(1), (2), (3), or (6) of GCIII.

[278] Geneva Convention Relative to the Treatment of Prisoners of War, Article 5, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Article 2; Corn, G; Jensen, ET & Watts, S 'Understanding the Distinct Function of the

potentially entitled to the protections of Article 4 of the Geneva Convention.[279] The second step in this determination requires that the Detaining Powers evaluate the character of the opposing forces. Article 4 determines that protected groups, including the "armed forces of a Party to the conflict" and associated "militias," "volunteer corps," and "organized resistance movements" so captured may qualify as POW's.[280] Qualifying armed groups must therefore be organized, must display a "fixed distinctive sign", must "carry arms openly," and must obey "the laws and customs of war." The third step is set out in GCIII, Article 5, which provides that if any "doubt" should "arise" about whether detainees "belong to any of the categories enumerated in Article 4, then the detaining power must treat the detainees as POW's until a "competent tribunal" determines each detainee's claim of POW status.[281]

API, Articles 43 and 44, define the terms, "armed forces" and "combatants". API, Article 43(2), provides that "[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by article 53 of GA III) are combatants and have the right to directly participate in hostilities".[282] Potential combatants include militias and volunteer corps forming part of such armed forces,[283] and other militias and volunteer corps, who are commanded by a person responsible for his subordinates; have a fixed distinctive sign recognizable at a distance; carry arms openly and who conduct their operations in

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Combatant Status Review Tribunals: A Response to Blocher' *The Yale Law Journal Pocket Part 1 16: 32 7 (2007)* at 328.

[279] 'Advisory Service on Int'l Humanitarian Law, Int'l Comm. of the Red Cross' *What Is International Humanitarian Law*, (July 2004), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf. (last accessed on 4 January 2015).

[280] Article 4 states in relevant part: 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 organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.
GCIII, Article 4(A)(2).

[281] The relevant part of Article 5 states: Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

[282] See *Convention (III) Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 UST. 3316, 75 U.N.T.S. 135.

[283] API, Article 43(1); GCI, Article 13(1); GCIII, Article 4(A)(I).

accordance with the laws and customs of war.[284] These conditions apply to certain militia and other volunteer corps but they also apply to members of the armed forces while on duty.[285]

The above must be interpreted in terms of API, Article 44(3), which requires combatants to distinguish themselves from the civilian population while engaged in an attack or military operations preparatory to an attack. This requirement is considered to reflect customary international law.[286] It is, however, permissible, in some circumstances, for a combatant not to wear a distinctive sign and to not distinguish himself from the civilian population as it "is the practice for such fighters to resume their everyday life in between engagements with the enemy".[287] A person only becomes a combatant by way of incorporation into the military, a militia, etc and upon the State to which the person belongs becoming a party to an IAC. This person will then remain a member of the regular armed forces until permanent demobilisation,[288] or until the IAC terminates.

Combatants have combatant privilege,[289] are permitted to participate in armed hostilities and are immune from criminal prosecution for their participation as long as LOAC is complied with.[290] This is endorsed in the Commentary on API[291] in that combatants enjoy this privilege, but that they are also legitimate targets. The Commentary indicates the API drafters intended to codify and clarify international custom on the point of combatant privilege.[292] Combatants are further entitled, upon capture, to treatment as prisoners of war.[293] The disadvantage to combatant status is that combatants are targetable at any time based upon their status,[294] notwithstanding whether they pose a threat at the time. This targeting authority will apply until they are rendered *hors de combat* by wounds or by surrender.

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[284] GCI, Article 13(2) and GCIII Article 4A.
[285] See Bothe, M *op cit* note 60 at 234-5; Henderson, I 'Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I' *International Humanitarian Law Series. Vol 25* at 81-2. See also the *United States v Lindh*, 212 F Supp 2d 541 (ED VA, 2002) at fn 35.
[286] Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 Vol I (Chapter I) at 384.
[287] Gardam, J *Non-Combatant Immunity as a Norm of International Humanitarian Law* (1993) at 103.
[288] Sandoz, Y et al *op cit* note 84 at 1677-8.
[289] As noted by the *Inter-American Commission on Human Rights, Report on Terrorism and Human Rights*, OEA/Ser.L/-V/II.116 Doc. 5 rev. 1 corr., 22 October 2002 at para 68.
[290] Ipsen, K '"Combatants and Non-Combatants"' in Fleck D (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (2008)at, para 301 at 79; Cassese, A *International Law* (2009) at 408.
[291] See Sassoli, M & Bouvier, A (2006) *How does the Law Protects in War?* at 143.
[292] Sandoz, Yet al *op cit* note 81 at 514.
[293] See GCIII, Article 4.
[294] See Solis, GD *op cit* note 50.

Combat status presents the fundamental framework for the mutual protection of participants of adversaries in IAC.[295] This reciprocal protection is derived from the idea that combatants are *de facto* agents of the State and that their actions in armed conflict are not personal in nature, resulting in no individual liability.[296] LOAC generally represents a system of reciprocal entitlements between States as equals during armed conflict.[297] This is the consequence of a contradiction whereby States collaborate during armed conflict between them.[298]

It is, as a result, submitted that combatants are liable to attack because they are members of the regular armed forces irrespective of what activities they may be engaged in.[299] Persons cannot, therefore, be liable to attack or immune therefrom based on their membership in a group.[300] The voluntary choice to become a member of a group and/or to act in a certain manner should be seen as the basis of liability, as the member must accept liability for the collective action by the group or for the foreseeable action to be taken by the group members.

Belonging to a Party to the conflict seems to reflect the *jus ad bellum* principle of acting under the right authority. Theoretically, it reflects the patriotic claim for combat status. The connection between the obligation to 'belong' to a Party to the conflict and governance by a State is reflected in the ICRC Commentary on Article 4(2) of the 1949 Prisoners of War Convention. The Commentary "refutes the contention … that this provision amounts to a '*jus insurrectionis*' for the inhabitants of occupied territory."[301]

The term, 'combatant' is mentioned six times in API.[302] The term was considered to be customary until 1977 when it was defined in the API.[303] API, Article 43, incorporates a two-

[295] Bosch, S & Cowling, M 'Combatant Status at Guantanamo Bay' *Comparative and International Law Journal of Southern Africa Vol 42* (2009) at Sabinet (last accessed on 1 May 2014).
[296] Kurtz, C 'The Difference Uniforms Make: Collective Violence in Criminal Law and War' *Philosophy and Public Affairs* (2004) available at http://www.warreninstitute.berkley.edu/faculty/kutz/papa_028.pdf (last accessed on 1 May 2014).
[297] Gordon, S *op cit* note 30 at 81.
[298] Ibid.
[299] See McMahan, J *op cit* note 140 at 208.
[300] Ibid at 209.
[301] ICRC Commentary, GC III, Article 4(2).
[302] API, Articles 1(2); 13(2)(d); Article 43(2); 44(1), (2), (3), (4), (5), (7); 47; 59(2)(a) .
[303] API, Article 43(2).

stage definition of combatant in reverse order.[304] API, Article 43(1), states that "[t]he armed forces of a party to a conflict consists of 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 an adverse party". [305] The commentary discussion of API, Article 43, further verifies that "[a]ll members of the Armed Forces or combatants, and only members of the Armed Forces are combatants." The commentary notes that this definition excludes the use of terms like 'part-time soldier'', semi-civilian' or 'semi-military status'.[306]

A combatant is thus either a member of the regular armed forces of a Party to an IAC,[307] who complies with the principle of distinction or a member of another armed group[308] belonging to a Party to the IAC and who operates under responsible command, wears a fixed distinctive sign, carries arms openly and respects LOAC.[309] The basic definition of a combatant refers to membership of a State's armed forces.[310] This definition became more complicated based on practical changes in conflict participation and a multi-stage 'test' was incorporated into API where a person is considered a combatant if they are considered to be freedom fighters.[311]

8.1.1 Organization and responsible command

The Armed Forces must be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of LOAC. They must, however, be part of ". . . organised

[304] See in general Watts, S 'Reciprocity and the Law of War' *Harvard International Law Journal Vol 50 No 2* (Summer 2009) at 429.
[305] This qualification was included as a result of the denial of POW status by Germany to the Forces francaises libres of General de Gaulle, whose government was in exile and not recognised by Germany – see Ruys, T & De Cock, C 'Protected Persons in International Armed Conflicts' *Working Paper No. 83 Leuven Centre for Global Governance Studies* (March 2012) at 6.
[306] Sandoz, Yet al *op cit* note 81 at 515. Hague Regulations, Article 3 (cited in Vol II, Ch. 1, at 571). Religious personnel of the armed forces are not combatants. See also API, Article 43(2). API acknowledges that there are circumstances when combatants cannot continuously distinguish themselves from the civilian population. They will accordingly retain their status if they carry their arms openly during each military engagement and during the time that they are visible to the adversary and while engaged in a military deployment - Lewis, MW *op cit* note 257 at 50.
[307] See GC III, Article 4(A)(1); See also GC III, Article 4(A)(2)-(3); P I, Article 43 & Customary LOAC, Rules 3 and 4.
[308] See Article GC III, 4(A)(2).
[309] See API, Articles 43; 44(3) & 44(5).
[310] The definition of combatant in Article 4A of GCIII.
[311] API, Article 4 - 1. are fighting in "... 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, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations".

armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party if represented by a government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia,* shall enforce compliance with the rules of international law applicable in armed conflict".[312] This provision does not necessarily demand a formal command and rank structure.[313] Sufficient discipline is, however, required to ensure respect for LOAC.[314] API further requires that "armed forces shall be subject to an internal disciplinary system."[315] This must be read with the obligations specified in API, Articles 86 and 87, which require commanders to actively suppress breaches of LOAC.[316]

8.1.2 Fixed signs and the carriage of weapons

This requirement is somewhat vague[317] but it is evident that it aims to protect combatants from acts of perfidy and secondly, to ensure that combatants are distinguished from civilians. They must "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 person cannot so distinguish himself, he shall retain his status as a combatant provided that, in such situations, he carries 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 launching of an attack in which he is to participate."[318] The reasonable conclusion is that the State must ensure that members of its regular armed forces are immediately recognized as

[312] API, Article 43.
[313] Draper, GIAD '"The Status of Combatants and the Question of Guerrilla Warfare"' *British Year Book of International Law 45* (1971) at 201.
[314] See Sandoz, Y et al *op cit* note 84 at para 1672; Watkin, K 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' *Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series* (Winter 2005) No 2 at 28.
[315] API, Article 43(1).
[316] Sandoz, Y et al *op cit* note 84, Article 43 at para 1675 – the requirement for an effective discipline system was incorporated in the Hague Convention IV, Article 1 which required that States issue instructions to their armed forces that complied with the Regulations.
[317] Watkin, K *op cit* note 316 at 29, available at http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf (last accessed on 1 May 2014).
[318] API, Article 44. See also the Hostages Case, Trials of War Criminals (Washington: Government Printing Office 1950) at 1244 - following WWII that the wearing of civilian clothes, together with parts of German, Italian and Serbian uniforms and the Soviet star insignia did not result in compliance with the requirement as it could not be seen from a distance.

such. The wearing of a uniform and a fixed insignia thus create the impression of combat status.[319]

The requirement to carry arms openly reduces the risk that weapons will be concealed.[320] However, DPH does not automatically require the carrying of arms as certain activities, which do not require the carrying of weapons, may conceivably constitute DPH. The ICRC Commentary on API, Article 44,[321] confirms that a distinctive sign should be worn where it is not feasible to carry arms openly.[322] On the other hand, API, Article 44(3), allows, in certain circumstances, for fixed distinctive signs not to be worn as a combatant will retain combatant status where arms are carried openly during each military engagement and during the time when the combatant is "engaged in a military deployment preceding the launching of an attack."[323]

8.1.3 Compliance with the laws and customs of war

This requirement is problematic when the nature of irregular combat is considered[324] and this principle should always operate equally for all that claim combat status.

8.1.4 Combat privilege and intentional targeting

It will be argued that the determination of DPH in IAC must be interpreted with regard to the acts that combatants are lawfully allowed to exercise in armed conflict. These acts have been interpreted to mean that "[s]oldiers have rights, insofar as they are members of the armed forces, as defined in LOAC. They are known as combatants and have the right to participate directly in hostilities. This means, in practical terms, that combatants are entitled to attack enemy forces, kill or injure them, and destroy property as part of military operations – activities that if done not in wartime or not by combatants would all be criminal behaviour".[325] This relates to the combatants' right to participate, which is a political

[319] Dinstein, Y *op cit* note 164 at 113.
[320] See ICRC Commentary, GC IV, Article 4(2). See 'Military Prosecutor v. Kassem' *International Law Review 42* (1971) at 478-479, where an Israeli court held with regards to Palestinian guerrillas that the carrying arms openly requirement was not complied with since the "the presence of arms in their possession was not established until they began to fire."
[321] Sandoz, Y et al *op cit* note 84, Article 44 at 1713.
[322] Watkin, K *op cit* note 316 at 32.
[323] AP I, Article 44(3).
[324] Watkin, K *op cit* note 316 at 34.
[325] Rowe, P *Soldiers, Rights of - Crimes of War Project* available at http://wwwcrimesofwar.org/thebook/soldiers-rights-of.html (last accessed on 1 May 2014).

concession by States and not to targeting authority, which is based on status, which in turn, is ultimately based on the actions of combatants. DPH thus relates to the loss of protection and does not award rights to civilians to participate in hostilities and this should be interpreted accordingly. To do so would confuse the civilian's liability to possible criminal prosecution under domestic law with targeting authority.

8.1.5 The "unlimited liability" clause in armed conflict

The nature of regular armed forces may be compared to that of non-State organised armed groups. The employment situation of military personnel is in some aspects unique, but not unlike the connection that those affiliated to non-State groups display. Military personnel serve a State and, in essence, their moral core and service are to defend the State through the management and actual application of violence. Their contract with the State may be termed as an "unlimited liability" clause whereby they accept an obligation of risk.[326] This contract seems intuitively irrational and unreasonable. These grave risks include the real possibility of engaging in morally and personal arduous actions in compliance with their obligations. Those affiliated to non-State groups also enter into this type of contract whereby grave risks are accepted and whereby obligations are undertaken to act in the pursuit of the non-State group's goals by way of forceful means as a collective. Both these parties thus act in terms of a 'contract' whereby a mandate is obtained to act collectively and whereby risk is accepted.

8.2 National Liberation Movement Members as Combatants

API further extends the category of legitimate combatant, to include situations that are deemed to be armed conflicts in which people are fighting against colonial domination, alien occupation and against racist regimes in the exercise of their right of self-determination.[327] The status is dependent on compliance with API, Article 44(3), which recognises that "there are situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself" and provides that such a combatant will not lose his combatant status so long as he "carries 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

[326] See in general Cook, ML *Noncombatant Immunity and the Force Protection Imperative in Ethics and the Military Profession: Mora; Warrior: Ethics and Service in the U.S. Military* (2010) at 123-124.
[327] Green, LC *The Contemporary Law of Armed Conflict* (1993) at 108.

deployment preceding the launching of an attack in which he is to participate."[328] It is argued that this concession is based on the understanding that these movements may be successful in the armed conflict and could thus, in future, become the government of the State. This concession would therefore ensure future compliance with LOAC by the prospective government.

8.3 Non-combatants

LOAC further classifies members of the armed forces into sub-categories of combatant and non-combatant.[329] Designation as a non-combatant can alter a person's protection or treatment under the law of war.[330] Non-combatants incorporate medical personnel and chaplains but they forfeit their protections should they engage in combat.[331] All other persons are classified as civilians[332] and benefit from presumptive immunity against direct attack.[333]

8.4 Customary Law of Armed Conflict Understanding of Combatant[334]

The principles of customary international law have been accepted as applicable to NIAC[335] and therefore a reasonable conclusion is that combatant immunity would equally apply to the

[328] This article does not extend to regular armies the right to engage in guerrilla tactics. Article 44(7) specifies that the 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 conflict."- See further Sandoz, Y et al *op cit* note 84 at para 1723. In granting recognition to fighters in national liberation wars, API significantly extended the ambit of IAC's. Thus, more 'civilians' were being authorised, under LOAC, to take part in armed conflict.

[329] *Regulations Respecting the Laws and Customs of War on Land, Annex to Convention Respecting the Laws and Customs of War on Land*, Article 3, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel - Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27, Rule 3; Definition of Combatants – Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 Vol I at 11.

[330] See API, Articles 46-47; Baxter, RR. So Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs, 28 *British Yearbook of International Law* 323 (1951). Maxwell, M & Watts, S 'Unlawful Enemy Combatant: Status, Theory of Culpability, of Neither?' *J. Int'L Crim. Justice* (2007) (deciding that the U.S. use of the term "unlawful enemy combatant" reflects legal convenience more than objective assessment of the existing laws and customs of war).

[331] API, Articles 13 & 43.

[332] API, Article 50.

[333] The International Criminal Tribunal for the former Yugoslavia ("ICTY") and the San Remo Manual acknowledge this distinction. The San Remo Manual states that it is "indisputable that the principle of distinction is customary international law for both international and non-international armed conflict." International Institute of Humanitarian Law, The Manual on the Law of Non-International Armed Conflict March 2006 at para 1.2.2.3.

[334] *Statute of the International Court of Justice*, Article 38(1)(b) ("evidence of general practice accepted as law"), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

[335] *Prosecutor v. Tadic*, (Appeal Chamber), paras 96–127 (2 October 1995) available at www.un.org/icty/tadic/appeal/decision-e/51002.htm. (last accessed on 1 May 2014).

regular armed forces participating in an NIAC.[336] The customary understanding of the term, 'combatant' was based on the terms, 'privileged belligerent' and 'prisoner of war'.[337] The Hague Convention II and its Regulations of 1899 defined individuals legally recognised to participate in hostilities as "[t]he laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps who are commanded by a person responsible for his subordinates; have a fixed distinctive emblem recognisable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war".[338] A matching definition of combatant was incorporated in the 1907 revision of the Regulations. Further, participants in a *levée en masse* are considered to be combatants.[339] Accordingly, the 1929 Geneva Convention relative to the treatment of POW's[340] included prisoner-of-war status for all captured persons who qualified as combatant in terms of the Hague regulation definition.

The ICRC Study on customary LOAC concludes that "[a]ttacks may only be directed against combatants" and "civilians are protected against attack unless for such time as they take a direct part in hostilities".[341] Civilians are defined as persons who are not members of the armed forces.[342] The term, 'combatant' in NIAC is determined to mean "persons who do not enjoy the protection against attacks accorded to civilians".[343] The Study, somewhat awkwardly, concludes that this situation creates an imbalance as combatants are at a disadvantage when intentional targeting applies, and therefore members of non-State armed groups may accordingly be considered to be continuously participating directly in hostilities.[344] The ICRC's study of customary LOAC also concluded that no 'combatant status' exists in NIAC but that specified individuals may possibly be regarded as combatants

[336] Ibid. See also Bassiouni, MC 'Legal Control of International Terrorism: A Policy-Oriented Assessment' *Harvard Journal of International Law 43* (2002) at 99. ("…only states can be at war. Clearly, however, a state can be engaged in an armed conflict with an insurgent or revolutionary group).
[337] Corn, G & Jenks, C 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflict' *U.PA. J. Int'l. L. [Vol 33:2]* at 318.
[338] Article 1.
[339] A levée en masse refers to the situation in which the inhabitants of a territory that has not yet been occupied, on the approach of the adversary, spontaneously take up arms to resist the invading troops without having had time to form themselves into armed units. Under LOAC, participants in a levée en masse are required to carry arms openly and respect the laws and customs of war in their military operations to be considered as combatants (Article 2 of the Hague Regulations of 1907 & Article 4(A)(6) of GCIII of 1949.
[340] Article 1. GIII, Article 4A.
[341] Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 Rule 1 at 3.
[342] Ibid Rule 5 at 17.
[343] Ibid at 3.
[344] Ibid at 17.

"[f]or purposes of the principle of distinction".[345] The study argues that State practice "is not clear as to the situation of members of armed opposition groups". It has, however, been argued that it "seems almost self-evident that in [NIAC's] there are indeed combatants, who, as opposed to civilians, may legitimately be targeted by the other side". Based on this "members of both the armed forces and the organized armed group" involved in the armed conflict may then be regarded as combatants.[346]

8.5 Unlawful Enemy Combatant

Some experts have argued that combatants should be separated into two sub-categories, being lawful and unlawful enemy combatants.[347] The division of combatants into legitimate and illegitimate is, however, inconsistent with the historical development of combatant status.[348] The initial concept of unlawful enemy combatant emanates from the US Supreme Court case of *Ex parte Quirin*[349] where German service men discarded their uniforms and committed acts of sabotage in the US during 1942.[350] The term, 'enemy combatant' was referred to in 2002 in a federal district court decision in *Coalition of Clergy v. Bush*[351] and thereafter the media adopted the term. The designation has also been used by the Bush Administration to label Taliban and *al-Qaeda* fighters.[352] The Obama administration substituted the term with 'unprivileged belligerent'.[353] This policy was endorsed by the US Congress[354] and the US Supreme Court.[355] Some authors have, accordingly, argued that this term forms part of customary LOAC.[356]

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[345] Ibid 3 at 11.
[346] Kretzmer D 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *EJIL 16* (2005) at 197–198.
[347] See Dinstein, Y *op cit* note 164 at 29 (classifying enemy civilians who takes up arms as unlawful combatants).
[348] 'Enemy unlawful combatant' not a legal term, it has no meaning in LOAC – Honigsberg, PJ *Our Nation Unhinged: The Human Consequences of the War on Terror* (2009) at 15.
[349] *Ex Parte Quirin* et al (1942) 317 US [Supreme Court Report] 1.
[350] Ibid at 30-1.
[351] *Coalition of Clergy, et al. v. George Walker, et al.* CV 02-570 AHM (JTLx), United States District Courts, 11 February 2002.
[352] See in general Corn, GS 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' *Corn 22 Stan. L.& Pol'Y Rev* at 253 – 294.
[353] Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. Mar. 13, 2009).
[354] *Detainee Treatment Act of 2005*, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (codified as amended at 42 U.S.C. § 2000dd**,** 10 U.S.C. at 801 & 28 U.S.C. § 2241 (2006)).
[355] *Hamdi v. Rumsfeld*, 542 U.S. 507, 517, 519 (2004) and Hamdan v. Rumsfeld 548 U.S. 557, 635 (2006).
[356] Nurick, L & Barrett, RW 'Legality of Guerrilla Forces Under the Laws of War' *American Journal of International Law* (1946) at 40. See also Watkin, K *op cit* note 316 at 45-47; See also United Kingdom Ministry of Defense, The Manual of The Law of Armed Conflict (2004) at para 11.4 at 279.

This description confers a notion of illegality and moral illegitimacy. This condemnation provided justification for subsequent legal and policy decisions which authorized treatment of these participants that are inconsistent with LOAC norms.[357] LOAC, however, only designates spies and mercenaries[358] as 'unlawful combatants'.[359]

9 Dissident Armed Forces

Common Article 3 and APII include the term "armed forces" on both sides of an NIAC.[360] Common Article 3 applies to "each Party to the conflict" and APII specifically refers to "dissident" armed forces. APII uses dissident armed forces in contradiction to "other organised armed groups". There is, however, no difference in the legal regimes governing the detention or targeting of these groups. Members of the dissident armed forces are targetable at any time under LOAC.[361] Common Article 3 only protects persons who are taking no active part in hostilities and it is reasonable to deduce that members of the armed forces may be targeted at any time during the NIAC. This is also in line with the principle of distinction.[362] Dissident armed forces, accordingly, do not attain civilian status,[363] but must retain some degree of their original organisational structure.[364]

In NIAC, irregular fighters may be in violation of domestic law. Law enforcement agencies may thus act against them and law enforcement agencies will then qualify as the armed forces in NIAC.[365] The Commentary to APII states that "[t]he term 'armed forces' of the High Contracting Party should be understood in the broadest sense". The Commentary further states that "irregular armed forces" was not used in APII "in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guards, customs, police forces or any other similar force)."[366] Any such forces that act against their government will possibly qualify as dissident armed

[357] Iglesias, E 'Article II: Uses and Abuses of Executive Power' *62 U. Miami L. Rev. 181* (2008) at 187; Corn, GS *op cit* note 354 at 253.
[358] Miccoli, M 'Mercenaries: Unlawful Soldiers' Luiss *Guido Carli Faculty of Law Working Paper* (2000) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=279631 (Last accessed on 23 July 2014).
[359] Regardless of this designation, such persons are protected by API, Article 75 and Common Article 3 of the GC's.
[360] Schmitt, MN *op cit* note 82 at 124.
[361] Ibid at 125.
[362] API, Articles 48 & 51; CLOAC, Rule 6; Schmitt, MN *op cit* note 82 at 125.
[363] Melzer, N *op cit* note 100 at 32.
[364] Ibid at 32; see also Schmitt, MN *op cit* note 82 at 124.
[365] Schmitt, MN *op cit* note 82 at 124-125.
[366] Sandoz, Y et al *op cit* note 84 at 4462.

forces.[367] The position is still that dissident armed forces constitute a category of organised armed forces.[368]

10 'Combatant' in Non-International Armed Conflict

In NIAC, organized armed groups constitute the armed forces of a non-State party to the conflict. It is then difficult to distinguish between members of organized armed groups and the civilian population. Civilians may support armed groups in many ways including, at times, by directly participating in hostilities on a spontaneous, sporadic or unorganized basis. APII, Article 1(1), limits the application of the APII to conflicts between State Parties and armed forces or groups "under responsible command . . . as to enable them to . . . implement this Protocol". The operation of APII thus requires the ability to reciprocate observance thereof before its protections become applicable.[369] It has been argued that, in an NIAC,[370] armed groups that meet the above conditions may be considered combatants and can be targeted at any time.[371] The ICRC Commentary on APII states that "[t]hose belonging to armed forces or armed groups may be attacked at any time."[372] It must further be noted that APII incorporates the term, 'civilian' and not the broader term, 'person'.[373]

Common Article 3 applies to "each Party to the conflict" which has a minimum degree of organization and discipline. The ICRC Commentary indicates that the term, 'each Party' binds a non-signatory Party – a Party . . . which need not even represent a legal entity capable of undertaking international legal obligations".[374] The UNSC adopted various resolutions with regards to the armed conflict in Somalia and their obligations under LOAC.[375] The situation in Somalia represents armed conflict between clan-based armed groups as the

[367] Schmitt, MN *op cit* note 82 at 126.
[368] Ibid.
[369] Watts, S *op cit* note 306 at 430.
[370] Geneva Convention III, Article 3; See *Rome Statute of the Int'l Criminal Court*, Article 8(2)(f), U.N. Doc. A/CONF.183/9 37 I.L.M. 999, 1009 (July 17, 1998) (describing the elements of a non-international armed conflict).
[371] Sandoz, Y et al *op cit* note 84 at para 4789. See also *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, para. 97 (ICTY App. Chamber, Oct. 2, 1995) noting that the distinction between IAC and NIAC "has become more and more blurred. . . .").
[372] Sandoz, Y et al *op cit* note 84 at para 4789.
[373] Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation., 1-2 September 2005, University Centre for International Humanitarian Law at 34 available at www.adh-geneva.ch/events/expert-meetings.php (last accessed on 1 May 2014).
[374] ICRC Commentary IV at 37.
[375] See in general Alasow, OA 'Rules of International Law Applicable to Non-International Armed Conflicts' in *International Humanitarian Law Series, Vol 21: Violations of the Rules Applicable in Non-International Armed Conflicts and their Possible Causes: The Case of Somalia* (2000) at 132.

government structures have collapsed.[376] The resolutions in general require "all parties to the conflict" to respect LOAC. Resolution 733[377] "[u]rges all parties to take all the necessary measures to ensure the safety of personnel sent to provide humanitarian assistance, . . . and to ensure full respect for the rules and principles of international humanitarian law regarding the protection of civilian populations".[378] Resolution 814[379] "[r]eiterates its demands that all Somali parties, including movements and factions, immediately cease and desist from all breaches of international humanitarian law . . .".[380] The requirement regarding leadership and sufficient control over these groups in Somalia is met as the command structures of these groups are rooted in clan history and their members are dependent on the leaders for weapons and food, which results in sufficient control, as required by Common Article 3.[381]

The term, 'combatant' is not mentioned in Common Article 3. Common Article 3 only prohibits "violence to life and person, in particular murder" of persons taking no active part in hostilities.[382] This also applies to those participants that have ceased to actively participate in hostilities. The term, 'active' must be interpreted to have the same meaning as the term, 'direct' in DPH in API[383] and APII.[384] The reasonable conclusion is that participants must do more than just cease their participation in the armed conflict. It seems that these participants must also take additional steps to actively disengage from such participation.[385] Participants in NIAC may therefore be attacked at any time until they actively disengage from the armed group.[386]

There is thus no traditional combat status in NIAC[387] but there are functional equivalents based on the principle of distinction. This is because armed conflict occurs between agents of

[376] Ibid at 129.
[377] 23 January 1992.
[378] At para 8 thereof.
[379] 26 March 1993.
[380] At para 13 thereof.
[381] See in general Alasow, OA *op cit* note 377 at 133.
[382] Common Article 3 to the GC's of 1949 an APII, Article 4.
[383] API, Article 51(3).
[384] APII, Article 13(3).
[385] Sassòli, M & Olson, LM 'The Relationship between International Humanitarian Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' *IRRC Vol 90 No 871* (September 2008) at 607 available at http://www.icrc.org/eng/resources/documents/article/review/review-871-p599.htm (last accessed on 1 May 2014).
[386] Ibid at 607.
[387] Matthews, H 'The Interaction between International Human Rights Law and International Humanitarian Law: Seeking the Most Effective Protection for Civilians in Non-International Armed Conflicts' *The International Journal of Human Rights Vol 17, Nos 5-6* (2013) at 641; see also the interpretation of the

the sovereign and those affiliated to a non-State armed group or between such groups. There is no equivalent to prisoner-of-war status in NIAC but this is not important as DPH relates to targeting and not POW rights. Some experts have concluded that the principle of distinction does not apply in NIAC and that all participants, and for that matter non-participants, in NIAC's are civilians, with some only directly participating in the hostilities from time to time.[388] It is, however, submitted that the principle of distinction, as customary LOAC,[389] demands that a division must be made, firstly to distinguish between the opposing adversaries and secondly, between participants and civilians for purposes of targeting decisions in armed conflict.

Persons affiliated to armed non-State armed groups cannot be considered to be traditional Just War civilians or combatants. It may, however, be argued that the AP's have amended the Just War concept. The civilian exception created by DPH confirms that such 'members' are neither combatants nor civilians.[390] API, Article 51(3), does not formally classify these participants as 'combatants'. These participants may only commit an act of DPH where such a person is classified as a civilian. These participants may then, for a certain time, be targeted as combatants but they do not become combatants.[391] This is because combatant status is recognised by LOAC based on the existence of an IAC and subsequent to the State's domestic law conferring membership in the regular armed forces in domestic law upon these persons, and is expressed through formal integration into permanent units. It must be remembered that combatant status is not awarded to members of the regular armed forces in an NIAC either, but they may be, and are in reality, targeted at any time; accordingly, the members of the non-State armed group have no status under LOAC but may also be targeted as the regular armed forces at any time.

Colombian Constitutional Court which confirmed that the term 'combatant' does not apply to NIAC. The court found that irregular fighters are criminals under domestic law – Case No. C-291/07, 25 April 2007. Keynote Address by Beerli, C 'ICRC Vice-President Scope and Application of International Humanitarian Law' *Proceedings of the Bruges Colloquium No 43* (Autumn 2013).

[388] Matthews, H *op cit* note 389 at 635.

[389] Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27.

[390] See Guard, L 'Targeted Killing and Just War: Reconciling Kill-Capture Missions, International Law, and the Combatant Civilian Framework' *Military Legitimacy Review* (2012) at 21.

[391] Ibid - Guard states that members of non-State armed groups are not civilians or combatants and decisions regarding their status can only effectively be made when their organizational capacity is considered together with the extent of harm that such groups may or have actually inflicted.

The arguments from writers like McMahan that equate liability to intentional attack of a participant in armed conflict to the existence of culpability of the threat[392] must be rejected. There is no indication in LOAC that requires the existence of a threat and the attack of an individual is done to diminish the ability of the collective to conduct hostilities. Where a group cannot be identified, the DPH exception becomes applicable. Notions of human rights law should also not be confused with LOAC principles and the existence of a threat is considered to be relevant where the right to life and the arbitrariness of its violation are evaluated.

Ohlin's argument that the traditional principles of LOAC dictate that "the individual must be linked to a larger collective, a larger belligerent force…it is only when [a particular fighter's] relationship to a larger collective is considered that the use of force against them may be permissible".[393] This linking principle is preferred and Olin's statement that "voluntary membership in an organization engaged in an armed conflict with the United States"[394] or, for that matter, any State, realistically meets the requirements of the linking principle that is "a functional equivalent to being a member of a military organization".[395]

10.1 Members of Organised Armed Groups

API, Article 43, defines the regular armed forces of a Party to an IAC as all its organised armed forces, groups and units which are under a command responsible to that Party for the conduct of it subordinates.[396] This also includes 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, are under a command responsible to that party for the conduct of its subordinates and subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.[397]

[392] McMahan, J *op cit* note 140 at 158.
[393] Ohlin, JD 'Targeting Co-Belligerents' forthcoming in Finkelstein,C; Ohlin, JD & Altman, A (eds) *Targeted Killings: Law and Morality in an Asymmetrical World* (2011).
[394] Ibid.
[395] Ibid.
[396] API, Article 43(1); Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 Vol I Rule 4.
[397] See Watkin, K *op cit* note 246 at 312.

Membership of such a group is usually regulated by domestic law or on basis of factual criteria and is expressed through formal integration into permanent units. The organised armed forces must, therefore, belong to a party to the conflict[398] and its conduct must be attributable to a State under the International Law of State responsibility. This applies even if a Party represents a government or an authority not recognized by an adverse Party. Such armed forces shall, accordingly, be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.[399]

Invariably, all armed groups, regular and irregular, seek to preserve their assets. Success in NIAC's increasingly depends upon gaining the support of the general population.[400] The ICRC has argued that the "LOAC applicable in such situations remains unclear as to whether members of organised armed groups are 'civilians' – and thus subject to direct attack only for such time as they directly participated in the hostilities – or whether they can be directly attacked according to the same principles as members of State armed forces, that is to say, irrespective of their individual direct participation in hostilities".[401] Henderson states that members of organised armed groups remain civilians.[402] It is submitted that this argument cannot withstand the requirements of State practice. The Israeli Supreme court also found that "a civilian who . . . 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".[403]

[398] See Articles 3 H IV R; Article 4 A [1] GC III; Article 43 API; Articles 13[2] GCI & 4 A [2] GC III (relating specifically to irregular militias and volunteer corps).
[399] API, Article 43(1). Organised armed groups will therefore qualify as armed forces under LOAC when they belong to a party to the conflict. It is essential that an organised armed group conduct the hostilities on behalf and with the agreement of a Party to the conflict. These armed actors must further display a sufficient degree of military organisation. States must determine who belongs to the armed forces, and not all members of the armed forces are combatants- Article 3 of the Hague Regulations of 1907. In NIAC, organized armed groups constitute the armed forces of a non-State party to the conflict.
[400] Engdahl, O & Wrange, P (eds) *Law of War – The Law as it was and the Law as it Should Be* (2008) at 209.
[401] Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report at 50.
[402] Henderson, I *op cit* note 4 at 96.
[403] PCATI *op cit* note 24 at 39.

Kaurin states that combatants are "dangerous" and pose a threat and may therefore be the object of violence.[404] There is thus a power differential between combatants and civilians. However, it would be illogical to treat those who also pose a threat and act in a hostile and threatening manner in the same way as civilians.[405] Reason also dictates that that these persons should not be worthy of the same treatment as those who are clearly identified as combatants as required by LOAC. These civilians, although they are not entitled to the same protections that a military structure provides, may be intentionally targeted as combatants would be, based on the continued threat they pose. Kaurin relies on the concept of 'justice' to treat like cases in a like manner. It is morally and legally unjust to treat like cases differently unless there is a compelling reason to do so. However, the argument that Kaurin suggests fails when she suggests a 'flexibility of the use of force' model commonly used by law enforcement, taking into account the level of threat posed to be countered with equal force to neutralise the threat. This would, in an armed conflict situation, require that a determination be made on the method of treating each individual situation by determining the "kind of combatant" a person might be.[406]

The argument further moves away from LOAC principles where she includes non-combatants into the highest level of threat category, based on the fact that they wear a uniform as opposed to those who are irregulars and are not easily identifiable. This, it is argued, is found consistently and, like Kaurin, these authors normally refer to civilians as non-combatants, while religious and medical personnel are included within the combatant category. The initial argument has potential as there is no reason to treat, for intentional targeting purpose, combatants and members of armed groups differently. This distinction is, however, not based on a threat. Threat is a human rights concept. In LOAC, a threat is not required, the object being to counter the military potential of the adversary in an essentially adversarial human confrontation. There is no argument that the military equipment of the adversary may at all times be destroyed where and when it is found. The distinction of the persons operating those assets is unjust. Armed non-State groups possess leadership, recruitment pools, publicity, ideologies, command and control, weapons, training, operational

[404] Kaurin, P *When Less is More: Expanding the Combatant / Noncombatant Distinction in Suny Series, Ethics and the Military Profession: Rethinking the Just War Tradition* (2007) at 118.
[405] Ibid at 118.
[406] Ibid at 118.

space, security, intelligence and finances.[407] Some, like *al Qaeda*, display a decentralized command system, while groups like the FARC allow substantial autonomy to individual groups within its system.[408] These groups both maintain a degree of control over territory.

11. Summary

There is a marked intricacy but also an inadequacy in LOAC regarding the classification of who may lawfully directly participate in armed conflict. Combatancy is accessed in terms of the restricted nature of the membership test, its association to legitimacy, the criteria for determining combatant status, and the resulting effort to deal with all manner of participants in armed conflict, including irregular fighters.

In NIAC the principle of distinction cannot be conceptualised in the same manner as in IAC's.[409] Distinction requires the presence of combat status and then defines civilians as those who are not combatants. However, the principle of distinction is similarly relevant in NIAC's.[410] Common Article 3 does not incorporate the term, 'combatant' or 'civilian', but refers to persons taking no active part in the hostilities and those who do take an active part in the hostilities. The provision refers to 'members of armed forces who have laid down their arms' as a sub-category of 'persons taking no active part in the hostilities'. Common Article 3 therefore confirms the existence of, and membership of, 'armed forces' in NIAC's. Common Article 3 is directed to 'each Party to the conflict' and it is submitted that this acknowledges collective entities that oppose each other.

APII and later treaties that apply in NIAC's incorporate the terms, 'civilians' and 'civilian population', without defining these terms.[411] It is submitted that the failure to incorporate the term, 'combatant' in these treaties does not exclude the application of the principle of

[407] Cragin, RK & Daly, S *Dynamic Terrorist Threat: An Assessment of Group Motivations and Capabilities in a Changing World* (2003) at 26.
[408] Ibid at 41.
[409] See for example, ICTY Trial Chamber, *Prosecutor v. Mrksic et al*, Judgment of 27 September 2007 at para 457.
[410] See Henckaerts, JM and Doswald-Beck, L (eds) *op cit* note 27 Vol I Rule 1 (Summary of the evidence in relation to NIAC) at 5-8.
[411] Article 5(1)(b) and (e) and Part IV (Articles. 13-18) AP II; Articles. 3(7)-(11) Amended APII to the CCW; Article 2 APIII to the CCW; Articles. 8(2)(e)(i), (iii) and (viii) ICC Statute.

distinction between members of regular and irregular organized armed groups and civilians.[412]

There is no doubt that intense disagreement still exists regarding the classes of people who are legitimately permitted to engage in armed conflict.[413] It may be attributed to the traditional Western view that LOAC takes with regard to armed conflict. This is demonstrated by the fact that there is little acknowledgement of the different cultures internationally and of the divergent modes of thinking, value systems and forms of political organisation. It is submitted that these distinct cultures and political systems must be recognised and that there is a marked difference between traditional Western traditions and non-Western preferences with regards to armed conflict.[414] In defining lawful combatancy, LOAC has created a group of participants in combat whose status remains controversial and there remains much confusion and controversy over how these participants in armed conflict should be treated.[415] The current law of targeting thus affords some parties to IAC strategic and tactical advantages from their own non-compliance with the laws of war and their adversary's compliance with the law.[416] It is, however, accepted that "the fact that one side in a conflict violates humanitarian law does not justify its adversary in disregarding the law".[417]

[412] Bothe, M 'Direct Participation in Hostilities in Non-International Armed Conflict' Paper submitted to the Second Informal Expert Meeting organized by the International Committee of the Red Cross and the TMC Asser Institute, The Hague, The Netherlands, 25-26 October 2004 at 9; See Sandoz, Y et al *op cit* note 84 1453 at para 4789.
[413] Nabulsi, K *Traditions of War, Occupation, Resistance and the Law* (1999) at 66.
[414] Schultz, SR *op cit* note 95 at 227-28.
[415] Watkin, K *op cit* note 316 at 7.
[416] Rosen, RD 'Targeting Adversary Forces in the Law of War on Terror: Preserving Civilian Immunity' *42 Vand J Transnat'l L683* (2009) at 691.
[417] Greenwood, C 'Historical Development and Legal Basis' in Fleck, D (ed) *The Handbook of International Humanitarian Law* (2008) at 12.

Chapter 5

Direct Participation in Hostilities in International Armed Conflict and Non-International Armed Conflict

"What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife"[1]

1. Introduction

This chapter will focus on the notion of 'direct participation in hostilities' ("DPH"), 'civilian direct participation in hostilities' ("C-DPH") in 'international armed conflict' ("IAC") and 'non-international armed conflict' ("NIAC"). In general, civilian status, as opposed to combat status, is required before a person may be intentionally targeted under the C-DPH exception created in Additional Protocol I[2] of 1977 to the Geneva Conventions of 1949 ("API"), Article 51(3) and Additional Protocol II[3] of 1977 ("APII"), Article 13(3). The initial focus will thus be on the requirements and classification of civilian status and the immunity against intentional attack that such status holds in the Law of Armed Conflict ("LOAC"). The specific focus will assess the meaning of the terms, 'direct' and the 'temporal loss of protection' by civilians against intentional targeting based on the 'for such time' requirement of C-DPH. Traditionally the determination of the scope of participation required by civilians to be subject to intentional targeting was a matter of policy, rather than a legal matter,[4] due to the uncertainty as to the meaning and interpretation of the requirements for C-DPH.

It seems intuitive, on initial scrutiny, that LOAC should protect civilians affected by armed conflict and that the law should not be a vehicle for civilian direct participants to obtain an actual or perceived advantage to the detriment of those mandated participants that legitimately act in armed conflict. LOAC must, as a principle obligation, pursue the protection of civilians in armed conflict based on humanitarian principles. Civilians have

[1] *Prosecutor v Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at 119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) at para 119.
[2] *Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts* (Protocol 1), 8 June 1977 ("API").
[3] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts*, UN DOC. A/32/144 (1977); 16 ILM 1391 (1977) ("APII").
[4] Hays Parks, W 'Memorandum on Executive Order 12333 and Assassination' *Department of the Army, Office of the Judge Advocate General of the Army, Washington, D.C. 20310-2200, DAJA-IA (27-1A)* (2 November 1989) Memorandum of Law, Subject: Executive Order 12333 and Assassination.

over time, however, and since the adoption of the C-DPH exception, become indispensable to States involved in contemporary IAC and NIAC, based on the military expertise they possess. This expertise is required due to the developments in weapons technology,[5] the asymmetry of many armed conflicts[6] and the escalation of outsourcing of military activities to civilian contractors.[7] Some civilians directly participating in armed conflicts thus constitute a worthwhile military target but the definition of a military objective, military necessity and the requirements of intentional targeting must be interpreted with regards to the provisions in LOAC,[8] which includes the general prohibition against attacking civilians.

LOAC may suffer as the distinction between civilian and combatant, and the distinction between participants in armed conflict becomes less distinct.[9] Sun Tzu stated as long ago as the 5th century BCE that it is important in armed conflict to "know your enemy".[10] This still holds true as targeting decisions become very complicated where adversaries cannot identify each other adequately. Adversaries need to know who they will oppose in order for them to ensure success. The purpose of the C-DPH exception was not only to protect civilians, but also to strengthen the principle of distinction by ensuring that civilians do not directly participate in hostilities.[11] Civilians have an obligation to refrain from C-DPH that may place the civilian population at risk.[12] Civilians who breach this duty become legitimate targets "for such time as they take a direct part in hostilities."[13] This principle has likely achieved the status of customary international law.[14] The ICRC regards the "lawfulness of an attack on a

[5] See Schmitt, MN 'War, Technology and International Humanitarian Law' *Program on Humanitarian Policy and Conflict Research at Harvard University, No. 4* (2005) at 5; Que´guiner, JF *Direct Participation in Hostilities under International Humanitarian Law, Program on Humanitarian Policy and Conflict Research at Harvard University* (2003) (working paper) at 5–6.
[6] See in general Geiss, R 'Asymmetric Conflict Structures' *International Review of the Red Cross* Vol 88 No. 864 (2006).
[7] See generally Schmitt, MN 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' *Chicago Journal of International Law* Vol 5 No 2 (2004) at 511.
[8] See for example the *Nuremberg Military Tribunals, Hostage Case* (USA v. List et al.), 11 NMT 1230, 1253 (1948).
[9] *Public Committee Against Torture in Israel v. Israel* (2007) 46 I.L.M. 375 (Supreme Court of Israel sitting as the High Court of Justice, 16 December 2006) at para 34.
[10] Schultz, SR *Insurgents, Terrorists, and Militias: The Warriors of Contemporary Armed Conflict* (2006) at 259.
[11] See the *Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, Convened in Geneva*, 23-25 October 2005 at 20 available at http://www.icrc.org/Web/eng/siteeng)/htmlall/participation-hostilities-LOAC-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf (last accessed on 1 May 2014).
[12] Hays Parks, W *op cit* note 4; Ben-Naftali, O & Michaeli, KR 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' *36 Cornell Int'l L. J. 233* (2003) at 265.
[13] API, Article 51(3).
[14] PCATI *op cit* note 9 at para 30.

civilian" as dependent "on what exactly constitutes direct participation in hostilities and, related thereto, when direct participation begins and when it ends . . . [but] the meaning of direct participation in hostilities has not yet been clarified".[15]

The application of the principles of LOAC, however, "in practice is sometimes difficult due to the fact that the provisions are framed in rather abstract terms, thus leaving room for divergent interpretations".[16] The question of whether a civilian is liable for having directly participated in hostilities, as per API, Article 51(3), or APII, Article 13(3), is not only complex, but also highly controversial.[17] Any attempt to formulate a definition of C-DPH that safeguards non-participating or indirectly participating civilians but which fails to entice an adversary that intentionally hides among civilian populations, is accordingly complicated.[18] The ultimate issue to be evaluated therefore relates to the meanings of 'direct' and 'for such time'.[19] The exact meanings of the phrases, 'direct part in hostilities' and 'for such time' are not settled.[20] The ICTY trial chamber held that "[i]t 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 to ascertain whether, in each individual circumstance, that person was actively involved in hostilities at the relevant time".[21]

2. Background to Direct Participation in Hostilities

Armed conflict can exist only between parties that are sufficiently organized to confront each other with military means. State governmental authorities have been presumed to dispose of armed forces that satisfy this criterion. As for armed groups, the ICTY has relied on several indicative factors, none of which are, in themselves, essential to establish whether the 'organization' criterion is fulfilled. Such indicative factors include the existence of a

[15] Henckaerts, J and Doswald-Beck, L (eds) *Customary International Humanitarian Law* Vol I (2005) at 173.
[16] Kellenberger, J 'International Humanitarian Law at the Beginning of the 21st Century' International Committee of the Red Cross (2002) available at http://icrc.org.web.eng/siteengo.nsf/iwplist99/efc5a1c8dd70b9c1256c3600 (last accessed on 1 May 2014).
[17] Williams, D 'The Often-Vexed Question of Direct Participation in Hostilities. A Possible Solution to a Fraught Legal Position?' *Journal of Politics and Law Vol 2 No 1* (March 2009) at 2.
[18] Human Rights Council, Fourteenth Session, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, A/HRC/14/24/Add.6 at 19-20.
[19] 'Forum, Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance' *42 New York University Journal of International Law and Politic*s (2010) at 637.
[20] See Schmitt, MN *Direct Participation in Hostilities and 21st Century Armed Conflict* (2004) at 507 available at http://www.michaelschmitt.org/images/Schmitfinal.pdf (last accessed on 1 May 2014).
[21] *Prosecutor v. Dusko Tadic*, (Trial Chamber) Case No IT-94-1 (7 May 1997) at para 616.

command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords".[22]

There are, however, persons who are not affiliated or connected to, or who qualify as members of dissident armed forces, who only participate in the armed conflict on a spontaneous, sporadic or unorganised basis.[23] In other situations, even where non-State armed groups operate, members thereof may at times engage in activities for their own benefit; these activities will normally be criminal in nature.[24] If it is accepted that civilians should refrain from directly participating in armed conflict. It will be argued that targeting decisions should focus on the responsibility of the participant and the ensuing risk associated with his entry into the conflict. There must thus be a responsibility on this person to withdraw from the hostilities in an unambiguous manner to avoid future intentional attack.[25] In this regard it is submitted that a person tasked with making targeting decisions cannot, under all circumstances, be expected to draw a distinction between plunder, looting, robbery, C-DPH and members of organised armed groups who participate in hostilities as opposed to those mentioned first that abuse the armed conflict situation to commit criminal acts.[26] This argument is based on the fact that this participant enjoys no right to participate in the armed conflict and thus will be at risk when he decides to participate. This is supported by the Inter-American Commission on Human Rights that expressed the opinion that civilians who take a direct part in hostilities temporarily forfeit their immunity from direct individualised attack during such time as they assume the role of combatant. The Commission, however, added

[22] *Prosecutor v. Boškoski & Tarčulovski*, Judgement, Case No. IT-04-82-T, T.Ch.I, 2008 at paras 194-206.
[23] Schmitt, MN 'The Status of Opposition Fighters in a Non-International Armed Conflict' in Watkin, K & Norris, AJ (eds) 'Non-International Armed Conflict in the Twenty-first Century' *International Law Studies – Vol 88* at 135.
[24] Alasow, OA 'Rules of International Law Applicable to Non-International Armed Conflicts' in *International Humanitarian Law Series, Vol. 21: Violations of the Rules Applicable in Non-International Armed Conflicts and their Possible Causes: The Case of Somalia* at 133.
[25] See in general Schmitt, MN *op cit* note 23 at 137.
[26] See in general Uhler, OM et al 'IV Commentary on the Geneva Convention Relative to the Protection of Civilian Person in Time of War' 62 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) at 4; See the presentations by Watkin, K; Kleffner, JK; Melzer, N & Parks, G in Beruto, GL (ed) *The Conduct of Hostilities. Revisiting the Law of Armed Conflict 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols* (2007) at 59 – 77.

that "[i]t is possible in this connection, however, that once a person qualifies as a combatant, whether regular or irregular, privileged or unprivileged, he or she cannot revert back to civilian status or otherwise alternate between combatant and civilian status".[27] This position is further supported by Parks who argues that a civilian who engages directly in combat cannot revert to his previous civilian status.[28] Williams also concludes that the temporal element should be eliminated from the targeting determination in C-DPH.[29]

3. Just War Theory

Just War theory is the most persistent ethic related to armed conflict. This theory states that armed conflict is justified only when certain conditions are present.[30] Just War theory is a compromise between the realist and pacifist paradigms relevant to armed conflict.[31] Modern Just War theory in LOAC is based on the submission that *jus in bello* rights and obligations are held by all persons that qualify as combatants and that *jus in bello* is independent from *jus ad bello*.[32] This means that combatants enjoy combatant privilege and the *jus ad bellum* status of the armed conflict does not influence or affect those combatant rights. It is submitted that this proposition may be viable in IAC but that it does not, in reality, correlate with NIAC. The *ad bellum* status of the armed party in an NIAC affects the *jus in bello* rights and obligations of irregular fighters, as they do not qualify as combatants.

Just War theory is based on the assumption that combatants are liable to force as they are 'non-innocent' in a morally neutral manner.[33] Combatants are engaged in a harmful activity during armed conflict[34] and accordingly the word, 'innocent' originating from the Latin word, '*nocentes*', means, 'posing a threat'. It is submitted that this threat must not be interpreted as posing an unjustified threat, since then arguments regarding legitimate self-defence will become possible. The implication is, however, that only just combatants possess a right to participate in a just armed conflict while unjust combatants do not and therefore have no

[27] See Kretzmer, D 'Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate means of defence?' *European Journal of International Law* Vol 16 (2005) at 101.
[28] Hays Parks, W 'Air War and the Law of War' *Air Force Law Review Vol 32 No 1* (1990) 1 at 118.
[29] Williams, D *op cit* note 17 at 6-7.
[30] Frank, T *Reframing Asymmetrical Warfare: Beyond the Just War Idea in Moral Dimension of Asymmetrical Warfare: Counter-Terrorism, Democratic Values and Military Ethics* at 68.
[31] Popovski, V *Religion and War in World Religions and Norms of War* (2009) at 20.
[32] Rodin, D *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) at 44.
[33] Ibid at 46.
[34] Ibid.

symmetrical privilege as combatants.[35] The notion that combatant privilege relates the rights and responsibilities of individual combatants and that so-called just armed conflict is a "collective exercise of individual rights of self and other-defence in a coordinated manner against a collective threat"[36] must accordingly be rejected. This, it is submitted, is because combatants, and for that matter, members of armed groups, act as a result of a mandate from their superiors and on behalf of the State or group as a collective. Armed conflict is not personal; its main object is to diminish the ability of the adversary, as a collective, to further participate in the armed conflict by reducing its ability or will.

Members of the armed forces and, for that matter, members of non-State armed groups, are not required to evaluate the legality of the armed conflict they are engaged in and LOAC simply requires them to adhere to the law during the armed conflict. It is also submitted that many participants in IAC and NIAC will, notwithstanding their own belief regarding the legality of the conflict, still participate, based on various reasons including, *inter alia*, professionalism, the coercive measures of military training, discipline and group pressure.

The direct participation of the combatant in armed conflict is mediated through the collective agency of the State on behalf of whom he participates. In this regard, a combatant is collectively linked to the more general will of the State. Combatants are thus linked to a State, which, in turn, creates an interrelationship between the combatants of the regular armed forces.[37] The individual combatant will only become liable to prosecution where he commits criminal acts during the armed conflict. The combatant's privilege is also not an individual right, but one that attaches to the armed force as a collective. The actions of individual participants in armed conflict cannot feasibly and practically be micro-managed;[38] this confirms the collective nature of armed conflict.

It is further submitted that the justification for armed conflict is mostly indeterminate and it is therefore pointless to attach *jus in bello* privileges to *ad bellum* justifications. Armed conflict and its justification may, on initial scrutiny, seem controversial but may become acceptable

[35] See McMahan, J 'The Ethics of Killing' in *War Ethics* (July 2004) at 718-722.
[36] Ibid at 717.
[37] See in general Kutz, C 'The Difference Uniforms Make: Collective Violence in Criminal Law and War' *Philosophy and Public Affairs Vol 33(2)* (2005) at 173.
[38] Dunlap, (Jn) CJ 'Do We Need New Regulations in International Humanitarian Law? One American's Perspective' Speech at the 22nd Conference on Humanitarian Law in Ettligen (Germany) (March 2012) in Thema at 3.

post bellum and initial judgments of the justification for armed conflict may prove false or misguided. This retrospective judgment of the *jus ad bellum* justification for armed conflict causes the link to *jus in bello* privileges to become meaningless.

API specifically states that "the provisions of the Geneva Conventions of 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict".[39] API has thus been criticized as providing "the resurrection of the Just War doctrine and effectively abolish[ing] the distinction between international and NIAC".[40] API has even been faulted as it is seen as excluding certain non-state actors from its operation.[41] LOAC protection and obligations are extended to a limited group of non-State actors whose capacity to remain legitimate depends on their actions during the conflict.[42] Only non-State actors who fall within the national liberation movement criteria, or who belong to a State are, as a matter of law, eligible for combatant status. In this regard the argument against expanding the scope of API to non-State actors is fundamentally a rights authority issue as it is based on protecting the existing privileged status of States.[43] LOAC thus developed three basic principles for engaging in Just War. These are the principles of military necessity, distinction and proportionality.

4. The Legal Basis of Direct Participation in Hostilities

The applicable international instruments in IAC, for purposes of C-DPH, are the *Hague Convention on Land Warfare*, which is regarded as customary law, the GC's and API. It must be understood that no treaty or any group of treaties cover all the rules of IAC; customary international law is thus very important to the conduct of armed conflict.[44] API, Article 1(2),

[39] API, Preamble.
[40] Feith, DJ 'API: Moving Humanitarian Law Backwards' *Akron Law Review* 19 (1986) at 532 in Watkin, K 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' *Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series* (Winter 2005) No 2 at 26 available at http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf (last accessed on 1 May 2014).
[41] Mushkat, R 'Who May Wage War? An Examination of an Old/New Question' *American University Journal of International Law and Policy 2* (1987) at 115-116.
[42] Watkin, K *op cit* note 40 at 27 available at http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf (last accessed on 1 May 2014).
[43] Ibid at 28.
[44] Dinstein, Y *The Conduct of Hostilities Under the Law of International Armed Conflict* (2004) at 6.

states that "[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants 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".[45] Customary LOAC,[46] Common Article 3 of the GC's[47] and APII are applicable to NIAC to a lesser or greater degree.

Common Article 3 states that "persons taking no active part in the hostilities […] shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, birth or wealth, or any other similar criteria." This same article confirms that certain acts are recited as explicitly prohibited. These prohibited acts, *inter alia*, include violence to life and person; taking of hostages and outrages upon personal dignity. This fundamental rule prohibits violence against people "taking no active part in hostilities". The rule was reaffirmed in APII, Article 4, which is more extensive in scope. The concluding clause of common Article 3 provides that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict".[48]

The determination of the persons who may be legitimately intentionally targeted in an IAC starts with an evaluation of API, Article 48.[49] This article requires that "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". APII also provides that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack . . .".[50] API, Article 50(1), provides that if there is 'doubt' that an individual is a legitimate target after taking all feasible[51] precautions, "that person shall be considered to be a civilian".[52] Article 51(2) of

[45] API, Article 1(2); Ibid at 6.
[46] Henckaerts, J and Doswald-Beck, L (eds) *op cit* note 15.
[47] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, of 12 August 1949 (GCI); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, of 12 August 1949 (GCII); *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, of 12 August 1949 (GCIII); *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, of 12 August 1949 (GCIV).
[48] See GCIV, Article 3.
[49] See in general Engdahl, O & Wrange, P (eds) *Law of War – The Law as It was and the Law as it Should Be* (2008) at 210.
[50] APII, Article 13(2).
[51] 'Feasible' is interpreted to mean 'capable of being done, accomplished or carried out, possible or practicable' and 'taking into account all circumstances ruling at the time, including humanitarian and military considerations' - Vandewiele, T *Commentary on the United Nations Convention on the Rights of the Child Optional Protocol, Vol. 46: The Involvement of Children in Armed Conflicts* (2006) at 26 - 27.

API offers protection for civilians who shall not be the object of attack. Articles 51(1) and (2) of API recodified the principle of distinction.[53] API, Article 52(2), states that civilians, individually and collectively, shall enjoy general protection from direct attack. LOAC, accordingly, determines that civilians are immune from intentional attack[54] "unless and for such time as they take direct part in hostilities".[55] API therefore conferred civilian status on all those who did not qualify to be combatants or non-combatants, regardless of whether or not they are harmless.[56] API thus bestowed equal protection on all civilians.

The circumstances under which civilians will lose their immunity from intentional attack is contained in API, Article 51(3), and APII, Article 13(3), where protection from intentional attack is forfeited "for such time" as civilians take a "direct part in hostilities".[57] The equilibrium between the demands of military necessity and humanity is expressed within these civilian exception clauses. These articles are intended to balance the humanitarian concerns to protect civilians with the dictates of military necessity. API, Article 51(3), thus confirms that considerations of humanity demand the protection of citizens, provided that they do not commit acts of C-DPH.[58] This provision refers to individual civilians as opposed to API, Article 52(2) which refers to citizens as individuals and as a collective. The Commentary on API confirms that "the immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts".[59]

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[52] The presumption of civilian status applies in both IAC and NIAC. HPCR Manual on International Law Applicable to Air and Missile Warfare (March 2010) commentary to Rule 12. In a non-international armed conflict, the presumption applies equally to membership in an organized armed group and C-DPH.

[53] Hays Parks, W 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' *42 N.Y.U. J. Int'L L. & Pol. 769* (2010) at 771.

[54] The term "attacks" is defined in API, Article 49(1) as "acts of violence against the adversary, whether in offence or in defence." It is submitted that any act of violence (large scale to minor attacks) will satisfy this qualification. Article 52(2) of API requires that all attacks must be limited to military objectives.

[55] API, Article 51(3); See also the journal dedicated to this issue of C-DPH: 'Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance' *42 New York University Journal of International Law and Politics 637* (2010); Article 13 of Additional APII applicable to NIAC replicates Article 51(3), although without an accompanying definition of the term "[c]ivilians"; APII, Article 5.

[56] API, Article 50(1).

[57] See also Henckaerts, J and Doswald-Beck, L (eds) *op cit* note 15 Vol Rules at Rule 6.

[58] Camins, E 'The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity' *90 International Review of the Red Cross 853* (2008) at 855.

[59] Sandoz, Y; Swinarski, C & Zimmerman, B (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) at [1942].

It has been argued that the C-DPH exception in API, Article 51(3), may favour considerations of humanity to the detriment of military necessity,[60] despite rules prohibiting terror bombing[61] and attacks against civilians for indirect participation in hostilities.[62] The argument is that military necessity requires that the harmful actions of civilians should result in the loss of their immunity from intentional attack in order for those civilians that do not participate or who only indirectly participate to be protected.

Regarding targeting decisions, API further incorporates an obligation to take the so-called passive precautions[63] against the effects of attack on civilians by the adversary.[64] Parties to the conflict are required "to the maximum effect feasible", to endeavour to remove civilians and civilian objects under their control from the vicinity of military objectives; to avoid locating military objectives within or near densely populated areas, and otherwise to protect civilians and civilian objects against the dangers resulting from military operations.

The wording of API, Article 51(3), and APII, Article 13(3), is vague and has proved to be challenging to interpret to obtain universal consensus on the meaning of the terms contained therein. It is submitted that the term, 'direct participation' must be interpreted in light of the fact that armed conflict is a group activity and participation therein is essentially group based. The notion of C-DPH must further be interpreted in good faith, in accordance with its ordinary meaning to be given to their constituent terms in context and in light of the object and purpose of LOAC.[65] There are, however, two implications from Article 51(3). The first is that the participants remain civilians even when they decide to directly participate in armed conflict, but they lose their immunity to intentional targeting. The second is that the regular armed forces target the civilian, based on the threat of harm to them or other civilians, although the threat need not be imminent.

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[60] See Dunlap, CJ (Jr) 'The End of Innocence: Rethinking Non-Combatancy in the Post-Kosovo Era' *Strategic Review Vol 28* (2000) at 14, discussed in Schmitt, MN 'Targeting and Humanitarian Law: Current Issues' *Israel Yearbook on Human Rights Vol 34* (2004) at 71–2.
[61] API, Article 51(2).
[62] API, Article 51(3).
[63] Pilloud, C and Pictet, J *Article 58 Commentary on the Additional Protocols* (1987) at 691.
[64] API, Article 58.
[65] Melzer, N *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law online: North Atlantic Treaty Organization Allied Command Operations* <http://www.aco.nato.int/resources/20/Legal%20Conference/ ICRC_002_0990.pdf> at 41 (last accessed on 1 May 2014).

The *Optional Protocol to the Convention on the Rights of the Child* of 2000 may also assist with the interpretation of C-DPH.[66] State Parties to this Optional Protocol are required to take "all feasible measures" to ensure that child C-DPH does not occur. The Optional Protocol and its *travaux preparatoires* do not provide an interpretation of C-DPH, nor is the difference between 'direct' and 'indirect' defined.[67] Article 1 refers to C-DPH and not armed conflict, which is a broader term.[68] The Committee on the Rights of the Child on the Optional Protocol[69] requires States in the reporting guidelines on Article 1 to report on the meaning that they attribute to C-DPH in legislation and practice. There is thus some latitude when defining C-DPH.[70] UNICEF considers C-DPH to "encompass not only active participation in combat, but also military activities and direct support functions".[71] Borel states that "[e]xperience in the field had shown that the distinction between direct and indirect participation in conflict was illusionary" with regards to the participation of children in armed conflict.[72] It has been argued that this definition is too wide and would not be accepted by the CRC Committee or other relevant actors.[73] This Optional Protocol and the comment thereon do not assist with an exact definition of C-DPH.

5. Example of the Practical Difficulties of Civilian Direct Participation in Hostilities

For purposes of discussion, a fictitious example provides a proposal for the further evaluation of the notion of C-DPH in practice. In many contemporary NIAC's there are non-State armed groups which are less organised than others. These groups make use of converted civilian vehicles during armed conflict. These vehicles are sometimes converted to become weapons platforms to accommodate heavy weapons. One may imagine some civilians sleeping on such a vehicle. If one applies the notion of C-DPH, as proposed by many experts, whereby those

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[66] See Vandewiele, T *op cit* note 53 at 19 - 27.
[67] See the *UNICEF Guide on the Optional Protocol to the Convention on the Rights of the Child Concerning the Involvement of Children in Armed Conflicts* (2003) at 13-14 available at http://www.unicef.org/sowc06/pdfs/option_protocol_conflict.pdf (last accessed on 13 January 2015).
[68] See the *ICRC, Optional Protocol to the Convention on the Rights of the Child Concerning the Involvement of Children in Armed Conflicts: Position of the ICRC* 27 October 1997, No. 42.
[69] CRC Committee, Guidelines Regarding Initial Reports of State Parties to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (UN Doc. CRC/OP/AC/1, 2001)
[70] Vandewiele, T *op cit* note 53 at 23.
[71] *Guide on the Optional Protocol to the Convention on the Rights of the Child Concerning the Involvement of Children in Armed Conflicts op cit* note 69 at 13-14.
[72] UN Press Release GA/SHC/3385. United States Defends Sanctions, Structural Adjustment Programmes; Opposes New Special Representative, In Third Committee Debate on Child Rights. UN United States Defends Sanctions, Structural Adjustment Programmes M2 Presswire November 13, 1996 at 2247, Borel, D. Third Committee - 9 - Press Release GA/SHC/3385 33rd Meeting (AM) 12 November 1996.
[73] Vandewiele, T *op cit* note 53 at 25.

committing acts of C-DPH may only be targeted when actively participating, then the vehicle will constitute a military objective at all times during the armed conflict and be subject to intentional targeting, but the presence of the civilians on the vehicle and the required proportionality test will result in the civilian harm outweighing the military gain. However, as soon as the 'civilians' wake up and start loading the weapon they would become intentionally targetable under the C-DPH exception. This is an absurd result to attempt to explain to a participant in an armed conflict that has experienced the realities of combat.

This situation becomes more complicated where the organisation makes use of a military vehicle. A combatant in such a vehicle will be targetable at any time, as will be the vehicle. Where the C-DPH exception is applied, the vehicle will constitute a target, but an evaluation will have to done as to the conduct of the occupants thereof before they may be targeted; alternatively, they may be immune to intentional targeting. This creates a disproportionate advantage for one group in an armed conflict compared to another that actually complies with LOAC. This must be interpreted together with the fact that status must not be confused with the right to intentionally target a person. Status accords certain rights, but targeting authority relates to the objective of armed conflict, which is to overcome the military potential of the adversary.

6. Civilian and Civilian Population

Generally, the protection from intentional targeting requires the status of civilian,[74] wounded person,[75] or, generally, that of *hors de combat*.[76] API, Article 51(3), "is an exception to the

[74] See API, Articles 48-71; see in general Beruto, GL *op cit* note 26 at 47 – 58.
[75] See 1949 GCI I, Articles 12-13 (outlining respectively protections owed to the wounded and qualification criteria for the status of wounded).
[76] Persons *Hors de Combat* – API, Articles 8(a) & (b) (Refrain from Acts of Hostility) and Article 41(2) (Abstains from any Hostile Act); Article 41(2) of API of the Protocol provides: A person is hors de combat if he is in the power of an adverse Party; he clearly expresses an intention to surrender; or he has been rendered unconscious or is otherwise by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape. See GCI, Articles 12-13 regarding the protection of the wounded and its qualification criteria. GCIV includes subcategories of civilian which are described as "populations of countries in conflict," (GCIV, Article 13) "national[s] of a neutral state" (GCIV, Article 4) and "interned protected persons." GCIV, Articles 78 & 79. The Fourth Convention prescribes a detailed regime of treatment obligations for interned protected persons in Part IV; Articles 79-141) LOAC also groups members of the regular armed forces into combatants and non-combatants (*Regulations Respecting the Laws and Customs of War on Land, Annex to Convention Respecting the Laws and Customs of War on Land*, Article 3, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, (delineating within the armed forces, combatants from non-combatants such as Chaplains and medical personnel).

duty to refrain from causing harm to innocent civilians, great caution must be employed when removing the law's protection of the lives of civilians in the appropriate circumstances".[77]

In terms of API, C-DPH results in the loss of civilian immunity against intentional attack but the civilian does not forfeit the status itself. The forfeiture is thus temporary. Some commentators have concluded that these participants constitute a category of the 'civilian' group.[78] It is submitted that this interpretation of classifying C-DPH as a category of civilian results in a substantial risk that the protection afforded to non-involved civilians may be undermined.[79] Where LOAC provides persons other than civilians with immunity from direct attack, the loss and restoration of protection is governed by criteria similar to, but not necessarily identical with, direct participation in hostilities.[80]

GCIV contains no general definition of the term, 'civilian'. CGIV includes subcategories of civilian, including the "populations of countries in conflict,"[81] "national[s] of neutral state[s],[82] and "interned protected persons".[83] Common Article 3 and APII do not directly address the scope of the notion of 'civilian'. In fact, Common Article 3 only refers to those taking no active part in hostilities. APII uses the term, 'civilian' but does not define it.[84] Article 13, subsection 2 and 3, of APII provides that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the

[77] PCATI *op cit* note 9 at .
[78] Watkin, K 'Combatants, Unprivileged Belligerents and Conflict in the 21st Century' *Israel Defense Forces Law Review 69* (2003) at 74-75, first produced as a policy brief for the Harvard Program on Humanitarian Policy and Conflict Research, www.LOACresearch.org/LOAC/pdfs/Session2.pdf (last accessed on 1 May 2014). See also Cassese, A *Expert Opinion On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law* Public Committee Against Torture in Israel at 14, www.stoptorture.org/il/eng/images/uploaded/publications/64.pdf. at 14 (last accessed on 1 May 2014). However, Dinstein disagrees and states that "civilians are not allowed to participate actively in the fighting: if they do they lose their status as civilians." See Dinstein, Y *op cit* note 44 at 27.
[79] See Watkin, K 'Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict' at 167 in Wippman, D & Evangelista, M (eds) *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (2005).
[80] For example, medical and religious personnel of the armed forces lose their protection in case of "hostile" or "harmful" acts outside their privileged function (GCI, Articles 21; APII, 11 [2]; Henckaerts, J and Doswald-Beck, L (eds) *op cit* note 15 Vol I Rule 25) - Combatants hors de combat lose their protection if they commit a "hostile act" or "attempt to escape" - API, Article 41(2).
[81] GCIV, Article 13 - The "whole of the populations of the countries in conflict" receive the protections of Part II of the Fourth Convention. Part II protects access to medical treatment as well as shelter from the effects of hostilities through hospital and safety zones - CGIV, Articles 14-26.
[82] GCIV, Article 4 - The Fourth Convention leaves protection of nationals of neutral states largely to the diplomatic system. See GCIV, Commentary at 48.
[83] GCIV, Articles 78 & 79 - The Fourth Convention prescribes a detailed regime of treatment obligations for interned protected persons in Part IV.
[84] APII, Article 13.

primary purpose of which is to spread terror among the civilian population are prohibited. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities".

API, Article 50, is the first express treaty provision defining the concept of 'civilian'. It logically defines civilians by excluding them from the category of combatants as anyone who is not a combatant.[85] Civilian thus refers to all persons "who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3), and (6) of GCIII and in Article 43 of API."[86] API therefore defines civilians negatively as all persons who are neither members of the armed forces of a party to the conflict, nor participants in a *levee en masse*.

The ICRC Customary LOAC[87] study concluded in 2005 that "[i]t can be argued that the terms, "dissident armed forces or other organized armed groups . . . under responsible command" in Article 1 of APII recognise the essential conditions of armed forces, as they apply in international armed conflict . . . and that it follows that civilians are all persons who are not members of such forces or groups. Subsequent treaties, applicable to non-international armed conflicts, have similarly used the terms, 'civilians' and 'civilian population' without defining them. While State armed forces are not considered civilians, practice is not clear as to whether members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in case of direct participation, or whether members of such groups are liable to attack as such, independently of the operation of Rule 6.[88]

The ICRC's Interpretative Guidance referred to civilians in IAC as "all persons who are neither members of the armed forces of a party to the conflict, nor participants in a *levee en masse*."[89] The ICRC defined civilians in NIAC as "all persons who are not members of the State armed forces or organized armed groups of a party to the conflict and are therefore entitled to protection against direct attack unless and for such time as they take a direct part in

[85] Schmitt, MN 'Fault Lines in the Law of Attack' in Breau, S & Jachec-Neale, A (eds) *Testing the Boundaries of International Humanitarian Law* (2006) at 277, 287.
[86] API, Article 50[1] – this definition reflects customary LOAC. See ICTY *Prosecutor v Blaskic*, Case No IT-95-14-T, Judgment of 3 March 2000 at 180. See also Report C-DPH 2005 at 43f, 58, 74; Report C-DPH 2006 at 10, 12ff, 19ff & Report C-DPH 2008 at 35, 37.
[87] Henckaerts, J and Doswald-Beck, L (eds) *op cit* note 15.
[88] Ibid at 19.
[89] Melzer, N *op cit* note 67 at 20; See also the GCIV, Article 4(6).

hostilities."[90] This has resulted in some experts stating that civilians are non-combatants.[91] The meaning of civilians in NIAC is derived from Common Article 3[92] and APII, which only acknowledge, but do not authorize participation in armed conflict.

Civilian status is premised on the uniformity of combatants as opposed to civilians that display considerable diversity and who are thus more difficult to define. This definition was also influenced by the regularisation of the function of soldiery and the military corps.[93] Civilians, in exchange for not participating in hostilities, are accordingly not, in general, to be made the object of attack.[94] When captured, civilians are not entitled to POW status;[95] however, they are entitled to other protections while in detention.[96] Civilians are thus not members of the regular armed forces, nor should they actively and directly participate in hostilities.[97] This is important as those who continuously and directly participate in hostilities will not possess civilian status. C-DPH must, therefore, refer to specific sporadic acts of direct participation.

Civilian status is further presumed where doubt exists, even though they are defined negatively as a secondary category, as opposed to combatants in armed conflict. Civilian status is therefore the default status for persons in armed conflict. A person may, as a result, only be the object of an intentional attack where it is evident that such a person is not a civilian, *hors de combat*, a non-combatant or where the person has forfeited the immunity against direct attack afforded by civilian status by way of acts of C-DPH.[98]

Civilians, however, do not enjoy protection from collateral attack where they are in proximity to a military objective, which may result in their being regarded as collateral damage where the military advance outweighs the consequent civilian harm. It is submitted that C-DPH must be interpreted together with the requirements for military objectives. Military objectives are interpreted to be members of the armed forces, other persons taking a direct part in

[90] Ibid at 27.
[91] Dinstein, Y *op cit* note 44 at 113.
[92] Common Article 3 to the GC's.
[93] Mohamedou at 21.
[94] API, Article 51(2).
[95] GCIII, Article 4A - nothing that, with few exceptions, civilians do not fall within the categories that qualify for POW status.
[96] GCIII, Articles. 27–37.
[97] Dinstein, Y *op cit* note 44 at 113.
[98] API, Article 51(3) & APII, Article 13(3).

hostilities who are targetable for the duration of their participation, and "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, offer a definite military advantage".[99] This approach is not reflective of the practice of all States. The US Army and Air Force reflect the API wording but the Navy and Department of Defence documents substitute "enemy's war fighting or war-sustaining capability" for "military action".[100] Civilians are, within this structure, defined with reference to combatants, and civilian objects are not military objectives. The infliction of harm on civilians may only occur as a consequence of an attack pursuant to a military advantage. Lawful violence may then harm civilians and civilian objects, only to the extent that they are cognitively subsumable under military objectives.

Civilians are thus generally protected from the reciprocal risk of intentional targeting that governs the relations between combatants. There is also no basis in LOAC that supports the argument that civilians may be intentionally targeted to destroy their support of the armed conflict.[101] This immunity from attack may be opportunistically manipulated by civilians who engage in attacks without subjecting themselves to the reciprocal risk normally inherent therein. It must further be accepted that civilians who are employed within or in close proximity to a military objective are at risk from collateral attack. The armed forces may not substitute a civilian in a position that typically would be occupied by a member of the military as this will not influence the intentional legitimate targeting consequences of the person so employed.[102]

[99] Human Rights Watch Report Off Target: The Conduct of the War and Civilian Casualties in Iraq. Human Rights Watch (2003) at 8 available at http://www.hrw.org/reports/2003/usa1203/usa1203.pdf (last accessed on 1 May 2014). See also the 2007 Human Rights Watch Report named Civilians Under Assault: Hezbollah's Rocket Attacks on Israel in the 2006 War available at www://www.HRW.org/reports/2007/iopto807/iopto807webcover.pdf (last accessed on 1 May 2014).

[100] See 'The Military Commander and The Law' (2006) at 614 available at http://www.milcom.jag.af.mil/milcom2006-complete.pdf (last accessed on 1 May 2014); The Law of Land warfare, FM 27-10 (1976) ch. 2 at para 40 available at http://ataim.train.army.mil/portal/atia/adlsc/view/public/296783-t/fm/27-10/Ch2.htm#s4 (last accessed on 1 May 2014); United States Commander's Handbook on the Law of Naval Operations, 21 NWP 1-14M (October 1995) at para 8.I.I and at 8-I available at www.nwc.navy.mil/ILD/NWP%201-14M.htm (last accessed on 1 May 2014); Department of Defence Commission Instruction No. 2, 30 April 2003 at para 5 D 3 available at www.dod.gov/news/May2003/d2oo3o430milcominstno2 (last accessed on 1 May 2014).

[101] Dinstein, Y *op cit* note 44 at 116.

[102] Hays Parks, W *op cit* note 4.

7. Narrow and Broad Interpretation of Civilian Direct Participation in Hostilities

States have incentives to pursue narrow or broad interpretations of C-DPH, or even both.[103] The concept of C-DPH is difficult to interpret and this allows States and armed groups to implement various interpretations, based on their particular desires, objectives, and abilities. A narrow interpretation of the elements of C-DPH generates a high threshold, which makes it demanding for civilians to directly participate in hostilities.[104] A narrow interpretation results in complications when targeting directly participating civilians.[105] The broad interpretation of the elements of C-DPH produces a low threshold, which allows civilians to directly participate in hostilities without effort. This also makes it effortless for States to justify targeting participating civilians.[106]

The US interprets C-DPH narrowly as "immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct and causal relationship between the activity engaged in and the harm done to the enemy".[107] C-DPH does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions and other supplies or forward deployment".[108] The US Department of Defense Law of War Working Group regards civilians C-DPH in the light of "geographic proximity of service provided to units in contact with the enemy, proximity of

[103] Christensen, ER *The Dilemma of Direct Participation in Hostilities* Presented to the Faculty of the Graduate School of the University of Texas at Austin in Partial Fulfillment of the Requirements for the Degree of Master of Public Affairs/Juris Doctor (2009) at 5 available at: http://ssrn.com/abstract=1398462 (last accessed on 1 May 2014); See Targeting Operations with Drone Technology: Humanitarian Law Implications. Background Note for the American Society of International Law Annual Meeting, Human Rights Institute, Colombia Law School. March 25, 2011 at 17 – 21.
[104] ICRC, Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities 60 (2005) available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/ (last accessed on 1 May 2014).
[105] Ibid.
[106] Christensen, ER *op cit* note 105 at 5.
[107] United States Congressional Serial Set, Serial No. 14751, Senate Executive Reports, Issues 4-15 Congress, United States Government Printing Office at 35 available at https://books.google.co.za/books?id=ocPcWoZ0ISYC&dq=immediate+and+actual+action+on+the+battlefield+likely+to+cause+harm+to+the+enemy+because+there+is+a+direct+and+causal+relationship+between+the+activity+engaged+in+and+the+harm+done+to+the+enemy&source=gbs_navlinks_s (last accessed on 13 January 2015).
[108] Message from the President Transmitting Two Optional Protocols to the Convention on the Rights of the Child, S, Treaty Doc No 106-37 (2000) available at 2000 WL 33366017 at 41; Christensen, ER *op cit* note 105 at 16.

relationship between services provided and harm resulting to the enemy, and temporal relation of support to enemy contact or harm resulting to enemy".[109]

Cassese proposes that C-DPH should be construed in an extremely narrow fashion.[110] This means that only those participants actually engaged in armed action are directly participating in hostilities.[111] His opinion seems to be based mainly on a law enforcement model. It is submitted that this approach is disconnected from the realities of armed conflicts and provokes disrespect for LOAC.[112]The 'revolving door' that is created hereby is unsustainable.[113] My personal interpretation is also based on an extremely narrow notion of C-DPH, but this interpretation only includes sporadic and unorganised acts of participation by civilians and to leaves members of the regular armed forces and members of organised armed groups open to intentional targeting throughout the existence of the armed conflict.

The broad approach covers hostile acts that intend to cause harm to armed forces or civilians.[114] The *Targeted Killing case* extends the meaning of hostilities to include gathering intelligence and preparing for hostilities.[115] This approach regards an individual civilian who directly participates in hostilities forfeiting his protection against intentional attack "until he or she unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal".[116] The civilian may thus be intentionally targeted "between episodes of participation. Repeated participation can be the basis of a determination that the individual is continuously engaged and thus continuously liable to attack".[117] This is confirmed in the T*argeted Killing* case which found that a civilian who has joined a "terrorist organisation" and "in the framework of his role in that organisation . . . commits a chain of hostilities" then "the rest between hostilities is nothing other than preparation for the next

[109] Int'L & Operational Law Dep't, The Judge Advocate General's Legal Center & School, U.S. Army, 2 Int'L & Operational Law I-10 Civilian Protections in Armed Conflict (September 2006), quoted in Christensen, ER *op cit* note 105 at 16.
[110] Cassese, A *op cit* note 80.
[111] Ibid at 12 & 13.
[112] Keller, H & Forowicz, MA 'Tightrope between Legality and Legitimacy: an Analysis of the Israeli Supreme Court's Judgment on Targeted Killing' *21 Leiden J. Int'l L.* 185 (2008) at 209.
[113] Kretzmer, D *op cit* note 27 at 193.
[114] *Targeted Killings* case (2006) HCJ 769/02, [33].
[115] Ibid.
[116] Schmitt, MN *op cit* note 20 at 38.
[117] Boothby, B 'And For Such Time As: The Time Dimension to Direct Participation in Hostilities' *42 New York University Journal of International Law and Politics* (2010) at 767–8.

hostility".[118] Here the burden rests on the civilian to contradict the assumption that he is continually C-DPH. This obligation on the civilian may be difficult in practice to accomplish but this is a risk that the civilian undertakes when deciding to directly participate in hostilities. I agree with this notion and civilians who join the regular armed forces and who join organised armed groups must take responsibility for their participation in armed conflict and its possible consequences.

8. The ICRC Interpretation of Civilian Direct Participation in Hostilities

The ICRC Guidance asserts that private contractors and civilian "employees of a party to an armed conflict who are civilians . . . are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities."[119] These civilians are, however, exposed to a greater risk of targeting due to their proximity to military objectives. The expert's consensus was that there must be a link between the act of C-DPH and the foreseeable harmful consequences or the intent to harm for the act to qualify as C-DPH.

The ICRC then asserts that C-DPH refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.[120] Galvin suggests that a narrow interpretation of C-DPH actually increases the risk to the civilian population[121] as it creates confusion and promotes disrespect for LOAC among combatants. He comments that it is illogical to attach participation to the direct release of kinetic forces, as non-kinetic force may be more harmful to the opposing forces in modern armed conflict. Activities far removed from the battlefield may conceivably contribute more than the actual combat activities. The actions of a person performing an indispensable function relative to the application of force against the opposing force, therefore qualify as C-DPH. Galvin, as a result, proposes that the appropriate test for C-DPH is whether the civilian functions as an integral facet of the uninterrupted process of defeating the enemy.

[118] Ibid at 767–8; *Targeted Killings case* (2006) HCJ 769/02, [39].
[119] Melzer, N *op cit* note 67 at 37.
[120] Ibid at 43-45.
[121] Galvin, JE 'Direct Participation in Hostilities: A Proposition for U.S. Reaction to the ICRC's Interpretive Guidance and Formulation for a Practicable Definition' *A Thesis submitted to The Faculty of The George Washington University Law School In partial satisfaction of the requirements for the degree of Master of Laws* May 20, 2012.

The ICRC then provides three cumulative criteria required for a specific act to qualify as C-DPH.[122] The act of C-DPH 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"); [123] 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"); 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").

Schmitt, the head of the US Naval War College's International Law Department, argues that the threshold-of-harm determination requires that "the harm contemplated may either adversely affect the enemy or harm protected persons or objects".[124] This standard only requires an 'objective likelihood'[125] that the consequence of the act will cause harm and the actual 'materialisation of harm'[126] is not required. An objective 'likelihood' will be present when a civilian exhibits subjective intent to cause the harm which is objectively identifiable.[127] The nature of the intended harm determines whether the threshold of harm is achieved and the "quantum of harm caused" is immaterial.[128]

Military harm consists of "not only the infliction of death, injury, or destruction on military personnel and objects", but any outcome which negatively affects the military operations or military capacity of a party to the conflict.[129] Military harm which will "contribute militarily" is the "most common form of harm inflicted during the conduct of hostilities".[130] This 'attack'[131] must only, in the alternative, be likely to cause at least death, injury, or destruction

[122] Melzer, N *op cit* note 67 at 47.
[123] Ibid at 47; 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' *42 N.Y.U. J. Int'L L. & Pol. 831* (2010) at 862.
[124] Schmitt, MN 'Deconstructing Direct Participation in Hostilities: The Constituent Elements'42 International Law and Politics (2010) at 715; Melzer, N *op cit* note 67 at 48; Melzer, N *op cit note 124* at 859.
[125] Melzer, N *op cit* note 67 at 47.
[126] Ibid at 33; Schmitt, MN *op cit* note 125 at 724.
[127] Schmitt, MN *op cit* note 125 at 724
[128] Ibid at 716.
[129] Melzer, N *op cit* note 67 at 47.
[130] Melzer, N *op cit* note 125 at 858. See also Schmitt MN *op cit* note 125 at 717.
[131] See Article 49 of API. Schmitt, MN *op cit* note 125 at 723.

of civilians or civilian objects.[132] These attacks will only be harmful when they are an integral part of armed confrontations which must 'in some way be connected to the armed conflict'.[133]

Various experts have criticised the 'threshold of harm' requirement based on its perceived limited scope and challenging application. Jensen notes that the 'actual harm' standard is excessively restrictive as it does not deal with non-members of an armed group that is party to the conflict.[134] He argues for some differentiation between hostile civilians and those "who disdain hostilities and comply with their status".[135] His interpretation of C-DPH includes "not only those who cause actual harm, but those who directly support those who cause actual harm . . . this would also 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 tactics".[136] Heaton supports Jensen and argues that the threshold requirement excludes the "essential links in the chain immediately preceding that final step".[137] He argues that the final hostile act depends on the 'support personnel', without whom the harm cannot be carried out.[138] The real value of the ICRC study should by now be clear. The study started an evaluation of C-DPH and the understanding thereof has exponentially increased due to the work of the ICRC.

Schmitt's misgiving on the issue is that the "strict application of the threshold of harm constitutive element would exclude conduct that by a reasonable assessment should amount to direct participation".[139] Schmitt favours military necessity,[140] but concedes that the definition of a military objective only includes harm which is military in nature.[141] Schmitt argues for loss of immunity "for support activities which do not adversely affect the enemy" including "unlawful conduct such as the deportation of civilians or hostage taking".[142] Schmitt maintains that any harmful acts directed against protected persons or objects as part

[132] Melzer, N *op cit* note 92. Melzer, N *op cit* note 125 at 861-862; PCATI *op cit* note 9 at para 33.
[133] Schmitt, MN *op cit* note 125 at 723.
[134] Jensen, ET 'Direct Participation in Hostilities' in William C Banks (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare*.' (2011) at 2221-28.
[135] Ibid.
[136] PCATI *op cit* note 9 – the judgment endorsed this conclusion in their judgment at para 35.
[137] Van Der Toorn, D 'Direct Participation in Hostilities': A Legal and Practical Road Test of the International Committee of the Red Cross's Guidance through Afghanistan, 17 *Austl. Int'L L.J.* 7 (2010) at 37.
[138] Ibid.
[139] Schmitt, MN *op cit* note 125 at 714.
[140] Ibid at 714.
[141] Melzer, N *op cit* note 125 at 859.
[142] Schmitt, MN *op cit* note 125 at 723.

of the armed conflict's 'war strategy', or within an obvious relationship with ongoing hostilities, should qualify as C-DPH.

Melzer, predictably, warns against arguments to diminish the required threshold of harm to "extend loss of protection to a potentially wide range of support activities", as he avers that this will weaken the generally recognised distinction between C-DPH and mere involvement in the general war effort'.[143] This supports a humanitarian approach to the requirement.

The Guidance stipulates that "direct causation should be understood as meaning that the harm in question must be brought about in one causal step" and thus excludes activities that indirectly cause harm.[144] The reasonable conclusion is, accordingly, that "temporal or geographic proximity cannot on its own, without direct causation, amount to a finding of direct participation in hostilities".[145] The Guidance does, however, appreciate that "the resulting harm does not have to be directly caused by each contributing person individually, but only by the collective operation as a whole".[146] A specific act may not "on its own directly cause the required threshold of harm, as actions might still amount to C-DPH where the individuals are part of a collective operation".[147] Where an individual act "constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm" the participant will still forfeit immunity.[148] The Guidance defines the word, 'direct' in the legal standard as referring to direct causation as opposed to indirect causation.[149] As a result, a direct causal result implies that the "harm in question must be brought about in one causal step."[150] This one-step idea requires that the causal contribution must be operational and on the battlefield.[151] Temporal and geographic proximity may imply causal proximity, but they

[143] Melzer, N *op cit* note 125 at 877.
[144] Melzer, N *op cit* note 67 at 54 and 55; Melzer, N *op cit* note 125 at 866. This view was endorsed by the PACTI judgment which held that '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' at para 35.
[145] Melzer, N *op cit* note 67 at 56.
[146] Melzer, N *op cit* note 125 at 866.
[147] Melzer, N *op cit* note 67 at 55.
[148] Ibid at 55; Kalshoven, F & Zegveld, L *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (2011) at 102.
[149] Melzer, N *op cit* note 67 at 1021.
[150] Ibid 1021.
[151] Ibid.

do not wholly determine it, since an action could directly cause a particular harm even when far removed in time and space.[152]

The direct causation test deals with whether the general war effort[153] and war sustaining activity qualifies as C-DPH. It is accepted that war sustaining activities[154] are essential to the war effort[155] but the experts at the ICRC's expert meetings "agreed on the centrality of a relatively close relationship between the act in question and the consequences affecting the ongoing hostilities".[156] This requires that there must be "a sufficiently close causal relation between the act and the resulting harm" for the civilian to lose his protected status.[157]

The last requirement of the Guidance requires the specific harm to show a link to the hostilities.[158] This excludes criminal activities "facilitated by the armed conflict", and not "designed to support one party to the conflict by directly causing the required threshold of harm to another party".[159] This belligerent nexus[160] requires that "an act must be purposely designed to directly cause the required threshold of harm, in support of a party to the conflict and to the detriment of another".[161] An act must only be objectively likely to inflict this harm.[162]

The ICRC further specifies that "measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act".[163] The loss of protection due to individual acts of participation consists of "measures preparatory to the execution of a

[152] Ibid at 1023.
[153] Ibid at 53.
[154] Ibid at 52.
[155] Watkin, K 'Opportunity Lost: Organised Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance' 42 *Int'l L and Pol* 641 (2010) at 707; Schmitt, MN *op cit* note 125 at 708 & 728; Melzer, N *op cit* note 67 at 55; PCATI *op cit* note 9 at para 34 - 35; Heaton, R *Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces* at 177-8; Fenrick, WJ 'ICRC Guidance on Direct Participation in Hostilities' *YIHL* (2009) at 293; Melzer, N *op cit* note 125 at 865 - 867; Solis, G *The Law of Armed Conflict: International Humanitarian Law in War* (2010) at 204.
[156] Schmitt, MN *op cit* note 125 at 725.
[157] Ibid at 725.
[158] Melzer, N *op cit* note 67 at 62.
[159] Ibid at 63 & 64; See in general Rogers, APV *Unequal Combat and the Law of War* (2004) at 19.
[160] Solis, G *op cit* note 156 at 204-5.
[161] Melzer, N *op cit* note 125 at 872.
[162] Melzer, N *op cit* note 67 at 64; and Kalshoven, F & Zegveld, L *op cit* note 149 at 102; Schmitt, MN *op cit* note 125 AT 735; Melzer, N *op cit* note 125 at 873.
[163] Melzer, N *op cit* note 67 at 65.

specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act".[164] Civilians should not exploit their immunity as LOAC allows for the temporary suspension of civilians' immunity against direct attack.[165] Military necessity is thus presumed to supersede humanitarian considerations for such time as a civilian directly participates in hostilities.[166]

The ICRC is of the opinion that "[c]ivilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians and lose protection against direct attack for as long as they assume their continuous combat function."[167] The Commentary uses the phrase, 'belongs to' to define membership of armed groups. The test for civilian loss of protection depends on current 'danger to the adversary'. On the contrary, combatants do not need to present harm before they are attacked. The Guidance thus regards 'members of organized armed groups' differently from combatants in IAC's. The Guidance therefore determines membership in an armed group of a non-State party to an NIAC conflict based on whether the person serves in a "continuous combat function."[168] The practical significance of this distinction is to create a category that regards fighters of the armed group of a non-State party to an NIAC as combatants in the regular armed forces. The concepts behind C-DPH and 'members of organized armed groups' are different.[169] Combatants have no protected status in armed conflict, not because they individually pose a threat, but because the group, which they form a part of, poses a threat.

Continuous combat function was first defined in the Guidance[170] as ". . . lasting integration into an armed organised group acting as the armed forces of a non-State party to the armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to

[164] Ibid at 1031.
[165] Ibid at 70.
[166] Melzer, N *Targeted Killings in International Law* (2009) at 331.
[167] Melzer, N *op cit* note 67 at 70-73.
[168] Ibid at 1007.
[169] McBride, D 'Who is a Member? Targeted Killings against Members of Organized Armed Groups' *Australian Year Book of International Law Vol 30* available at http://ssrn.com/abstract=2261128 (last accessed on 1 May 2014).
[170] Watkin, K *op cit* note 156 at 655.

continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.[171] A person is thus considered to function in a continuous combat role when he is involved in the preparation, execution, or command of acts or operations amounting to C-DPH. This term reaffirms the Israeli Supreme Court's finding that organizational members who perform combat functions do not reacquire their civilian immunity during "rest intervals".[172]

Interestingly, it seems that legal experts have attempted to determine the meaning of C-DPH by exponentially legalising the issue. Legally trained persons are usually comfortable to argue by relying on authoritative texts[173] and also usually appeal to a shared set of authoritative sources. The ICRC and, in general, all the other experts, have interpreted C-DPH from this perspective. Complicated terms like, 'three cumulative criteria', 'likely to adversely affect', 'direct causal link', 'directly cause the required threshold of harm', 'direct causation', 'one causal step', 'belligerent nexus' and 'objectively likely' are used. This practice is understandable but it creates confusion and a sense of detachment between the law and the actual situation of a participant during armed conflict.[174]

Legal experts have, it is argued, constructed characterization of C-DPH which is based on concepts in law with which they feel comfortable. C-DPH is, in this regard, equated with the domestic criminal law interpretation of a criminal act and the provision of the defence of necessity. Here, in the same manner as when a person commits a criminal act in domestic law, will a C-DPH be subject to the criminal jurisdiction of the domestic law of the State. Thus the law enforcement personnel may attempt to arrest the participant at that time and may even use lethal action to effect the arrest and defend their and others right to life in terms of the principle of necessity. Once the person has concluded his criminal act, he must be arrested and prosecuted. It will be submitted that this approach does not reflect the reality of armed conflict and the ultimate goal thereof.

[171] Melzer, N *op cit* note 67 at 1007-1008.
[172] Ibid.
[173] Including statutes, legal reasoning in court cases and other regulations and opinions.
[174] Lesh, M *Routledge Handbook of the Law of Armed Conflict, Part II: Principle of Distinction* at 1 – 14 available at http://law.huji.ac.il/upload/Lesh_LossofProtection.pdf (last accessed on 13 January 2015).

9. Direct Participation in Hostilities in International Armed Conflict

The exception to civilian immunity during an IAC is found in API, Article 51(3), which states that "[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities". The drafters at the Diplomatic Conferences did not explain the meaning of 'direct part in hostilities.'[175] The content of API, Article 51(3), must be evaluated within the broader provisions contained in API.

This broader Article 51 relates to the "protection of the civilian population" and provides for general protection of the civilian population and individual civilians from the "dangers arising from military operations."[176] The "protection afforded by this Section" relates to the prohibitions contained in API, Article 51(1),[177] (2),[178] and (4)[179] to (8). Article 51(1)(b) forbids as indiscriminate any "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".[180]

Civilians are also not to be made the object of attack,[181] are to be protected from the dangers arising from military operations. This imposes prohibitions on parties to the conflict on carrying out indiscriminate attacks,[182] reprisals against civilians[183] and from using civilians to

[175] See the Additional Protocols Official Records XV at 330, CDDH/III/224; see also AP Commentary at 618-619, paras 1942-1945; and Bothe, M; Partsch, KJ & Solf, W *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) at 301-304, paras 2.4 – 2.4.2.2 .
[176] API, Article 51(1).
[177] API, Article 51(1) specifically states that "[t]o give effect to this [general] protection, the following rules, which are additional to other applicable rules of international law, shall be observed in circumstances."
[178] In this regard the "civilian population and 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."
[179] API, Article 51(4) then prohibits indiscriminate attacks, which includes attacks not directed at a specific military objective; which employ a method or means of combat which cannot be directed at a specific military objective; or 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.
[180] API, Article 51(1)(b).
[181] See ICRC CLOAC Study, Rules 1-2, 5-6, and 7-10.
[182] API, Article 51(5)(a) & (b) - Indiscriminate attacks are regarded as 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.
[183] API, Article 51(6) - Reprisal attacks against the civilian population or civilians are also prohibited.

protect military installations or sites.[184] API, Article 51(8), refers to obligations including those precautionary measures provided for in API, Article 57.

API, Article 57, refers to precautions in attack and states that "constant care shall be taken to spare the civilian population, civilians and civilian objects".[185] API, Article 57(2), requires those who plan and decide on attacks to take precautions and do "everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 (Attacks shall be limited strictly to military objectives) and that it is not prohibited by the provisions of this Protocol to attack them; take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; [186] refrain from deciding to launch any 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.[187] API, Article 57(2)(a)(iii), accordingly requires that a person responsible for an attack take into account the principle of proportionality. The ICRC Commentary states that "[t]his idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 '(Basic Rule)' and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive".[188]

In addition, attacks must be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection, or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[189] The article requires effective advance warning of attacks which may

[184] API, Article 51(7) prohibits the use of the civilian population or individual civilians 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.
[185] API, Article 57(1).
[186] API, Article 57(2)(a)(ii)
[187] API, Article 57(2)(a)(iii).
[188] Sandoz, Y et al *op cit* note 61 at para 1980.
[189] API, Article 57(2)(b).

affect the civilian population, unless circumstances do not permit such a warning.[190] API, Article 57(3), requires that "[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects."[191] API, Article 57(4), refers to military operations at sea or in the air and the precautions that are required in the execution thereof. The interpretation of API, Article 51(3), should thus incorporate these provisions.

Article 51(3) has been widely accepted and has, to date, had no reservations to its applicability.[192] API creates specific circumstances where certain persons intentional targeting is considered to be legal.[193] The adoption of API significantly increased the protection afforded to civilians by approving a broad definition of 'civilian' to comprise all persons who do not qualify as a 'combatant'.[194] Now only civilians who take a direct part in hostilities lose their protection from intentional attack and indirect participation in hostilities is not sufficient to cause such forfeiture of protection.[195]

It is thus clear that API, Article 51(3), in its final form, did not merely reaffirm the existing rules of international law designed to protect civilians.[196] Article 51(3) constituted a significant modification in the balance between such force as is necessary to subdue the enemy[197] and humanity which should prevail over necessity, except where civilians directly participate in hostilities. Humanity has been accepted as a general principle of international law already in *Corfu Channel*[198] as well as later in the 1996 *Legality of the Threat or Use of Nuclear Weapons* advisory opinion.[199]

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[190] API, Article 57(2)(c).
[191] API, Article 57(3).
[192] API, Article 51(3) (adopted by seventy-seven votes in favour, one against, and sixteen abstentions) - See Official Records of the Diplomatic Conferences, Vol. VI, CDDH/SR.41, 164-204, §§ 119-181.
[193] See in general Engdahl, O & Wrange, P (eds) *op cit* note 50 at 210.
[194] API, Articles 50(1), 43; GCIII, Article 4A.
[195] See Sandoz, Y *op cit* note 61.
[196] UK, Statement at the CDDH, Official Records, CDDH/SR.41, 1977 at 164, [119].
[197] *Hostage Case* (USA v. List et al.), Nuremberg Military Tribunals, Hostage Case (USA v. List et al.), 11 NMT 1230, 1253 (1948) at 1253. See also Dunlap, Jr CJ *op cit* note 62 at 14, discussed in Schmitt, MN 'Targeting and Humanitarian Law: Current Issues' *Israel Yearbook on Human Rights Vol 34* (2004) at 71–2.
[198] I.C.J. Reports 1949 at 22
[199] Opinion given on 8 July 1996, General List No 95.

API, Article 51(3), has been interpreted to "usually mean[s] attacking enemy combatants or military objectives" or "engaging in acts of war directed towards enemy personnel or material".[200] Melzer holds the view that 'hostilities' refers only to situations of extreme violence.[201] The final ICRC commentary on Article 51(3) of API referred to the carrying out of 'hostile acts'.[202] This confused C-DPH with engaging in 'hostile acts' and considerable latitude in the interpretation of C-DPH remained. The ICTY concluded in the Galic matter that to "take a 'direct' part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or material of the enemy armed forces".[203] The ICRC Commentary states that C-DPH refers to "acts which by their nature and purpose are likely to cause actual harm to the personnel and equipment of the armed forces",[204] and "covers not only the time that [a] civilian actually makes use of a weapon, but also, for example, . . . situations in which he undertakes hostile acts without using a weapon".[205] The existence of harm was not required and it will be argued that direct participation relates to risk, more specifically, the risk that a person undertakes to enter the armed conflict.

10. Direct Participation in Hostilities in Non-International Armed Conflict

NIAC has become pervasive in some areas of the world during the latter half of the twentieth century and this is still applicable today.[206] Some States, including, *inter alia*, Angola and Myanmar, have been involved in an NIAC since their independence, while others, including the Philippines, Sri Lanka and the Sudan, have experienced protracted NIAC's for most of their history.[207] Statistics show that NIAC's are moving from brevity to longevity, which impacts on cost and human suffering.[208] This translates to massive civilian casualties, refugees, economic collapse and obstructed development. Many other States, including Mozambique, Nigeria, Cambodia and Afghanistan, have also experienced protracted NIAC's. It may be argued that the international system post-1945 has supported the establishment of

[200] Henderson, I 'Contemporary Law of Targeting: Military Objectives, Proportionality, and Precautions in Attack under Additional API' *International Humanitarian Law Series Vol 25* (2009) at 99.
[201] Melzer, N *Targeted Killing in International Law* (2008) at 243.
[202] Sandoz, Y *op cit* note 61 at [1942].
[203] *Prosecutor v Galic*, (Trial Chamber) Case No IT-98-29-T (5 December 2003) at 48.
[204] Sandoz, Y et al *op cit* note 61 at 1944.
[205] Ibid at 617 at paras 1942–43; See also Vandewiele, T *op cit* note 53 at 22.
[206] See in general Hironaka, A .*'Neverending Wars: The International Community, Weak States, and the Perpetuation of Civil War* (2008) at 1.
[207] Ibid.
[208] Ibid.

'weak' States which may be susceptible to NIAC's.[209] States display a marked disparity in military power based on technological advancements which create an environment for widespread NIAC's.[210] Most NIAC's currently display characteristics of asymmetric warfare where there is a substantial inequality between the quantity and quality of the military power available to the adversaries in the conflict.[211] This is usually true where State parties are involved in armed conflict with non-State actors. Non-State armed groups challenge the application and legitimacy of LOAC.[212]

The relevant provisions of the international instruments pertaining to C-DPH in NIAC are common Article 3 to the GC's and APII, Article 13(3). Common Article 3 refers to the term 'persons' when dealing with those "taking no active part in the hostilities". This includes "members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, . . . ".[213] The GC's, for example in GCI, Article 22(5), later refer to "the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick". There are thus civilian wounded and sick and members of the armed forces who share the same fate. Members of the armed forces and civilians are therefore included in the term, 'persons'. GCIV, Article 10, refers to "the protection of civilian persons". Interestingly GCIV, Article 15, refers to "civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character".[214] The only other references to the term, 'active' state "[n]o repatriated person may be employed on active military service",[215] and that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities".[216]

APII, Article 13(3) relating to C-DPH in NIAC, has been referred to as meaning "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and

[209] Ibid.
[210] John-Hopkins, M 'Regulating the Conduct Urban Warfare: Lessons from Contemporary Asymmetric Armed Conflicts' *International Review of the Red Cross Vol 92 No 878* (June 2010) at 470.
[211] Schmitt, MN 'Asymmetrical Warfare and International Humanitarian Law' *Vol. 62 A.F. L. Rev.* (2008).
[212] See in this regard Perrin, B *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organisations, and the Law* (2012) at 2.
[213] GC's, Common Article 3(1).
[214] GCIV, Article 15(b).
[215] GCIII, Article 117.
[216] GCIII, Article 118.

equipment of the enemy armed forces".[217] This should be interpreted to include, but is not to be limited to, causing harm to personnel or equipment of the adversary.[218] The Commentary to APII, Article 13(3), confirms the notion that a civilian forfeits protection against intentional attack by presenting a threat to his adversary for as long as his participation continues. The civilian may no longer be intentionally attacked from the time that he no longer presents any danger for his adversary.[219]

It is again submitted that APII, Article 13(3), must be evaluated within the broader provisions of APII. APII, Article 13(1), provides that "[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances." Sub-article 2 confirms that "[t]he 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". This is then followed by the NIAC civilian immunity exception in sub-article 3.

APII, Article 13, provides general protection to civilians against the dangers arising from military operations. APII, Article 13(2), states that civilians will forfeit immunity for such time as they take a direct part in hostilities. The Diplomatic Conferences which debated and adopted the AP's declined to extend the category of legitimate combatant to persons taking part in NIAC under APII. It is possible that the definition of 'combatant' in API was linked to the Hague definition of 'qualified belligerent' and this might explain why a similar definition was not included in APII. The thought process is therefore that only government forces are allowed to use force lawfully, thus excluding non-State actors from this definition. States are uncomfortable with the idea of their own citizens taking up arms against them and receiving protection for such actions.

[217] *Prosecutor v Rutaganda* (Trial Chamber) Case No ICTR-96-3-T (6 December 1999) at 100; See also *Prosecutor v Semanza* (Trial Chamber) Case No ICTR-9620-T (15 May 2003) where the same conclusion was reached at 363-366).
[218] Henderson, I *op cit* note 201 at 105.
[219] Sandoz, Y et al *op cit* note 61 at [4789].

11. 'Hostile Act' in International and Non-International Armed Conflict

C-DPH is based on specific acts, which must be likely to cause military harm or death, injury or destruction to a party to the conflict.[220] The API Commentaries, regarding Article 51(3), state that "[h]ostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces".[221] The *Targeted Killing* case also found that hostile acts constitute acts against civilians.[222]

Direct participation may be interpreted to include the causing of damage to the adversary or supplying the adversary.[223] This definition is considered problematic as civilian participation in armed conflict is escalating on a level not expected in 1949 or 1977. Voluntary civilian participation was, amongst others, present in the Georgia-Russia conflict of 2008[224] and during Operation Cast Lead in Gaza.[225] Cyber participation in armed conflict specifically marks an increased opportunity for civilians to conduct harmful actions against an adversary. This trend is further exacerbated as such cyber involvement has proven to be relatively unproblematic and these actions are taken by persons that are generally not aware of the possible implications of their participation under LOAC.[226] The definition of who is a combatant is almost identical to who qualifies for prisoner-of-war status.[227]

The ICRC Commentary on API states that "the word 'hostilities' refers to the time that the civilian actually makes use of a weapon" but also refers to "the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon".[228] The

[220] Melzer, N *op cit* note 67 at 47.
[221] Sandoz, Y et al *op cit* note 61 at para 1942. See also Sassòli, M 'Targeting: The Scope and Utility of the Concept of "Military Objectives" for the Protection of Civilians in Contemporary Armed Conflicts' in Wippman, D & Evangelista, M *New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts* (2005) at 201.
[222] PCATI *op cit* note 9 at para 33.
[223] API, Article 51(3); See Kodar, E 'Applying the Law of Armed Conflict to Cyber Attacks: From the Martens Clause to Additional Protocol I' *ENDC Proceedings* Vol 15 (2012) at 124.
[224] See the reports produced by Project Grey Goose (2007) Phase I Report: Russia/Georgia Cyber War – Findings and Analysis (17 October) available at www.scribd.com/doc/6967393/Project-Grey-Goose-Phase-I-Report and Project Gray Goose (2009) Phase II Report: The Evolving State of Cyber Warfare (20 March) available at www.scribd.com/doc/13442963/Project-Grey-Goose-Phase-II-Report (both last accessed on 1 May 2014).
[225] Shachtman, N 'Wage Cyberwar Against Hamas, Surrender Your PC' – Wired (8 January 2009) available at www.wired.com/dangerroom/2009/01/israel-dns-hack/ (last accessed on 1 May 2014).
[226] See Kodar, E 'Applying the Law of Armed Conflict to Cyber Attacks: From the Martens Clause to Additional Protocol I' *ENDC Proceedings Vol 15* (2012) at 124.
[227] Ricou Heaton, J 'Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces' *57 A.F. L. Rev. 155, 182* (2005) at 169.
[228] Commentary on API, at Article 51(3).

element of hostilities is ambiguous and no official definition of 'hostilities' exists in LOAC.[229] This confusion is highlighted when, for example, voluntary civilian human shields are considered. These persons acting as shields will qualify as C-DPH and they may thus be intentionally targeted.[230] The Commentary further notes that "[h]ostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces."[231] It is argued that "acts which by nature or objective are intended to cause damage to civilians should be added to that definition".[232]

The Inter-American Commission on Human Rights held that "mere support" of the military effort by a civilian constitutes indirect participation.[233] Accordingly, indirect participation does not involve "acts of violence which pose an immediate threat of actual harm to the adverse party."[234] The Inter-American Commission on Human Rights further found that C-DPH means "acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and material."[235] Actual harm must be differentiated from civilian actions that only support the State's interest, even if such actions eventually but remotely cause harm indirectly to the adversary.[236] It is submitted that hostile acts are not the requirement for C-DPH and that the object of armed conflict is to reduce the ability or will of the adversary, as a collective, to conduct hostilities. Individual acts of hostility cannot be the test for C-DPH as this is inconsistent with the nature of armed conflict. The ICRC's Commentary which concludes that C-DPH "implies a direct casual relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place"[237] is, as a result, rejected as impractical. This interpretation of C-DPH, as illustrated with examples of acts that qualify as C-DPH, by Schmitt,[238] shows that these determinations are likely to be of little assistance in combat as they are legally well reasoned but complicated to apply

[229] ICRC, Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities 60 (2005) at 17 available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/ (last accessed on 1 May 2014).
[230] Dinstein, Y *op cit* note 44 at 130.
[231] Commentary on API, at Article 51(3).
[232] Christensen, E 'The Dilemma of Direct Participation in Hostilities' *19 J. Transnat'l L. & Pol'y 281* (2009) at 288.
[233] Henckaerts, J and Doswald-Beck, L (eds) *op cit* note 15 Vol II at 114 (citing Third Report on Human Rights in Columbia, Doc. OEA/Ser.L/V/ II.102 Doc. 9 rev. 1, February 26, 1999, paras 53–6).
[234] Ibid.
[235] Ibid.
[236] Walzer, M *Just and Unjust Wars* (2000) at 146.
[237] Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary report at 21.
[238] Schmitt, MN *op cit* note 7 at 545.

practicably.[239]It may also be noted that the term, C-DPH is also used in API, Article 77(2), relating to children under the age of 15 and their participation in hostilities.

C-DPH does not require direct proximity to the battlefield or zone of combat.[240] These concepts are, at the very least, very difficult to define accurately as the modern armed conflict does not display concentration and brevity anymore. LOAC was intended to function within temporal and geographic realms but contemporary armed conflicts do not generally display a limited and identifiable territorial or spatial dimension as participants in armed conflict no longer require specified territory in which armed conflict occurs.[241] This definition excludes planning, training and associated activities that may occur universally.[242] It must be accepted that there "is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring States . . . whether or not actual combat takes place there . . . A violation of the laws or customs of war may therefore occur at a time and in a place where no fighting is actually taking place".[243] This reasoning is not totally applicable to modern armed conflict, especially where transnational organised armed groups are involved. It, however, illustrates the point that proximity is not required and that actual immediate threat is also not necessary before a person may be intentionally targeted, based on C-DPH.

The Commentary to Rule 6[244] of customary LOAC states that the rule may create an imbalance where members of armed non-State groups are considered to be civilians. Members of the regular armed forces may be attacked at any time during the armed conflict but members of armed non-State groups may only, according to the traditional interpretation of C-DPH, be legitimately targeted for "such time as they take a direct part in hostilities". The solution is to regard all members of armed groups participating in armed conflict as continuously taking a direct part in hostilities, or not as civilians.

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[239] See in general Henderson, I *op cit* note 201 at 103.
[240] Schmitt, MN *op cit* note 20 at 510-512.
[241] See in general O'Connell, ME 'Combatants and the Combat Zone' *43 U. Rich. L. Rev. 845* (2009) at 858; Blank, LR 'Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat' *Georgia Journal of International and Comparative Law Vol 39 No 1* (2010) *No 1* at 22.
[242] Blank, LR *op cit* note 243 at 22.
[243] *Prosecutor v Kunarac, Kovac and Vukovic* (Appeals Chamber) Case No IT-96-23&23/I (12 June 2002) at 57.
[244] 'Civilians are protected against attack unless and for such time as they take a direct part in hostilities'.

The International Criminal Tribunal for the former Yugoslavia ("ICTY") has confirmed that a substantial body of customary international law exists to regulate NIAC.[245] These customary rules, in general, protect civilians and civilian property from direct attack and unnecessary harm. The laws applicable to NIAC's must be distinguished from counter-terrorism operations where mainly domestic and/or international criminal law would apply.[246]

The armed conflict between the Russian Federation and the Government in the disputed regions of Abkhazia and South Ossetia included military actions by combatants and civilians who engaged directly in hostilities.[247] Many have referred to this as the 'democratization of violence' where, *in causa*, Abkhazi and South Ossetian militiamen, bandits and armed gangs participated in the hostilities. It is not suggested here that C-DPH is a new phenomenon and that civilians have always played a significant role in armed conflict.[248] In this regard, civilians will only retain their protected status "unless for such time as they take a direct part in hostilities".[249] It is submitted that C-DPH thus includes a possibility, and probably even provides for such participants to never forfeit their civilian status, but to only forfeit their protection for as long as they directly participate in the hostilities. Williams states that such participants will "go back to being civilians afterwards".[250] It is therefore submitted that this statement cannot be sustained as the person will never lose his civilian status.

12. 'For Such Time' in International and Non-International Armed Conflict

Civilians are only legitimate targets "for such time as they take a direct part in hostilities".[251] The meaning of, 'for such time' relates to the parameters of the time periods of C-DPH. This phrase suggests that there is a beginning of the loss of civilian immunity, which extends for a certain period of time.[252] This temporal element permits civilians to regain their immunity by disengaging from hostilities. However, there is considerable controversy over the interpretation of this element.

[245] *Tadic* (Jurisdiction) 35 ILM 32 (1996).
[246] Aytac, O *Legal Aspects of Combating Terrorism, Centre for Excellence Defence Against Terrorism* (2008) at 77.
[247] Uhler, OM et al 'IV Commentary on the Geneva Convention Relative to the Protection of Civilian Person in Time of War' *62* (Pictet, JS (ed) *Ronald Griffin & C.W. Dumbleton trans., 1958)* at 2.
[248] Ibid at 2.
[249] API, Article 51(3).
[250] Uhler, OM et al *op cit* note 249 at 3.
[251] API at Article 51(3).
[252] Lesh, M *op cit* note 175 at 14 - 16.

This issue also relates to the narrow and broad approaches to C-DPH. The narrow approach is based on a strict textual interpretation of the phrase, 'unless for such time'.[253] C-DPH here refers to specific acts which result in the loss of protection. This approach is endorsed by the ICRC Commentary which equates C-DPH with "acts of war".[254] It is submitted that this approach confirms that C-DPH does not apply to the actions of non-State armed groups as the narrow approach would preclude the intentional targeting of the leadership of these groups that only plan and give orders to its members, as opposed to committing specific aggressive acts. The Guidance specifies that preparatory measures must be "of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act".[255] It may be argued that this interpretation is too restrictive,[256] that preparatory acts before deployment may constitute C-DPH and that command functions normally focus on specific acts, but they also aim to establish a general capacity to pursue the successful resolution of the armed conflict as a whole.[257]

From the onset it must be noted that it is unrealistic to require participants in an armed conflict to be reactive and to target an individual who is actually busy attacking them. This thinking will erode the integrity of LOAC. An argument will thus be made which leaves civilians, who voluntarily directly participate in armed conflict, at risk of immediate and possible future targeting. This is based on the possibility that those responsible for targeting decisions may not be aware that the civilian has ceased to directly participate in the conflict; the civilian therefore assumes the risk of being regarded as part of the military potential of the adversary and thus subject to immediate and future intentional targeting.[258]

A civilian will only forfeit protection from direct attack 'for such time' as he takes a direct part in hostilities. It may be argued that this creates a temporal limitation on the loss of protection from direct attack. API, Article 52(2), contains another temporal restriction where it refers to military objects which must be accessed only "in the circumstances ruling at the time". Combatants lose protection from attack by being a member of the regular armed forces

[253] Ibid at14.
[254] Sandoz, Y et al *op cit* note 61 at para 4789.
[255] Melzer, N *op cit* note 67 at 65 – 66.
[256] Boothby, B *op cit* note 118 at 741.
[257] Melzer, N *op cit* note 124 *42 New York Journal of International Law and Politics* (2010) at 867.
[258] Watkin, K 'Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing' *Duke Journal of Comparative & International Law Vol 15: 281* (2005) at 311-313.

or militia, etc. Many scholars have argued that a strict interpretation of API, Article 51(3), means that civilians may take a direct part in hostilities and then return to their daily activities, leaving them immune to attack but liable to domestic criminal prosecution for the acts of C-DPH.[259] It is argued that this argument is flawed and does not correspond to current or past State practice. It is further argued that continued acts of C-DPH may, in certain circumstances, lead to the future loss of immunity to direct attack and that this interpretation is justifiable in terms of API, Article 51, and military necessity. Schmitt states that LOAC must be interpreted "in light of the underlying purpose of the law".[260]

The ICRC Commentary on APII provides that a civilian who directly participates in hostilities "will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked . . ."[261] While vague, this definition appears to inherently incorporate an element of threat. Phrased conversely, it would appear that a civilian-terrorist may be attacked for such time as he presents a threat to the state. However, the definition is silent as to whether terrorist leaders and planners constitute such a threat.

Schmitt correctly states that persons responsible for targeting decisions will lose respect for LOAC which, in turn, will expose the civilian population as a whole to greater danger. He also argues that civilians will be less inclined to commit acts of C-DPH where these act will place them at risk of direct attack. It is submitted that he correctly argues that civilians who opt into hostilities "remains a valid military objective until unambiguously opting out".[262] This argument places the risk for actions correctly, with the risk-taker being the civilian. This includes the risk that a civilian, who has committed an act of C-DPH, may be targeted where the person responsible for the targeting decision is not aware of the civilian's withdrawal from hostilities. The Israeli Supreme court also found that "a civilian who . . . 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".[263]

[259] See Henderson, I *op cit* note 201 at 95.
[260] Schmitt, MN *op cit* note 20 at 510.
[261] Sandoz, Y et al *op cit* note 61.
[262] Schmitt, MN *op cit* note 20 at 510.
[263] PCATI *op cit* note 9 at 39.

The ICRC Commentary states that C-DPH includes "preparation for combat and return from combat," but that "once he ceases to participate, the civilian regains the right to protection . . . ." This language seems to indicate that a civilian can be a "farmer by day and a guerrilla by night". This criticism, known as the 'revolving door' approach, points out that such logic not only encourages terrorists to seek refuge among civilian populations, but also limits armed forces' ability to fight terrorism. In response, some experts have proposed a 'membership approach', whereby known members of an armed group could be targeted at any time, and civilians would have the burden of demonstrating affirmative disengagement from an armed group. While this approach seems to contradict the 'direct' and 'for such time' elements of C-DPH, the 'membership approach' does seem to be gaining in popularity and will be discussed later in this report. Nevertheless, reservists already operate under the 'revolving door' approach and are only legitimate targets while on active duty and cannot legally be targeted when they return to civilian life.

The Israeli Supreme Court held that there is no international consensus regarding the meaning of the temporal element of C-DPH. [264] Civilians who engaged in C-DPH sporadically should not be intentionally targeted but a civilian who habitually engages in hostile acts may be intentionally targeted at any time.[265] This court thus favours a case-by-case analysis for the challenge of C-DPH. This view is supported by Schmitt who argues that C-DPH requires a case-by-case analysis due to the subjective and sometimes vague elements of C-DPH.[266] The *US Naval Handbook* simply concludes that C-DPH "must be judged on a case-by-case basis".[267]

It may be argued that the, 'for such time' requirement in the C-DPH exception is based on a threat and not to limit the potential of the adversary. Henderson states that the challenge is to determine when a civilian's actions present an immediate and clear physical danger to an adversary.[268] This reasoning is flawed as there is no evidence that threat is the requirement

[264] Ibid at para 39.
[265] Ibid at para 39.
[266] Schmitt, MN *op cit* note 7 at 534.
[267] See Henckaerts, J and Doswald-Beck, L (eds) *op cit* note 15 Vol I at 24 & Vol II at 117. The US Air Force handbook offers additional examples including civilian ground observers that report the approach of hostile aircraft and rescuers of downed military airmen.
[268] Henderson, I *op cit* note 20 at 94.

for the loss of protection against attack. The ICRC suggested draft clause to the 1971 *Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Principles in Armed Conflicts* drew a distinction between civilians who took a part in military operations and civilians who contributed to the military effort.[269] It is suggested that this is a better view in that it refers to a 'contribution' and not to a threat.

The temporal scope of C-DPH should be interpreted as widely as possible. The protection that LOAC affords to the civilian should be directed at non-participating or indirectly participating civilians who do not risk direct participation in the hostilities as they are not the main object of these civilians that abuse the law to obtain an advantage therefrom.

With regard to the 'for such time' element of C-DPH, the ICRC Interpretative Guidance states that direct participation for civilians is limited to each single act. The initial act of direct participation would be the actual preparatory measures for that specific act, while participation terminates when that activity ends.[270] The ICRC's Guidance set a test which each specific act by the civilian must meet. This requires observance of three cumulative requirements to constitute C-DPH. These include the "threshold of harm" that is objectively likely to result from the act, either by adversely impacting on the military operations or capacity of the opposing party, or by causing the loss of life or property of protected civilian persons or objects; the act must cause the expected harm directly, in one step; the act must have a "belligerent nexus" and it must be specifically designed to support the military operations of one party to the detriment of another. This test, in general, eliminates conduct that is 'indirect'.[271] The conduct must "constitute[s] an integral part of armed confrontations occurring between belligerents".[272]

Necessity under domestic law and necessity under LOAC operate differently. Necessity in LOAC refers to the need to overcome the military potential of the adversary as opposed to the

[269] Ibid at 94.
[270] Melzer, N *op cit* note 72.
[271] HPCR Commentary section C.28(2) at n 278; Melzer, N *op cit* note 124 at 858.
[272] Ibid at 859; See also in general the Human Rights Council, Fourteenth Session, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, A/HRC/14/24/Add.6 at 19-20.

presence of a threat. The 'for such time' requirement of C-DPH must be interpreted in terms of necessity as understood in LOAC.

13. Status and Rights of Civilians Directly Participating in International Armed Conflict

Civilians who directly participate in hostilities in an IAC are, according to some experts, "unprivileged belligerents" and are covered by only the provisions of common Article 3 and possibly by API, Article 75, as treaty law of customary LOAC. The second school of thought regards civilians, who have taken a direct part in hostilities and who satisfy the nationality criteria set out in GCIV, Article 4, as protected persons within the meaning of GCIV.[273]

The beginning and termination of hostilities demarcate the parameters of the period to evaluate the temporal scope of C-DPH. There is a narrow approach to the 'for such time' requirement which interprets the loss of civilian protection as lasting for the duration of the specific act which must be "of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act".[274] This approach is clearly too restrictive as it does not account for preparatory acts and is not supported by State practice.

14. Status and Rights of Civilians Directly Participating in Non-International Armed Conflict

Civilians who directly participate in NIAC are subject, for the duration of their participation, to the same rules regarding the loss of protection from intentional attack that apply during IAC. Civilians detained in NIAC's for directly participating in NIAC's do not, as a matter of law, enjoy prisoner-of-war status and may be criminally prosecuted by the detaining State under domestic law for their participation. Their rights during detention will be governed by LOAC, IHRL and domestic law.[275] NIAC treaty law makes no mention of proportionality but the ICRC customary LOAC Study asserts that the principle represents a customary LOAC principle and therefore will apply in NIAC.[276]

[273] Keynote Address by Beerli, C 'ICRC Vice-President Scope and Application of International Humanitarian Law' *Proceedings of the Bruges Colloquium No 43* (Autumn 2013).
[274] Melzer, N *op cit* note 67 at 65–6.
[275] Keynote Address by Beerli, C *op cit* note 275.
[276] Matthews, H 'The Interaction between International Human Rights Law and International Humanitarian Law: Seeking the Most Effective Protection for Civilians in Non-International Armed Conflicts' *The*

15. The Direct Participation Exception to Civilian Immunity and the Nature of Armed Conflict

C-DPH must be interpreted from at least two perspectives. The first is from the perspective of the participant in the conflict, where such a participant may not intentionally target a civilian, and from the perspective of the civilian, who should not directly participate in the conflict. It is, however, submitted that armed forces seem to distinguish between combatants and civilians due to the nature of conflict based on self-interest. Direct participants do not intentionally target civilians as they do not want to lose the goodwill of the civilian population which is seen as an asset for intelligence purposes. The law needs to take into account this reality as the principle of distinction may only be adhered to where it benefits the armed participants and distinction may become part of military necessity.

There is a difference between offensive and defensive action in armed conflict. Defensive action is mostly based on the presence of a threat and C-DPH rule does not create a real challenge. It is submitted that it is difficult for a person with a strong affiliation to an armed group, regular or irregular, as his actions are linked to that of the group; therefore the targeting will attempt to limit the group's ability to commit further hostile acts. This is similar to averring that a combatant may commit a single act of C-DPH. The closest that a combatant may come to such action would be an unauthorised action, which would probably qualify as a criminal act. Here the collective will act as one; therefore C-DPH is impossible. C-DPH may flow from civilians who are affiliated to a group with very little structure and organisation or where a person, not associated with any group, commits an act against the armed forces. Where this is a criminal act, IHRL would probably apply and an attempt should be made to capture the perpetrator. However, where a person, who is affiliated to an armed group, commits a criminal act of which the leaders of the group have prior knowledge but fail to take action to prevent such criminal act, this act will also qualify as an act committed as a member of the group.

16. Obligations and Risk in Armed Conflict

The main issue in civilian C-DPH is that of risk. The civilian that enters the armed conflict has to accept the risk of being intentionally targeted even where he has terminated his

International Journal of Human Rights, Vol. 17 Nos 5-6 (2013) at 635 available at http://dx.doi.org/10.1080/13642987.2013.831694 (last accessed on 1 May 2014).

participation, as the adversary may still regard him as a military objective, based on information available. This may well be a reasonable assumption on the targeting party's behalf in time of armed conflict where perfect intelligence is not always available. The additional risk is that which is created for those non-participating civilians through the actions of the civilians who directly participate. Such actions should not receive any favourable treatment from the law. Military necessity and humanity towards civilians therefore require the intentional targeting of C-DPH.

17. State Practice

The US seems to consider several 'distinct signatures' as sufficient to establish that an attack by an unmanned aerial vehicle ("UAV") would satisfy the principle of distinction. The US divides these signatures into signatures that are legally adequate; signatures that are never legally adequate; and signatures that can be either legally adequate or legally inadequate, depending on how the US interprets the signature.[277] These categories have been developed specifically with regards to *al-Qaeda* and AQAP. These signatures which are always considered legally adequate under LOAC include the planning of attacks,[278] transporting weapons,[279] handling explosives, [280] known armed group compounds,[281] and armed group

[277] Heller, KJ 'One Hell of a Killing Machine: Signature Strikes and International Law' *Melbourne Legal Studies Research Paper No. 634 Journal of International Criminal Justice* (2012) at 8.
[278] See Melzer, N *op cit* note 67 at 1023; High Court of Justice, Israel 769/02 Public Committee Against Torture in Israel v the Government of Israel at para 12; see also Rogers, APV 'Direct Participation in Hostilities' *48 Military Law and Law of War Review* (2009) 144-160, at 157; Dinstein, Y. Distinction and Loss of Civilian Protection in International Armed Conflicts, 84 International Law Studies Series of the US Naval War College (2008) at 190; Schmitt, M 'Unmanned Combat Aircraft Systems and International Humanitarian Law' *30 Boston University International Law Journal* (2012) 595-619 at 612; Jenks et al *The Law of Armed Conflict: An Operational Approach* (2012) at 151.
[279] Barnes, J US 'Relaxes Drone Rules' *Wall Street Journal* 26 April 2012 available at http://online.wsj.com/article/SB10001424052702304723304577366251852418174.html (last accessed on 1 May 2014). According to API, Article 52(2), '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 neutralization, in the circumstances ruling at the time, offers a definite military advantage'. Weapons make an 'effective contribution to military action' by their nature; an object transporting weapons in a combat zone makes such a contribution through use.
[280] Cloud, D 'CIA Drones Have Broader List of Targets Los Angeles' *Times* (5 May 2010) available at http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506 (last accessed on 1 May 2014); G. Miller, CIA Seeks New Authority to Expand Yemen Drone Campaign. The Washington Post, 19 April 2012 available at http://www.washingtonpost.com/world/national-security/cia-seeks-new-authority-o-expand-yemen-drone-campaign/2012/04/18/gIQAsaumRT_story.html?tid=pm_world_pop (last accessed on 1 May 2014).
[281] Miller, G 'CIA Seeks New Authority to Expand Yemen Drone Campaign' *The Washington Post* (19 April 2012) available at http://www.washingtonpost.com/world/national-security/cia-seeks-new-authority-o-expand-yemen-drone-campaign/2012/04/18/gIQAsaumRT_story.html?tid=pm_world_pop (last accessed on 1 May 2014).

training camps.[282] Legally inadequate signatures that are considered legally inadequate under LOAC,[283] although the US has targeted persons under this category, are military-age males in areas of known terrorist activity,[284] consorting with known militants[285] armed men travelling in trucks in an armed group controlled area[286] and suspicious camps in an armed group controlled area.[287] Possibly adequate signatures have been identified; their legality depends on how the US interprets them. Some possible interpretations would justify a signature strike.[288] These include groups of armed men travelling toward a conflict area,[289] operating an armed group training camp,[290] training to join an armed group[291] and facilitators of terrorist activity.[292]

18. Specific Issues: Cyber Warfare

An area of prominence regarding C-DPH relates to civilians who participate in armed conflict by causing harm via the use of cyber-attacks on computer networks. The information age has resulted in people living with new perceptions of awareness. Cyberspace is continuously expanding and is comprised of a digital network that links, *inter alia*, social, business and military communications.[293] The information communication environment relies on satellites,

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[282] Quoted in Munter Found Drone Strikes Unacceptable Dawn (30 May 2012) available at http://dawn.com/2012/05/30/munter-found-drone-strikes-unacceptable/ (last accessed on 1 May 2014).
[283] Heller, KJ *op cit* note 279 at 11.
[284] Becker, J & Shane, S 'Secret Kill List Proves a Test of Obama's Principles and Will' *New York Times* (9 May 2012) available at http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&_r=1& (last accessed on 1 May 2014).
[285] Filkins, D 'The Journalist and the Spies' *New Yorker* (19 September 2011) available at http://www.newyorker.com/reporting/2011/09/19/110919fa_fact_filkins (last accessed on 1 May 2014).
[286] Roggio, B 'US Predators Strike Again in Southern Yemen' *Long War Journal* (16 April 2012) available at http://www.longwarjournal.org/archives/2012/04/us_predators_strike_35.php (last accessed on 1 May 2014); Judgment, *Simić* (IT-95-9-T), Trial Chamber, 17 October 2003, at ¶ 659. See also Schmitt, M 'Targeting and International Humanitarian Law in Afghanistan' *85 International Law Studies Series of the US Naval War College* (2009) 307-339 at 319.
[287] Quoted in Munter Found Drone Strikes Unacceptable Dawn, 30 May 2012 available at http://dawn.com/2012/05/30/munter-found-drone-strikes-unacceptable/ (last accessed on 1 May 2014).
[288] Heller, KJ *op cit* note 279 at 15.
[289] See Roggio, B. US Drones Kill 21 AQAP Fighters in Separate Strikes in Southern Yemen. Long War Journal (14 April 2012) available at http://www.longwarjournal.org/archives/2012/04/us_drones_kill_21_aq.php (last accessed on 1 May 2014); Miller, G. White House Approves Broader Yemen Drone Campaign. The Washington Post (26 April 2011) available at http://www.washingtonpost.com/world/national-security/white-house-approves-broader-yemen-drone-campaign/2012/04/25/gIQA82U6hT_story.html (last accessed on 1 May 2014).
[290] Filkins, D *op cit* note 287.
[291] Cloud, D 'CIA Drones Have Broader List of Targets' *Los Angeles Times* (5 May 2010) available at http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506 (last accessed on 1 May 2014); Melzer, N *op cit* note 67 at 1007.
[292] Heller, KJ *op cit* note 279 at 17.
[293] Katlin-Borland, N *Cyberwar: A Real and Growing Threat in* Costigan, S (ed) *Cyberspaces and Global Affairs* (2012) at 3.

cell phones and the internet. This has brought about a new domain of possible conflict.[294] Cyberspace has created a new immaterial dimension with newly empowered actors that are capable of producing physical effects on people and objects.[295] Information assets have changed the manner in which armed conflict is perceived and some military theorists have even referred to this as a 'Revolution in Military Affairs'.[296] Cyber war must not be confused with robotic and standoff platforms such as drones[297] or information-enabled warfare, which is a force multiplier for conventional armed conflict whereby military assets acquire an enhanced capability due to their computer- assisted capabilities[298] and where technology assists or influences military infrastructure and generally replaces manpower through semi-autonomous, unmanned remote operated systems.[299] Cyberwar refers to those strategic actions by an adversary within cyberspace to attack an adversary's computer systems,[300] to obtain the adversary's information that is stored thereon, or to withhold or destroy such information to obtain some form of tactical advantage in the process. Cyberspace differs from the traditional battle space as it has no traditional borders, no clearly demarcated line between public and private spheres, and no established rules.[301]

The first requirement relevant to C-DPH with reference to cyberwar is the presence of an armed conflict in existence at the time of the actions by a member of an armed group or a civilian by way of a computer network. This trend, where civilians voluntarily participate or where civilians make their computers available to assist in cyber-attacks, was recorded in the Georgia-Russia conflict of 2008[302] and during Operation Cast Lead in Gaza.[303]

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[294] See for a discussion of the Chinese 'Integrated Network Electronic Warfare" strategy – Krekel, B; Bakos, G; Barnet, C et al *China's Cyberwarfare Capability* at 3 – 6.
[295] See in general Gere, F *The Future of Asymmetric Warfare in Ashgate Research Companion to War: Origins and Prevention* (2012) at 524.
[296] Sharma, A *Cyber Wars: A Paradigm Shift from Means to Ends in Virtual Battlefield: Perspectives on Cyber Warfare*s (2009) at 5.
[297] Anderson, K 'Targeted Killings in U.S. Counterterrorism Strategy and Law in Legislating the War on Terror: An Agenda for Reform' *American University Washington College of Law Washington College of Law Research Paper No. 2011-16* at 352.
[298] Sharma, A *Cyber Wars: A Paradigm Shift from Means to Ends in* Czosseck, C & Geers, K *Virtual Battlefield: Perspectives on Cyber Warfare* (2009) at 5.
[299] Deakin, RS *Battlespace Technologies: Network Enabled Information Dominance* (2010) at 6.
[300] This may be done by way of spreading malware in computer systems, flooding sites with electronic mail or planting worms within the computer system – Last, M & Kandel, A (eds) *Fighting Terrorism in Cyberspace* (2010) at 34.
[301] Katlin-Borland, N *op cit* note 295 at 16.
[302] See the reports by Project Grey Goose (2007) Phase I Report: Russia/Georgia Cyber War – Findings and Analysis. 17 October available at www.scribd.com/doc/6967393/Project-Grey-Goose-Phase-I-Report and Project Gray Goose (2009) Phase II Report: The Evolving State of Cyber warfare (20 March) available at www.scribd.com/doc/13442963/Project-Grey-Goose-Phase-II-Report (both last accessed on 1 May 2014).

Armed conflict has been transformed by way of the domains in which it is waged[304] as the zone of combat now also includes cyberspace.[305] This is because military success is attained in modern armed conflicts by controlling a physical territory, cyberspace and various digital information systems. It is submitted that the existing LOAC applies to these forms of combat but that such participation lends itself well to be defined, in general, as C-DPH.

The *Tallinn Manual on the International Law Applicable to Cyber Warfare*[306] evaluates the rules of LOAC with regards to cyber warfare.[307] The *Tallinn Manual*, Rule 29, states that "[c]ivilians are not prohibited from directly participating in cyber operations amounting to hostilities, but forfeit their protection from attacks for such time as they so participate."[308] The principles here are not new and the commentary to Rule 29 states that no treaties or customary LOAC exists which restricts civilians "from directly participating in hostilities during either international or non-international armed conflict."[309] In this regard, Rule 29 may be seen as restatement of the C-DPH exception to civilian immunity.

What is certain is that information warfare requires intensive personnel with specialised skills from the commercial industry, academia and the so-called hacker community. These individuals will, by way of specialised techniques using sophisticated computer software, together with their knowledge of the targeted networks, pursue military objectives. This does not include the individual who acts on an unorganised and irregular manner to inflict damage or illegally obtain military information from a military information source.[310] There is evidence that the military is in possession of and has developed customised tools to exploit vulnerabilities in software programmes to facilitate the penetration of an adversary's

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[303] Shachtman, N (2009) Wage Cyberwar Against Hamas, Surrender Your PC – Wired. 8 January available at www.wired.com/dangerroom/2009/01/israel-dns-hack/ (last accessed on 1 May 2014).
[304] Beruto, GL (ed) *The Conduct of Hostilities. Revisiting the Law of Armed Conflict 100 Years after the 1907 Hague Conventions and 30 Years after the 1977 Additional Protocols. Current Problems of International Humanitarian Law* (6-8 September 2007) at 30 (last accessed on 1 May 2014).
[305] Beruto, GL *op cit* note 26 at 30.
[306] Commissioned by the NATO Cooperative Cyber Defence Centre of Excellence.
[307] *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Michael N. Schmitt gen. ed., 2013) and Vihul, L 'The Tallinn Manual on the International Law Applicable to Cyber Warfare' *EJIL: TALK!* (Apr. 15, 2013) available at http://www.ejiltalk.org/the-tallinn-manual-on-the-international-law-applicable-to-cyber-warfare/ (last accessed on 1 May 2014).
[308] Ibid at 104.
[309] Ibid at 104
[310] Krekel, B; Bakos, G; Barnet, C et al *Capabilities of the People's Republic of China to Conduct Cyber Warfare and Compute Network Exploitation* (2009) at 5.

information networks. Some have even argued that these programmes that support hacking activities have and could potentially be made available by the State to individuals not affiliated to the military, in order for these activities to be conducted by non-State actors.[311] These cyber attacks may thus originate from the military and from organised non-State groups, but may even emanate from unconnected individuals. These sporadic and unorganised actions of non-military and unconnected persons must be measured against LOAC instruments to establish whether they constitute C-DPH but it is conceivable that such actions, as an essential part of a concerted military attack on an adversary, will reach the requirements and essential elements for them to be classified as C-DPH.

19. Summary

Combatants may be targeted by virtue of their status alone and those directly participating in hostilities may be intentionally targeted, based on their participation. Members of an organised non-State group operating within an NIAC may thus not be regarded as combatants, which results in no entitlement on their behalf to participate directly in the armed conflict and being subject to criminal sanction under domestic criminal law. This does not influence their ability to be intentionally targeted. A civilian is not even committing an international crime by directly participating in an armed conflict.[312] It seems that most experts are convinced that a person's status determines whether such person may be legitimately and intentionally targeted. This may be true in the case of civilians but not for those who do not possess this status.

Therefore, in an IAC, the members of the regular armed forces will become combatants and will be deemed to directly participate in hostilities for the term of the conflict. A member of the regular armed forces will also be targetable for such time as the conflict occurs since the members, as a part of the collective, are targetable in order to diminish the group's ability to conduct hostilities. A member of a non-State armed group will share this targeting strategy and will thus be targetable for the duration of the conflict but will not attain combatant status. None of the parties in an NIAC will attain combatant status and the regular armed forces will

[311] Ibid at 5.
[312] Hampson, FJ 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law' in Pedrozo, RA & Wollschlaeger, DP (eds) *International Law Studies, Vol 87 International Law and the Changing Character of War* at 189.

have the authority to conduct hostilities based on domestic law, just as they would in an IAC. The members constitute a military objective and the group is targeted.

The ever-increasing military significance of civilians may create reservations as to whether the C-DPH exception in API, Article 51(3), and APII, Article 13(3), strikes a proper balance between the competing considerations of military necessity and humanity.[313] The notion of C-DPH must be interpreted with reference to the entire instrument in which it is found. Here meaning may be given to C-DPH when the provisions of API, and specifically Article 43, are examined. API, Article 43(2)[314] provides that "[m] embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities". Non-combatants incorporate medical personnel and chaplains but they forfeit their protection should they engage in combat.[315] All other persons are classified as civilians[316] and benefit from presumptive immunity against direct attack.[317] Here the persons protected in this provision may not directly participate in hostilities and will forfeit that protection only where they "engage in combat". C-DPH is thus equivalent to combat activities.

Those individuals who sporadically participate in hostilities would only be those who do not belong to an armed group and whose targeting would not affect the military potential of the armed group. These individual would show no real casual nexus with an armed group; their targeting and the 'for such time' thereof must be interpreted to mean that the elimination of

[313] Camins, E *op cit* note 60 at 881.
[314] Article 43.-Armed forces
1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
[315] API, Articles 13 & 43.
[316] API, Article 50.
[317] The International Criminal Tribunal for the former Yugoslavia ("ICTY") and the San Remo Manual acknowledge this distinction. The San Remo Manual states that it is "indisputable that the principle of distinction is customary international law for both international and non-international armed conflict." International Institute of Humanitarian Law, The Manual on the Law of Non-International Armed Conflict (March 2006) at para 1.2.2.3.

these participants would be necessary to avert a specific threat and that it would have no bearing on the military potential of any armed group.

Chapter 6

Direct Participation in Hostilities and the Application of International Human Rights Law during Armed Conflict

1. Introduction

Hominum causa omne jus constitutum est, is translated to mean that all law is created for the benefit of human beings. This maxim embodies the continued development of the law, in general, and specifically, the Law of Armed Conflict ("LOAC") towards a people-centred approach.[1] LOAC, *inter alia*, attempts to realize the protection of civilians during armed conflict by infusing armed conflict with humanitarian principles. It may, however, be argued that this protection could also be achieved by way of other bodies of law, such as human rights law and domestic law[2] or by way of a relationship between these bodies of law.

There exists such a relationship between International Human Rights Law ("IHRL") and LOAC. This relationship between IHRL and LOAC may be evaluated from a number of perspectives.[3] Both LOAC and IHRL represent normative systems of law, with accepted and distinctive traits.[4] It may be argued that these two systems of law are mutually complementary but in practice they advance two systems of protection with regard to the specific relations of the persons involved.[5] In reality, military forces generally apply both LOAC and IHRL norms during armed conflicts and the application of one system to the total exclusion of the other is therefore not based in actual practice.[6] There is thus some internal coherence between these two systems; consequently it may thus be argued that a relationship between the two is feasible, based on their fundamental similarity that allows for comparison and contradistinction between them.[7] This similarity is founded, arguably, on a shared

[1] Robinson, D & Oosterveld, V 'The Evolution of International Humanitarian Law' in McRae, RG *Huam Security and thee New Diplomacy: Protecting People, Promoting Peace* (2011) at 161.
[2] See Kellenberger, J *Challenges Faced by the ICRC and Int'l Humanitarian Law (LOAC)* available at http://www.icrc.org/web/eng/siteeng0.nsf/html/kellenberger-statement-191006) (last accessed on 1 May 2014). Kellenberger was the President of the ICRC at Georgetown University in Washington, D.C.
[3] Yorke, J *Right to Life and the Value of Life: Orientations in Law, Politics and Ethics* (2010) at 119.
[4] Escorihuela, AL 'Humanitarian Law and Human Rights Law: The Politics of Distinction' *Michigan State Journal of International Law, Vol 19:2 (299 – 407)* (2010) at 301.
[5] Ibid at 119.
[6] Nelson, A *Joint Series: Guest Blogger Ken Watkin on the Overlap of IHL and IHRL* http://intercrossblog.icrc.org/blog/joint-series-guest-blogger-ken-watkin-overlap-ihl-and-ihrl (last accessed on 28 December 2014).
[7] *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Rep. of the Study Group of the Int'l Law Commission, 58th Sess., May 1–June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (2006).

purpose of protecting the life and dignity of individuals.[8] This relationship and the arguments in this chapter are based on what may be considered the Western concept of human rights. Other concepts, such as the Muslim concept of human rights, will not, due to space limitations, be fully accessed.[9]

The State's general obligation to protect civilians is based in human rights. The responsibility to protect civilians covers all situations of violence, not only armed conflict, but also civil unrest.[10] In general, LOAC is thus narrower in scope than human rights as LOAC requires the existence of an armed conflict before it applies. Both the systems, however, foresee the possibility that life may be lawfully taken under specific circumstances with specific reference to the existing factual conditions, but there is also a fundamental prohibition against any arbitrary depravation of life in both systems. The protection of civilians in armed conflict is generally based on the Geneva Conventions of 1949[11] ("GC's") and specifically on GCIV,[12] the Additional Protocols of 1977[13] ("AP's") and customary LOAC.[14] The fundamental guarantees for civilians specifically during non-international armed conflict ("NIAC") are contained in Common Article 3 to the GC's ("Common Article 3) and Additional Protocol II of 1977 ("APII"), Article 4,[15] and in customary LOAC.[16]

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[8] Iguyovwe, R 'The Inter–play Between International Humanitarian Law and International Human Rights Law' *34 Commw. L. Bull. 4* (2008) at 749; Mottershaw, E. Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law, 12 *Int'L J. Hum. RTS.* 449-470 (2008) at 449.

[9] Raja'i-Khorassani, S, the permanent delegate to the UN from the Republic of Iran declared in 1985 that "the very concept of human rights was a Judeo-Christian invention' and inadmissible in Islam . . ." – Spencer, R *Islam Unveiled: Disturbing Questions about the World's Fastest-Growing Faith* (2012) at 57.

[10] Breakley, H 'The Protection of Civilians in Armed Conflict: Four Concepts in Norms of Protection: Responsibility to Protect, Protection of Civilians and their Interaction' *UNUP* (2012) at 62 – 81 available at https://www.academia.edu/2212186/The_Protection_of_Civilians_in_Armed_Conflict_Four_Concepts (last accessed on 15 January 2015).

[11] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, of 12 August 1949 ("GCI"); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, of 12 August 1949 ("GCII"); *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, of 12 August 1949 ("GCIII"); *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, of 12 August 1949 ("GCIV").

[12] *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, of 12 August 1949 (GCIV)

[13] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977*, 1125 UNTS 3 ("API"), and *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977*, 1125 UNTS 609 ("APII").

[14] See the ICRC Customary LOAC Study - Henckaerts, J and Doswald-Beck, L (Eds) Customary International Humanitarian Law (2005).

[15] Article 4 — Fundamental guarantees: 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour

LOAC, indirectly by way of its own rules, protects some human rights where the effects of the comparable rights between LOAC and IHRL overlap. LOAC, however, only protects these human rights to the extent that they are principally endangered during armed conflicts, and only where their protection is not contradictory to the continuation of an armed conflict. The question is whether States are also, in addition to their LOAC obligations, constrained by their IHRL obligations during an armed conflict.[17]

This chapter will focus on the relationship between IHRL and LOAC, with reference to the notion of civilian direct participation in hostilities ("C-DPH") in armed conflict. International law is fragmenting and the various subsets of norms within international law have resulted in the division of the system of general international law.[18] This has led to the formation of a public interest domain in the international sphere, which includes, amongst others, the protection of the individual in armed conflict. Some experts have, as a result, argued that this has developed the complementarity between LOAC and IHRL.[19] The specific issue to be explored is whether a direct participant in an armed conflict may be intentionally targeted under LOAC until such time as he surrenders or becomes otherwise *hors de combat*; alternatively whether, under IHRL, such a participant may only be intentionally targeted under exceptional circumstances, where capture is not feasible[20] or further alternatively,

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and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
a) violence to the life, . . .

[16] Breakley, H *op cit* note 10 at 40.

[17] See in general Cerone, J *Human Rights on the Battlefield in International Studies in Human Rights, Vol 92: Human Rights in Turmoil: Facing Threats, Consolidating Achievements* (2006) at 98.

[18] See in general in this regard Gowlland-Debbas, V *Right to Life and Genocide* (1999) at 123; see in general Gaggioli, G The Use of Force in Armed Conflicts Interplay between the Conduct of Hostilities and Law Enforcement Paradigms *ICRC Report*.

[19] See the contributions by Doswald–Beck, L & Vité, S 'International Humanitarian Law and Human Rights Law' *33 Int'L Rev. Red Cross 94* (1993); Watkin, K 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Conflict' *98 AM. J. Int'L L. 1* (2004); Meron, T 'The Humanization of International Humanitarian Law' *94 AM. J. INT'L L. (2000)* at 239; Quentin–Baxter, R '*Human Rights and Humanitarian Law – Conflict or Confluence?*' *9 Aust. YBIL, 94–112* (1985); Droege, C 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' *40 ISR. L. Rev. 310* (2007); Kretzmer, D (*et al*) 'International Humanitarian Law and International Human Rights Law: Exploring Parallel Application' *40 ISR. L. Rev. 306* (2007); Krieger, H 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' *11 J. Conflict & Sec. L. 265* (2006).

[20] See in general Sassòli, M & Olson, LM 'The Relationship between International Humanitarian Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' *IRRC Vol 90 No 871* September 2008 at 599-627 available at

whether these two extremes could complement each other. The question thus is whether LOAC and IHRL can function on an interoperable basis and whether they even should.[21] In this regard, it must, as a starting point, be accepted that the existence of an armed conflict cannot be used to legitimise human rights abuses.

2. The Origins of the Law of Armed Conflict and International Human Rights Law

LOAC and IHRL have, as their common denominator, the principle of humanity. This humanity in LOAC was accentuated after the World War II, based on the adoption of numerous international human rights instruments and the creation of international processes of State accountability.[22] It may accordingly be argued, based on the content of these instruments, that respect for the human dignity of every person formed the foundation of LOAC and IHRL.[23] Human dignity[24] is intended to protect humans from outrages upon their personal dignity by way of unlawful attacks on their bodies or by way of humiliation and debasement of the honour, self-respect or mental well-being of a person.[25] Some have even argued, because of this, that the basis of LOAC is located in human rights and that LOAC is thus contained within IHRL.[26]

IHRL is primarily concerned with the relationship between the State and individuals within their jurisdiction in times of peace and public emergency.[27] State sovereignty, which is interpreted here not as a right and not as a responsibility on the State, demands responsibility

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http://www.icrc.org/eng/resources/documents/article/review/review-871-p599.htm (last accessed on 1 May 2014).

[21] See for a general discussion Hampson, FJ 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law' in Pedrozo, RA & Wollschlaeger, DP (eds) 'International Law Studies' *Vol 87 International Law and the Changing Character of War Naval War College Blue Book Series* (2011) at 187.

[22] Rehman, J *International Human Rights Law* (2010) at 764.

[23] Andreopoulos, GJ *On Accountability of Non-State Armed Groups in Non-State Actors in the Human Rights Universe* (2006) at 143.

[24] For a discussion of the concept of 'human dignity' see Bernard-Naude (ed) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008); Botha, H 'Human Dignity in Comparative Perspective' *Stell LR (2009) 2* 207-208; Frowein, JA 'Human Dignity in International Law' in Kretzmer, D & Klein, E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002); Rao, N 'Three Concepts of Dignity in Constitutional Law' *Notre Dame Law Review* (SSRN) Vol 86 No 1 (2011); Carozza, PG 'Human Dignity and Judicial Interpretation of Human Rights: A Reply Notre Dame Law School Legal Studies Research Paper' No. 09-14; Dan-Cohen, M 'Defending Dignity UC Berkeley Public Law and Legal Theory' *Research Paper Series NO 92* (2002).

[25] *Prosecutor v. Furundzja*, No. IT-95-17/1-T at para 183 (10 December 1998).

[26] Gorman, RF & Merrills, JG *Human Rights in the World* (1996) at 310.

[27] Shaw, MN *International Law* (2008) at 265; Andreopoulos, GJ *op cit* note 23 at 141.

for the protection of those within the jurisdiction of the State.[28] This implies that people must be safe and protected in freedom, dignity and in equality.[29] In this regard, it is evident that one of the roles of human rights is to address the underlying issues that lead to armed conflict. Armed conflict poses a threat to the security of those within the jurisdiction of the State and States must accordingly act in defence of those so placed.[30]

LOAC requires the existence of an armed conflict for it to apply. It attempts to regulate the conduct of hostilities and to infuse humanitarian principles into armed conflict to the benefit of certain protected persons.[31] The main difference between these areas of law thus relates to the equilibrium between the rights of all individuals as against the maintenance of public order, and between military necessity and humanity.[32] This distinction is a consequence of the independent historical origins of these systems, which resulted in divergent basic philosophies, objectives, applications and implementing mechanisms.[33] The independent development of these two areas of law accordingly has limited the influence that they may have upon each other.

LOAC, unlike IHRL, does not necessarily confer rights to the individual. The term 'right', or any other similar term, is not found in the Geneva Convention of 1864,[34] nor is the term, 'human rights' contained in either the Hague Regulations of 1899 or 1907. The United Nations ("UN") Charter of 1945 gave some prominence to general human rights and the preamble refers to "faith in fundamental human rights". Later reference is made to "universal respect for, and observance of, human rights and the fundamental freedoms for all without distinction as to race, sex, language, or religion".[35] However, the UN Charter's focus is on upholding State sovereignty[36] and not on individual rights.[37] The idea of 'rights' is, for the

[28] See the Report of the International Commission on Intervention and State Sovereignty in Ramcharan, BG *Security Council and the Protection of Human Rights* (2002) at 4.
[29] See the core international human rights conventions.
[30] Plaw, A *Political Extremities: The Ethics and Realities of Targeted Killing* (2008) at 237.
[31] Shaw, MN *op cit* note 27 at 1167.
[32] Gowland-Debbas, V *op cit* note 18 at 126.
[33] Ibid at 125-6.
[34] Provost, R *International Human Rights and Humanitarian Law* (2002) at 27.
[35] UN Charter, Article 55(c).
[36] UN Charter, Article 2(1) – "the organisation is based on the sovereign equality of its members." This must be read together with the non-intervention clause at UN Charter, Article 2(7).
[37] The focus on sovereignty was initially seen as essential for maintaining stability but it would later prove to be an impediment to restoring order – see Helmke, B *Under Attack: Challenges to the Rules Governing the International Use of Force* (2013) at 58.

first time, found in the *Geneva Conventions Relative to the Treatment of Prisoners of War* of 1929. The GC', probably influenced by the Universal Declaration of Human Rights of 1948 ("UDHR"),[38] contain various references to the 'rights' of protected persons. The idea of human rights was, during this period, and soon thereafter, progressively established by way of significant multilateral treaties.[39] The international community has set various human rights standards but the necessary machinery to implement the standards has not been forthcoming.[40]

Common Article 3(1) of the GC's ("Common Article 3"), with regards to NIAC's, refers to "[p]ersons 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: *a)* violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; *b)* taking of hostages; *c)* outrages upon personal dignity, in particular humiliating and degrading treatment; *d)* the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

The International Court of Justice ("ICJ") held, in the Nicaragua case,[41] that Common Article 3(1) represents a minimum yardstick constituting "fundamental general principles of humanitarian law" and is applicable in all circumstances, including international armed conflicts ("IAC"). This was confirmed in the *Tadic* case[42] and in the matter of Jean-Paul Akeyesu.[43] Common Article 3 thus diverges from the normal LOAC provisions as it regulates the relationship between a State and its nationals. This provision therefore, in essence, represents a human rights notion. It is also held by the ICTY that those provisions of APII

[38] *Universal Declaration of Human Rights*, GA Res. 217A (III), U.N. Doc A/810 at 71 (1948).
[39] *Convention on the Prevention and Punishment of the Crime of Genocide* (1948); *Covenant on Civil and Political Rights* (1966); *Covenant on Economic, Social and Cultural Rights* (1966).
[40] Evans, T *Politics of Human Rights: A Global Perspective* (2005) at 13.
[41] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (United States v. Nicaragua), Merits, Judgement of 27 June 1986 – Case No. 153 at 113-114.
[42] *Prosecutor v. Tadic*, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995 at para 98.
[43] *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Trial Chamber Decision of 2 September 1998 at para 608.

that overlap with the basic core of human rights provisions of Common Article 3 represent customary LOAC.[44] The ICTY also held that a customary LOAC norm exists, which prohibits intentional attacks against civilians applicable in IAC and NIAC based on Additional Protocol I[45] ("API"), Article 51, and APII, Article 13.[46]

The AP's appear to be more directly related to human rights law, possibly as IHRL had developed sufficiently at that time to have a greater effect on the drafting of the AP's.[47] Both the AP's acknowledge the application of human rights in armed conflict and the ICRC Commentary states that "[h]uman rights continue to apply concurrently [with LOAC] in time of armed conflict."[48] APII states "that international instruments relating to human rights offers a basic protection to the human person".[49] This results in human rights law operating as an additional framework in the relations between the State and persons within its jurisdiction during an NIAC.[50] The AP's regard 'civilians' as protected persons and this class of person is placed in contradiction to 'combatants'. The exclusion from protection afforded to civilians against intentional attack is forfeited 'for such time' as such individuals 'directly participate in hostilities'.[51] This exclusion from protection does not reflect the nature of the interest protected, *in causa*, protection against intentional attack. The protection afforded herein is, however, not like in a human rights construction, derived from the human nature of the civilian, but is derived from membership of the civilians as a collective. LOAC, in keeping with its objective, aims to protect civilians as a group against the harmful effects of armed conflict; this protection is forfeited when the civilian acts in a manner that is contrary to his status and assumes the risk inherent in such participation.

LOAC and IHRL have thus progressively drawn closer during the last decades. API, Article 72[52] (Field of Application), states that fundamental human rights are recognized during an

[44] *Prosecutor v. Tadic*, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995 at para 117 & Meron, T *Human Rights and Humanitarian Norms as Customary Law* (1989) at 73.
[45] *Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (Protocol 1), 8 June 1977.
[46] *Prosecutor v. Milan Martic*, Case No. IT-95-11-R61, 8 March 1996 at paras 8-11.
[47] See in general Provost, R *op cit* note 34 at 27–33.
[48] Sandoz, Y, Swanarski, C & Zimmerman, Z *Commentary on the Additional Protocols* (1987) at para 4429.
[49] Preambular; Articles 4 & 13(2).
[50] Gowlland-Debbas, V *op cit* note 18 at 126 - 128.
[51] API, Article 51(3) & APII, Article 13(3).
[52] The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I

IAC and it is additional to GCIV "as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict".[53] Further, API, Article 75[54] (Fundamental guarantees), and APII, Article 6[55] (Penal prosecutions), originate directly from the ICCPR.[56] The 'Fundamental Guarantees' in API, Article 75, however, only refer to "persons who are in the power of a Party to the conflict" and thus incorporate a principle of non-discrimination, with its main prohibitions relating to the physical and mental well-being of individuals, arbitrary detention and essential legal guarantees. It may be argued that API, Article 75, is repeated in APII, Articles 4 (Fundamental guarantees), 5 (Persons whose liberty has been restricted) and 6. Irregular participants therefore receive human rights protection through the operation of API, Article 75, and, for that matter, the provisions of APII. Common Article 3 and API, Article 75 applies, based on customary international law, to armed conflicts covered by API.[57] It is argued that API, Article 75, was influenced by the UDHR and the ICCPR. Some experts have accordingly argued that the relationship between LOAC and human rights law "is expressed in the adoption of major human rights principles in Article 75 AP I".[58] These human rights norms must be employed notwithstanding the geographic location of the armed conflict. In 2011, former Secretary of State, Hillary Clinton, confirmed that the US would, based on a legal obligation, adhere to the norms of API, Article 75 in IAC with regards to the treatment of detainees.[59] The *Hamdan* case, where a majority of the US Supreme Court ruled API,

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and II thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

[53] Hansen, MA 'Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict' *Military Law Review, Vol 194, Winter 2007* at 21.

[54] 1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
(a) Violence to the life, health, or physical or mental well-being of persons, in particular:
(i) Murder; . . .

[55] Article 6 — Penal prosecutions 1 - This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

[56] ICCPR, Article 6-27.

[57] Nelson, A *op cit* note 5.

[58] Greenwood, C "Scope of Application of Humanitarian Law", in Fleck, D (ed) *The Handbook of International Humanitarian Law* (2008) 74 Rule 254.

[59] Available at press release http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university (last accessed on 28 December 2014).

Article 75 applied as customary international law to the NIAC with *Al Qaeda*, may indicate a change in US policy towards the application of human rights norms within LOAC.[60] The judiciary in the UK applied the domestic human rights standards of the territorial State within which an armed conflict was happening to set standards for the actions of intervening military forces.[61] The court found that the only authority to detain persons emanates from the host State's domestic law and the UNSC Resolutions.

3. The Progressive Development of IHRL by the United Nations

Concerns for the respect of human rights during armed conflict were focused on in the 1968 *Proclamation of Teheran*, in which Member States warned that "[m]assive denials of human rights, arising out of aggression or any armed conflict with their tragic consequences, and resulting in untold misery, engender reactions which could engulf the world in ever growing hostilities". During the 1970's the General Assembly ("GA") adopted several resolutions[62] reaffirming the necessity to protect the full observance of human rights in armed conflicts. In particular, the GA affirmed in resolution 2675 (XXV) that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict". The GA has advocated the progressive development of human rights through the *Millennium Development Goals. The Millennium Declaration* endeavours "[t]o ensure the implementation, by States Parties […] of international humanitarian law and human rights law, and call[ed] upon all States to consider signing and ratifying the Rome Statute of the International Criminal Court".[63]

The Security Council ("SC") also regularly adopts periodic and thematic resolutions on the protection of particular categories of persons in armed conflicts. The SC has accordingly placed its authority behind the body of human rights and LOAC.[64] Resolution 1265 (1999) appeals to parties to comply strictly with their obligations under LOAC, human rights law and refugee law. Resolution 1894 (2009) stipulated "that parties to armed conflict comply

[60] Nelson, A *op cit* note 5).
[61] Serdar Mohammed and Ministry of National Defence available at http://www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf (last accessed on 28 December 2014).
[62] See resolutions 2597 (XXIV), 2675 (XXV), 2676 (XXV), 2852 (XXVI), 2853 (XXVI), 3032 (XXVII), 3102 (XXVIII), 3319 (XXIX), 3500 (XXX), 31/19 and 32/44; United Nations Human Rights, Office of the High Commissioner, International Legal Protection of Human Rights in Armed Conflict HR/PUB/11/01, United Nations Publication, SALES No. E.11.XIV.3 (2011), United Nations at 94.
[63] General Assembly Resolution 55/2 at para 9.
[64] Ramcharan, BG *op cit* note 28 at 1.

strictly with the obligations applicable to them under international humanitarian, human rights and refugee law". Resolution 1894 (2009) stated that "the deliberate targeting of civilians as such and other protected persons, and the commission of systematic, flagrant and widespread violations of applicable international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security" and reaffirmed "its readiness to consider such situations and, where necessary, to adopt appropriate steps". The norms of IHRL and LOAC are thus a central part of the legislative and policy framework of the SC in its work with international peace and security.

The UN special rapporteurs and experts issued a joint statement in 2003 wherein they expressed "alarm at the growing threats against human rights, threats that necessitate a renewed resolve to defend and promote these rights . . . and . . . profound concern at the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism,[65] which affect negatively the enjoyment of virtually all human rights – civil, cultural, economic, political and social."[66]

4. The Nature of Classical and New Armed Conflicts

There are many categories of armed conflicts which create legal issues relevant to whom is bound by LOAC and IHRL, and specifically relevant to who may be intentionally targeted, on what basis, as well as the temporal scope of these attacks.[67] It may be argued that the failure of LOAC to adequately regulate contemporary NIAC is due to the fact that it developed to accommodate and regulate classical armed confrontations and that IHRL may be applied to supplement LOAC. IAC's still occur intermittently, as seen in the armed conflict between Eritrea and Ethiopia in 2000, the Russia and Georgia conflict in 2008, Iraq and Kuwait, the subsequent US-led coalition Gulf War and the continued friction between the two nuclear powers, India and Pakistan, which constitutes the most threatening scenario of

[65] For a discussion on terrorism and human rights obligations see Sookhdeo, P *Terrorism and Human Rights in the Field of Conflict in Current Issues in Human Rights and International Relations: Papers from the Clemens Nathan Research Centre* at 93 – 105.
[66] Joint Statement of UN Special Rapporteurs/Representatives, Experts and Chairpersons of the Working Groups on the Special Procedures of the United Nations Commission on Human Rights, 30 June 2003, A/58/120, Annex 2. See in general Kessing, PV 'Terrorism and Human Rights in International Studies in Human Rights' *Vol 92: Human Rights in Turmoil: Facing Threats, Consolidating Achievements* at 133-134.
[67] Sassoli, M 'The Role of Human Rights and International Humanitarian Law*'* at 36 in Ben-Naftali, O *International Humanitarian Law and International Human Rights Law* (2011).

symmetric armed conflict today. The object of IAC's is to cumulatively weakening the military potential or the will of the adversary to continue with the armed action.[68]

NIAC's have, however, currently become more prevalent.[69] Common Article 3 and possibly APII regulate these conflicts, depending on whether the required prescribed thresholds for their application have been reached. Some NIAC's, like the Rwandan armed conflict against rebel forces in the Congo, sometimes occur on the territory of more than one State. Other conflicts have even taken place between regular armed forces of one or more States and an organised non-State armed national or transnational group, such as Operation Enduring Freedom between the US and its Allies, and *Al Qaeda* and its associates in Afghanistan.[70] Other less conventional conflicts have also occurred, including situations like Afghanistan in 2001, where one adversary possessed no discernable ordinary armed forces. Other armed conflicts have even seen one party to the conflict conducting some of its military operations by way of civilians committing acts of DPH, therefore sporadic and intermittent hostile acts, like the actions of Hamas in Gaza. The armed conflict in Serbia in 1999 displayed an even more distorted situation, referred to as immaculate war, where the military superior party, the US, only used air power to overcome its adversary due to its total control over this space and the benefits it held in terms of the exclusion of the loss of its personnel and assets. The adversary could thus be attacked with impunity due to their inability to target US aircraft.[71] In yet other armed conflicts, the military superiority of one party is so disproportionate to that of its adversary that the weaker side has no realistic prospect of success in conventional hostilities. The conflict in Iraq in 2003, where the coalition forces considerably outmatched the Iraqi armed forces, is an example of such an asymmetric conflict.

An asymmetric conflict thus exists when the adversaries to an armed conflict appreciably differ in terms of qualitative and quantitative strength.[72] This definition may result in most contemporary armed conflicts being classified as asymmetric. Asymmetry may also refer to the difference between adversaries in terms of legal status, thus one party to the armed

[68] Sassoli, M *op cit* note 67 at 45.
[69] Engdahl, O (ed) 'Law at War: The Law as It Was and the Law as it Should Be: Lieber Amicorum Ove Bring' *International Humanitarian Law Series, Vol 22* (2008) at 21.
[70] Sassoli, M *op cit* note 67 at 47.
[71] Ibid at 46.
[72] Lindström, F *Asymmetric Warfare and Challenges for International Humanitarian Law, Civilian Direct Participation in Hostilities and State Response* Master's Thesis in Public International Law, Uppsala Universitet, Department of Law (2012) at 11.

conflict is not a State.[73] Some non-State armed groups will, however, display the characteristics or functions of a State and therefore a discussion regarding Statehood must be undertaken. There is evidence that the level of asymmetry[74] in a conflict is an indicator of the ability and propensity by parties to respect LOAC and still hope to attain their goals within the armed conflict.[75]

It has been argued that, in general, all the parties to an asymmetric conflict display a propensity to violate or at least to 'reinterpret' LOAC.[76] The St Petersburg Declaration confirmed that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".[77] This fundamental philosophy is excluded in asymmetric conflicts as the side which possesses the advanced military potential is usually not confronted by traditional 'military' forces as the weaker adversary has to employ irregular tactics in an attempt to balance the military potential of their adversary.[78]

The contemporary developments in armed conflicts have generated a novel relationship between security and defence operations. The distinction between military forces and law enforcement agencies has been blurred. There is now a link between military operations outside of States and domestic security.[79] The armed conflicts in Iraq and Afghanistan and possibly, the so-called 'war on terror' against *al Qaeda,* are counterinsurgency in nature. States have therefore developed a security-defence combination strategy to address the threats and challenges that these conflicts pose.[80] Watkin has referred to this as the "police primary" approach where the participation of military forces in law enforcement operations

[73] Stepanova, E 'Terrorism in Asymmetrical Conflicts. Ideological and Structural Aspects' *SIPRI Research Report No 23* (2008) at 19.
[74] See GeiB, R 'Asymmetric Conflicts Structures' *IRRC Volume 88 No 864* (December 2006) at 757-758.
[75] Geiss, Asymmetric Conflict Structures, 88 *International Review of the Red Cross* (2006) 757–777; Sassoli, M *op cit* note 67 at 36.
[76] Schlesinger (Chairman), Final Report of the Independent Panel to Review DoD Detention Operations (2004) at 85, http://www.defenselink.mil./news/Aug2004/d20040824finalreport.pdf (last accessed on 1 May 2014). GeiB, R *op cit* note 74 at 757 providing examples of this, including the US-led coalitions armed conflict in Iraq and the armed conflict in Afghanistan between the US and the Taliban. Lindström, F. Asymmetric Warfare and Challenges for International Humanitarian Law, Civilian Direct Participation in Hostilities and State Response. Master's Thesis in Public International Law, Uppsala Universitet, Department of Law (2012) at 6.
[77] '*Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, St. Petersburg, 29 November/11 December 1868', in de Martens (ed), Nouveau recueil general de traites et autres actes relatifs aux rapports de droit international, 1ere serie, Vol XVIII (1843–75) at 474–475; reproduced in Schindler, D and Toman, J *The Laws of Armed Conflicts* (2004) at 91.
[78] Sassoli, M *op cit* note 67 at 38.
[79] See in general Gere, F 'The Future of Asymmetric Warfare' in Gardner, H & Kobtzeff, O *Ashgate Research Companion to War: Origins and Prevention* (2012) at 505 – 525.
[80] Ibid at 506.

occurs during insurgencies.[81] Where there is an overlap of LOAC and IHRL, the latter legal regime is often favoured as a matter of policy. Similarly, human rights based law enforcement will continue to be the default position for the US, Canada, Europe and other States dealing internally with the threat of transnational violence posed by non-State actors.

A legal mind will recognise this relationship of asymmetry as mirroring the relationship between the State and the individual within its jurisdiction. LOAC was, however, created within a system where the equality of the parties as States is accepted. Human rights law, thus, in theory, is better suited to regulate conflicts where there is a marked disparity in military power between the adversaries. Writers, like Frank, have argued that asymmetrical armed conflicts should essentially be seen as a policing issue and that the military should accordingly focus on the value of human life.[82]

5. International Human Rights Law and the Law of Armed Conflict

Many argue that the convergence between IHRL and LOAC is due to the proliferation of NIAC's.[83] It may be argued that LOAC and IHRL have converged with regards to their scope of application in armed conflict and there are, today, few persuasive moral reasons for this distinction to remain as extensive as it currently is.[84] Meron stated that the "humanization" of LOAC is motivated by human rights and principles of humanity.[85] On the other hand, a persuasive argument may be made for the possibility that the two branches of law should remain distinct, based on the role each plays in protecting persons in different circumstances. Israel believes that "the two systems, which were codified in separate instruments, remained distinct. The law of armed conflict applies in situations where generally recognised human rights norms could not be applied owing to the fact that the normal government-citizen

[81] Nelson, A *op cit* note 5.
[82] Frank, T 'Reframing Asymmetrical Warfare: Beyond the Just War Idea' in *Moral Dimension of Asymmetrical Warfare: Counter-Terrorism, Democratic Values and Military Ethics* (2009) at 74 – 77.
[83] Freeman, M 'International Law and Internal Armed Conflicts: Clarifying the Interplay between Human Rights and Humanitarian Protections' *The Journal of Humanitarian Assistance* (July 24, 2000) at 1.
[84] See Matthews, H 'The Interaction between International Human Rights Law and International Humanitarian Law: Seeking the Most Effective Protection for Civilians in Non-International Armed Conflicts' *The International Journal of Human Rights Vol 17 Nos 5-6* (2013) at 637 available at http://dx.doi.org/10.1080/13642987.2013.831694 (last accessed on 1 May 2014).
[85] Meron, T 'The Humanization of Humanitarian Law' *94 AM. J. Int'L L. 239, 243* (2000) at 243.

relationship did not prevail. Any attempt simultaneously to apply the two regimes could only be detrimental to both".[86]

LOAC, in general, is constructed to achieve the alleviation of human suffering during armed conflict by protecting the interests of the individual and is essentially based on the application of the rights of humanity. LOAC requires a trigger for it to apply. This trigger is the existence of an armed conflict. The ICTY's Appeals Chamber held that an armed conflict exists whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State and that LOAC will apply from the initiation of the armed conflict; it will extend beyond the cessation of hostilities until a peaceful settlement is achieved.[87] The Trial Chamber further stated that the standard of protracted armed violence refers predominantly to the intensity of the armed violence as opposed to its duration. Armed groups involved in the armed conflict must also have a minimum degree of organization.[88]

The basic rules of LOAC relate to the protection of civilians and the civilized treatment of prisoners of war.[89] Military necessity, however, since the Lieber Code[90] referred to the "necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war." Today military necessity is defined as "[m]easures of regulated force not forbidden by international law, which are indispensable for securing the prompt submission of the enemy, with the least possible

[86] HCR, Summary Record of the 18th Meeting, 15 May 2003; Second Periodic Report of Israel, E/C.12/2003/SR.18, 4 June 2003 at para 23.
[87] *Prosecutor v. Tadic*, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995 at para 70.
[88] *Prosecutor v. Ramush Haradinaj* et. al, Case No. IT-04-84-T, Judgement of 3 April 2008 at paras 49 and 60 - The Trial Chamber found that the intensity of an armed conflict and the degree of organisation thereof includes "the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the [United Nations] Security Council may also be a reflection of the intensity of a conflict." The adversaries must be sufficiently organized to confront each other with military means. […] [I]ndicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords."
[89] Doswald-Beck, L & Vite, S 'International Humanitarian Law and Human Rights' *IRRC, No. 293. 30-04-1993* at 2.
[90] *General Orders, no. 100: Instructions for the Armies of the United States in the Field*, approved 24 April 1863 (Lieber Code) at Article 14 (reproduced and available at http://www.icrc.org/LOAC.nsf/FULL/110?OpenDocument (last accessed on 1 May 2014).

expenditure of economic and human resources."[91] The fundamental concept of armed conflict, it is submitted, is still basically the same and is based on the requirements of military necessity and tempered by humanity. LOAC thus, in making provision for military necessity, differs from IHRL.[92]

IHRL generally binds States and directly awards positive fundamental rights to the individual. IHRL obligations, in general, refer to *ratione personae* (based on person), *ratione loci* (based on location) and *ratione materiae* (based on content).[93] The protection offered by IHRL to civilians is thus wider in scope than LOAC regarding the rights afforded and protection offered.[94] IHRL developed as a rights-based system which the individual may often enforce against the State, while LOAC is an obligations-based system which imposes obligations on individuals during armed conflict.[95] This translates into a discrepancy relating to the rights and procedural capacity of the individual. However, it is submitted that the human interests that both areas of law aim to protect are fundamentally comparable even though they adopt different normative frameworks.[96]

The basic texts of IHRL create standards of general application to all humans by reason of their humanity.[97] These standards should ideally apply in all circumstances and at all times. The ICJ, in its *Advisory Opinion on Legality of the Threat of Nuclear Weapons*, referred to "cardinal principles contained in the texts constituting the fabric of humanitarian law".[98] In this regard, the ICJ held that "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilians between civilians and civilian targets".[99] The intentional targeting must thus be limited to military objectives.[100] API, Article 52(2), states that "[a]ttacks shall be limited strictly to

[91] US Air Force Manual, US Manual FM 27-10 & the German Manual ZDv 15/10 in Doswald-Beck, L & Vite, S *op cit* note 88 at 3.
[92] The German Military Manual ZDv 15/10 refers to military necessity and humanity.
[93] Kessing, PV *op cit* note 66 at 155.
[94] Matthews, H *op cit* note 83 at 633.
[95] Provost, R *op cit* note 34 at 13. See also in general *Prosecutor v Kunarac, Kovac, and Vukovic*, Judgment (ICTY Trial Chamber, 2001); Hansen, MA *op cit* note 53 at 3.
[96] See in general Moir, L Legal Protection of Civilians during Armed Conflict (2002) at 275
[97] Rehman, J *op cit* note 22 at 765.
[98] Advisory Opinion at 257.
[99] Rehman, J *op cit* note 22 at 257.
[100] See the *Hague Rule of Air Warfare*, 1923 Parliamentary Papers, Cmd. 2201, Miscellaneous No. 14 (1924) at Article 24(1); GCI at Article 19(2); GCIV at Article 18; UNESCO *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 249 U.N.T.S. 240, entered into force 7 August 1956 at Article 8(1)(a); *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed*

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 neutralization, in the circumstances ruling at the time, offers a definite military of advantage".

Arguably the fundamental difference between LOAC and IHRL is that the substantive protection a person benefits from under LOAC depends on the manner in which LOAC awards status and the category that the person, as a result, is deemed to belong to, while the protection under IHRL, in general, benefits all human rights, taking into account certain exceptions to the rule with regards to the protection of specific rights for specific categories of persons recognised as deserving of specific protection. In LOAC relative to IAC there is a fundamental distinction between civilians and combatants and, it is argued herein, between 'members' of the regular armed forces and 'members' affiliated to non-State armed groups in NIAC. Combatants in IAC, members of the regular armed forces and members of non-State organised armed groups may be attacked until they surrender or are otherwise rendered *hors de combat*, while civilians may not be intentionally targeted, unless and for 'such time' as they 'directly participate in hostilities'. Distinction in LOAC is also not based on formal and universal equality as per human rights, but is instead based on status.[101] LOAC incorporates discrimination among classes of persons with regards to their relationship to the State.[102] This confirms LOAC's do not, as a fundamental aim, protect the human dignity of persons.[103]

LOAC incorporate a distinction between different classes of persons based on the nature of their relationship to the armed conflict. Specific legal duties and protection s apply to combatants, civilians, medical personnel, representatives of the ICRC, unlawful combatants, UN forces and others. These classed are fundamentally different from the approach in human rights law, where rights are identified that are universal and indivisible in its application to all humans.

Conflict, 26 March 1999, 38 I.L.M. 769 (1999) at Articles 6(a), 8, 13(1)(b); *Rome Statute of the International Criminal Court* (1998) at Article 8(2)(b)(ii), (v) & (ix).

[101] Kretzmer, D 'Targeted Killing of Suspected Terrorists: Extra–Judicial Executions or Legitimate Means of Defence?' *16 Eur. J. Int'L L.* (2005) at 171.

[102] Pejic, J 'Non–Discrimination and Armed Conflict' *83 Int'L Rev. Red Cross 183* (2001); Escorihuela, AL *op cit* note 6 at 359.

[103] Benvenisti, E 'Human Dignity in Combat: The Duty to Spare Enemy Civilians' *39 Isr. L. Rev.* (2006) at 81.

LOAC and IHRL differ as persons are necessarily connected to a group under LOAC as opposed to IHRL in general, where the individual's rights are protected.[104] The two bodies of law have different guardians, being the ICRC on the one hand and the UN on the other hand. The stronger influence from the UN may have resulted in the distinction between *jus in bello* and *jus ad bellum* being diminished.[105] Human rights vests rights in persons without the imposition of States, while LOAC mitigates human suffering.[106] The fundamental notion of 'human dignity' requires that any sanction imposed against a person must be based on personal fault. In IHRL, an individual will thus possess rights notwithstanding any relationship to a group and the corresponding State obligations herein will apply *erga omnes* as opposed to *interpartes*.[107] Human rights require a stable political situation wherein individuals can make use of institutional mechanisms to protect their interests. These institutional mechanisms are generally less effective in situations of armed conflict and the ability of individuals to protect their own interests are accordingly impaired.[108] LOAC and IHRL each independently display a normative strength, which may well be undermined should a crude or passionate attempt be made to intermix the two or to introduce an interpretation where the one branch influences the other with negative consequences. It may be that each distinct branch is partly incompatible with the other and that each system should be applied to the situations they are better suited to regulate.[109]

It is argued that the main issue to be decided is whether an NIAC should be considered to be a law enforcement matter or should be regulated by LOAC. The application of human rights during armed conflict would result in the erosion of rules that authorize intentional targeting as a first option. Participants responsible for targeting decisions would only be permitted to intentionally target when such action is considered to be absolutely necessary. There will, accordingly, have to be a substantial threat or a situation of necessity before intentional targeting may be resorted to.[110] Where such a threat is not identified, an adversary would have to be allowed an opportunity to surrender or non-lethal force would have to be

[104] Provost, R *op cit* note 34 at 343.
[105] Fortin, K 'Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law 1948 –1968' *IRRC Vol 94 No 888* (Winter 2012) at 1437.
[106] Dinstein, Y *Conduct of Hostilities under the Law of International Armed Conflict* (2004) at 20.
[107] Provost, R *op cit* note 34 at 344; Watts, S 'Reciprocity and the Law of War' *Harvard International Law Journal Vol 50 No 2* (Summer 2009) at 422.
[108] Ibid.
[109] Ibid at 350.
[110] Hansen, MA *op cit* note 53 at 52.

employed against the adversary. This would require a modification of the principles of proportionality and of incidental damage. Based on this, it is argued that IHRL is not appropriate to regulate armed conflict as the authorisation of the intentional targeting to take human life in the pursuit of a military victory contradicts the basic tenants of IHRL.

States have the capacity to project their power beyond their territory with dramatic destructive consequences. States thus now have human rights obligations towards persons outside their territorial borders but who are subject to their jurisdiction.[111] Extraterritorial jurisdiction would thus apply wherever a State exercises all or some of the public powers it commonly exercises within its own territory.[112] This development is exacerbated in transnational internal armed conflicts between States and transnational non-State armed groups where the State operates against the non-State group outside of its own territory. The logical and reasonable conclusion is that human rights "apply always and everywhere".[113] The ICRC study into customary LOAC also found that specific areas of customary LOAC and IHRL intersect.[114]

In the final instance and in general, targeting decisions in LOAC relate to status, which status is determined through affiliation to a group. The decision to target a participant thus becomes one of determining membership of or affiliation to a group rather than assessing if the individual members have met the criteria to be legitimately intentionally targeted. Targeting based on C-DPH may realistically be the exception to this norm. This normal targeting evaluation reflects a fundamental difference between assessing group characteristics under LOAC and the individual rights based approach of human rights law. States will generally not permit their citizens and armed forces to be attacked by non-State armed groups that are involved in an armed conflict with the State.[115]

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[111] See *Lilian Celiberti de Casariego v. Uruguay*, Communication No. R. 13/56, decision of 29 July 1981, UN Doc. Supp. No. 40 (A/36/40) at 185; *Ilascu and Others v. Moldova and Russia*, Application No. 48787/99, judgment of 8 July 2004. Reports of Judgments and Decisions, 2004-VII, at 392-394.
[112] Gowland-Debbas, V *op cit* note 18 at 131; See also the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, (2004) ICJ Rep. 136 at 178-181– Case No. 123 (A).
[113] Report on Human Rights in Armed Conflict, UN Doc. A/8052 (1970) 13 at para 25.
[114] Henckaerts, J & Doswald-Beck, L *op cit* note 13 Vol 1: Rules.
[115] See in general MacDonald, SD' The Lawful Use of Targeted Killing in Contemporary International Humanitarian Law' *Journal of Terrorism Research 2(3)* (2011).

6. The Motivation for Expanding Human Rights Law into Armed Conflict

LOAC has, with some success, balanced the demands of military necessity against the considerations of humanity to minimize human suffering.[116] It has been argued that violations of LOAC cannot be ascribed to the inadequacy of its rules but violations rather originate from a reluctance to respect the rules, from unsatisfactory means to enforce them, from indecision as to their application and from a lack of knowledge.[117]

The rules of IHRL have no limitation on their material field of application.[118] The application of IHRL during armed conflict was confirmed and re-affirmed by the SC, the UN General Assembly, the now-defunct UN Human Rights Commission, the Special Rapporteurs and the ICJ.[119] The ICJ stated that "the protection offered by human rights conventions does not cease in case of armed conflict, save for the effect of provisions for derogation . . ."[120]

There are acceptable arguments against the application of human rights during armed conflict and why non-State armed groups cannot be regarded as addressees of human rights.[121] However, it is evident that soft law in the human rights field, including statements of international and non-governmental bodies, judicial reasoning and scholarly writings, maintains that non-State armed groups have human rights obligations.[122]

IHRL is traditionally addressed to States, but there are arguments, although contentious, that extend human rights obligations to bind everyone who exercises governmental level authority.[123] Non-State armed groups will have to display a high level of organisation and possibly even government style duties and have control over territory before a convincing argument may be made for the application of HRL obligations to the group. Admittedly

[116] Hansen, MA *op cit* note 53 at 3.
[117] Henckaerts, JM 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' *87 Int'L Rev. Red Cross 175* (2005) at 176.
[118] Sassoli, M *op cit* note 67 Sassoli, M *op cit* note 67 at 51.
[119] Ibid at 52.
[120] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories Advisory Opinion*, ICJ Reports (2004) 136 at 178, paras 102–106 & *Legality of the Treat or Use of Nuclear Weapons Advisory Opinion*, ICJ Reports (1996) at 226, para 25.
[121] Report of the consultative meeting on the draft Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international Human Rights and humanitarian law (27 December 2002), UN ESCOR, 59th Sess, UN Doc E/CN.4/2003/63 at para 47.
[122] Clapham, A 'Human Rights Obligations of Non-State Actors in Conflict Situations' *88 IRRC* (2006) 491 at 494–507; International Council on Human Rights Policy, 'Ends & Means: Human Rights Approaches to Armed Groups' (2000) available at <http://www.reliefweb.int/library/documents/2001/EndsandMeans.pdf> (last accessed on 1 May 2014) at 59–62.
[123] Clapham, A *op cit* note 123 491 at 494–507.

"armed conflict can exist only between parties that are sufficiently organized to confront each other with military means". State governmental authorities have been presumed to dispose of armed forces that satisfy this criterion. As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the 'organization' criterion is fulfilled. These factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics, and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.[124]

The UN High Commissioner on Human Rights and the ICRC has increasingly regarded human rights to conflict prevention and post-conflict resolution.[125] The United Nations Human Rights, Office of the High Commissioner states that human rights obligations are recognised as inherent rights of all human beings; therefore these rights apply in times of peace and in situations of armed conflict.[126] The United Nations Human Rights, Office of the High Commissioner states that LOAC and IHRL both aim to protect the dignity[127] and humanity of all.[128] The Report further avers that both bodies of law apply to situations of armed conflict and provide complementary and mutually reinforcing protection.[129] The Human Rights Committee in its General Comments Numbers 29 (2001) and 31 (2004), stated that the ICCPR applied in situations of armed conflict where LOAC was applicable.[130] The Human Rights Council in its resolution 9/9 further recognized that HRL and LOAC were complementary and mutually reinforcing.[131]

[124] *Prosecutor v. Boškoski & Tarčulovski*, Judgement, Case No. IT-04-82-T, T.Ch.I, 2008 at paras 194-206.
[125] Benedek, W *op cit* note 361 at 179.
[126] United Nations Human Rights *op cit* note 62 at 5.
[127] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement of 10 December 1998 at para 183 - The Trial Chamber of the ICTY held that the general principle of respect for human dignity was the "basic underpinning" of both human rights law and international humanitarian law.
[128] United Nations Human Rights *op cit* note 126 at 1.
[129] Ibid.
[130] See General Comments Nos 29 (2001) on States of Emergency (Article 4) at para 3 and 31 (2004) on the nature of the general legal obligation imposed on States Parties to the ICCPR at para 11.
[131] United Nations Human Rights *op cit* note 62 at 5.

The interpretation of provisions in treaties should take into account later agreements on the topic. The *Optional Protocol to the Convention on the Rights of the Child* of 2000 includes, in Article 1 thereof, a prohibition against the DPH of children. The preamble to the Optional Protocol places it within human rights law and LOAC and IHRL have merged with regards to child soldiers.[132] It may, however, be argued that the Optional Protocol requires that States take 'all feasible measures' to ensure that child C-DPH does not take place and that this provision does not deal with targeting decisions.

There is substantial convergence between LOAC and IHRL with regards to the obligations upon parties to ensure the prohibition of unnecessary suffering. This was affirmed by the ICJ in its *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons*.[133] This principle has attained customary LOAC status and represents the "overriding consideration of humanity".[134] An ICRC Commentary notes that: [If] a case is "not covered by the law in force," whether this is because of a gap in the law or because the parties do not consider themselves to be bound by Common Article 3, or, are not bound by Protocol II, this does not mean that anything is permitted. The human person remains under the protection of the principles of humanity and the dictates of the public conscience. This clarification prevents an *a contrario* interpretation. Since they reflect public conscience, the principles of humanity actually constitute a universal reference point and apply independently of the Protocol".[135]

7. The Motivation against Expanding Human Rights Law into Armed Conflict

Armed conflict must be interpreted with reference to LOAC and the realities.[136] There is a concern that the infusion of IHRL will restrict the conduct of armed conflict to an extent never foreseen or intended by the drafters and subsequent parties to LOAC instruments. Realistically, the aim of armed conflict is to overcome the military potential or will of the adversary; if the law frustrates this goal excessively then the "'[e]xcessive humanization might exceed the limits acceptable to armed forces, provoke their resistance, and thus erode

[132] Vandewiele, T 'Commentary on the United Nations Convention on the Rights of the Child Optional Protocol' Vol 46: *The Involvement of Children in Armed Conflicts* (2006) at 19.
[133] ICJ Reports, 1996 at 226. See the Legality of the Treat or Use of Nuclear Weapons Advisory Opinion, ICJ Reports (1996) at 257 at para 78.
[134] Ibid at para 95.
[135] I.C.R.C., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* at 1341.
[136] Hansen, MA *op cit* note 53 at 4.

the credibility of the rules."[137] It may also be argued that the unconstrained humanization of armed conflict unreasonably protracts the conflict and aggravates the harm to civilians.[138]

The major parts of LOAC and IHRL were formed by State consent through the treaty process or through the development of customary international law. The sovereign equality of States is a legal fiction but it is foundational in the international legal system.[139] LOAC is thus essentially a self-applied system in which States create the content thereof.

LOAC should, in principle, be the same for the adversaries in all conflicts, failing which it will probably not be respected. It is well known that States are, in fact, not equal in many non-legal ways. Common Article 3 of the GC's, however, does not premise the duties of participants in an armed conflict as being conditioned on reciprocity.[140] The application of LOAC shall rather "not affect the legal status of the Parties to the conflict."[141] The parties are equally required not to act in an inhumane manner. States are the principal developers of LOAC, which is made up of a combination of customary practices and treaty codification,[142] and IHRL should accordingly not be joined together without State consent. The Statute of the ICJ, Article 38, provides a list of the sources of international law to include treaties, customs, and recognized general principles as the sources.[143] These sources reflect and confirm the principle of state sovereignty and consent.[144] State consent is also central to the creation of customary international law. Customary law develops from the consistent practice of States acting out of a sense of legal obligation. It is therefore difficult to imagine how IHRL would apply during armed conflict where a State has not consented thereto. State sovereignty and consent should thus prevent judicial forums from imposing human rights upon States as binding obligations in armed conflict.[145]

[137] Meron, T 'The Humanization of Humanitarian' Law *94 AM. J. Int'L L. 239, 243 (2000)* at 241.
[138] See the Lieber Code, Article 29: "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief."
[139] Provost, R *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organisations, and the Law* at 24.
[140] Ibid at 25.
[141] GC's, Common Article 3.
[142] Reeves, SR & Thurnher, JS 'Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity - Humanity Balance' *Harvard National Security Journal Features* (2013) at 2.
[143] *Statute of the International Court of Justice*, Article 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993.
[144] Hansen, MA *op cit* note 53 at 32.
[145] United Nations Human Rights *op cit* note 62 at 5.

It is further incumbent on States to ensure that military necessity does not totally displace considerations of humanity.[146] Draper states that "[t]he attempt to confuse the two regimes is insupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed . . .". He then states that the idea of humanity might well represent a common base for the two regimes but this alone does not justify the simultaneous application of the two regimes of law.[147]

In general, States privilege the law enforcement authorities and the military forces within their domestic legal framework when confronted with an internal conflict. Most States regard human rights law as being applicable only to law enforcement measures with regards to prevention measures. These States distinguish between those human rights that can be compromised and absolute human rights.[148] States are concerned that the acceptance of the rules of LOAC for a domestic conflict could restrict its freedom of action and that the application of LOAC would confer legitimacy or protection on the armed groups.[149] This is why common Article 3 states that "the application of the preceding provisions shall not affect the legal status of the Parties to the conflict". The commentary by Pictet's notes that "[t]his clause [common Article 3(2)] is essential. Without it neither Article 3, nor any other Article in its place, would ever have been adopted. Common Article 3 is not concerned with the internal affairs of States as it merely ensures respect for the indispensable rules of humanity which all States consider as universally valid. Consequently, the application of common Article 3 does not in itself constitute any recognition by the *de jure* Government that its adversary has any authority, nor does it limit the State's right to suppress the rebellion using all its means".[150]

Currently States thus have a much greater incentive to apply LOAC. The use of LOAC creates a strategic advantage for many governmental purposes.[151] LOAC regulates, *inter alia*,

[146] Reeves, SR & Thurnher, JS *op cit* note 141 at 2.
[147] Draper, GAID 'Humanitarian Law and Human Rights' *Act Juridica 193* (1979).
[148] See the German Counterterrorism Strategy as discussed in Heinz, WS. Germany, State Responses to Terrorist Challenges and Human Rights in National Insecurity and Human Rights: democracies Debate Counterterrorism at 157 – 176; the Canadian National Security Policy in Adelman, H 'Canada's Balancing Act, Protecting Human Rights and Countering Terrorist Threats' in Brysk, A & Shafir, G *National Insecurity and Human Rights: Democracies Debate Counterterrorism* (2007) at 137 – 156.
[149] Fleck, D (ed) *The Handbook of International Humanitarian Law* (2008) at 612.
[150] Pictet, J *The Geneva Conventions of 12 August 1949: Commentary, Geneva: International Committee of the Red Cross 1952* at 60-61.
[151] Kennedy, D *Of War and Law* (2006) at 13-45.

the use of lethal force, and imposes fewer restrictions upon States than HRL does in its struggle against armed groups. Proponents of humanity in armed conflict have, on the other hand, supported a human rights model during armed conflict to achieve their aims.[152]

8. *Lex Specialis* in Armed Conflict

The current literature seems to indicate that there is still an exclusionary approach with regards to the application of LOAC and IHRL.[153] This situation is clearly exposed in the approaches employed in the European and North American continents. The debate primarily focuses on the principle of *lex specialis derogate lex generali* on the one hand, and the question of the extra-territorial application of IHRL treaty law on the other.

Challenges that occur when two branches of law apply simultaneously should be settled with reference to the '*lex specialis derogate legi generali*' principle.[154] The principle confirms, by way of an objective standard which corresponds to the regulated matter, a preferential order for two rules that apply to the same question but which is regulated it in a different way by the two rules.[155] International law, in theory, displays no clear hierarchy of norms and when two branches of law regulate the same area, one will be considered the *lex specialis* and the other the *lex generalis*.[156] The preference for a specific rule is based on its convenience thereof in relation to the issue and its applicability thereto. The principle thus basically determines which rule will prevail over the other to regulate a specific issue.[157]

The determination of the *lex specialis* does not exclude the operation of the *lex generalis* in total.[158] The *lex generalis* assists with the interpretation of the *lex specialis*[159] but an

[152] Doswald-Beck, L 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?' *International Review of the Red Cross* 2006 at 883-887.
[153] Nelson, A *op cit* note 5.
[154] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 at para 106; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 at para 25; Case Concerning Military and Paramilitary Activities in and against Nicaragua (United States v. Nicaragua), Judgment of 19 December 2005 at paras 216-220.
[155] Sassòli, M & Olson, LM *op cit* note 20 at 603.
[156] Matthews, H *op cit* note 83 at 638; Hansen, MA *op cit* note 53 at 4.
[157] Sassòli, M & Olson, LM *op cit* note 20 at 604.
[158] For a discussion of the strong form of the lex specialis (total exclusion of the lex generalis) and the weak for (partial displacement), see van Schaack, B 'The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory' *Legal Studies Research Papers Series Accepted Paper No 02-12* (January 2012) at 43 - 45 available at: http://digitalcommons.law.scu.edu/facpubs/166 (last accessed on 10 June 2014).
[159] See the *Vienna Convention on the Law of Treaties*, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), Article 31(3)(c) available at

interpretation of the *lex specialis*, which is inconsistent with the *lex generalis*, must be avoided if possible.[160] This applies to treaty law interpretation but, because customary international law derives from State practice and *opinion juris*, the existence of a customary human right and a different customary humanitarian rule is not unrealistic.[161] The ICJ, in its *Nuclear Weapons Advisory Opinion*,[162] held that HRL is, in effect, displaced by LOAC during armed conflict.[163] The *Advisory Opinion on the Wall* and UN human rights bodies have argued that HRL is not completely displaced by LOAC but may indeed, at times, be directly applicable during armed conflict.[164] The ICJ described the relationship between LOAC and IHRL as "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law".[165]

The Eritrea Ethiopia Claims Commission found that human rights law in armed conflict enjoys "particular relevance in any situations involving persons who may not be protected fully by international humanitarian law, as with a Party's acts affecting its own nationals".[166] Here it is submitted that LOAC specifies the rules regarding DPH specifically as well as the relation of this exclusion to civilian immunity and the right to life. LOAC would thus, in the case of DPH, specify what constitutes the arbitrary depravation of life, meaning the civilian may only be targeted 'for such time' as the civilian 'directly participates in hostilities'.[167] The intentional targeting of the civilian DPH must also take into account the definition of a military objective and the principle of proportionality. The application of IHRL rules regarding the right to life is, therefore, not required in these circumstances. This would

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https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (last accessed on 14 January 2015).

[160] Sassòli, M & Olson, LM *op cit* note 20 at 605.

[161] Henckaerts, J & Doswald-Beck, L *op cit* note 13 Vol 1: Rules at 299-383.

[162] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996 at para 25.

[163] Lubell, N 'Challenges in Applying Human Rights Law to Armed Conflict' *IRRC, Vol 87 No 860* December 2005 at 738; See also Jarah, S & McBeth, A (eds) *Research Handbook on International Human Rights Law* (2010) at 309 – 310.

[164] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004; Human Rights Committee, General Comment 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) at para 3; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel; 31/08/2001. E/C.12/1/Add.69.

[165] Ibid at para 106.

[166] Eritrea Ethiopia Claims Commission, Partial Award, Civilians Claims, Ethiopia's Claim 5 (17 December 2004) at 28.

[167] API, Article 51(3) & APII, Article 13(3).

change where there is law enforcement action against civilians. The distinction between *jus ad bello* and *jus in bello* must be kept intact.

There is, however, extensive evidence that the ICJ holds the view that human rights continue to apply during armed conflict.[168] The ICJ has confirmed that "[t]he test of what is an arbitrary deprivation of life . . . falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[169] In this regard it is submitted that the right to life is a matter for concurrent application of both branches of the law. LOAC and IHRL will be mutually reinforcing and complementary.[170] Complementarity of application suggests that LOAC and IHRL do not contradict each other as they are based on the same principles and values. Complementarity reflects the operation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties where account may be taken of the "relevant rule of international law applicable in the relations between parties" when interpreting a norm. This confirms that international law is a coherent system.[171]

The Inter-American Commission on Human Rights held that "in a situation of armed conflict, the test for assessing the observance of a particular right (under the American Declaration of the Rights and Duties of Man) may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis.*[172] The Human Rights Committee holds that "more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights".[173]

Complementarity can often present answers for harmonising different legal norms, within limits. Where there is a genuine conflict between those norms, one must prevail. In such a

[168] UN Commission on Human Rights, Working Paper on the Relationship between Human Rights and International Humanitarian Law by Hampton, F & Salama, I. UN Doc. E/CN.4/Sub.2/2005/14, 21 June 2005.
[169] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996 at 240, para 25.
[170] See in general Droege, C *op cit* note 19 at 337.
[171] Ibid.
[172] *Coard v United States*, Case no 10.951, Report no 109/99, IACommHR, 29 September 1999 at paras 38–44; Detainees in Guantanamo Bay, Cuba—Request for precautionary measures (12 March 2002) IACommHR 41 ILM (2002) 532.
[173] UNCHR 'General Comment 31' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2004), UN Doc HRI/GEN/1/Rev.7, UN Doc CCPR/C/21/Rev.1/Add.13 at para 11.

case, the *lex specialis* norm will prevail.[174] The application of LOAC will in certain circumstances, and specifically with regards to the right to life, often conflict with the State's legal obligations under IHRL.[175] Common Article 3 and APII intersect in various ways and it may be argued that LOAC contained therein reiterates human rights obligations.[176]

LOAC applies as soon as any armed conflict arises and, in theory and at least in the traditional analysis, human rights protection ceases.[177] In general, LOAC will, according to common Article 2 of the GC's, apply during IAC.[178] In LOAC, intentional attacks are lawful against combatants and, it is argued, against members of non-State armed groups to the conflict and civilians directly participating in hostilities. Law enforcement activities are, by definition, normally directed against suspects,[179] with the intention of capturing such persons. LOAC is a *lex specialis* that supersedes IHRL during an IAC and an NIAC.[180] This has been referred to as a continuum of protection for civilians whereby at some point only IHRL applies, and at the other extreme, only LOAC applies. The area between the two extremes allows for progressive simultaneous application of both bodies of law to a lesser or greater extent. Within these extremes the various forms of conflict will be considered. Thereafter situations of internal disturbances and NIAC, where only common Article 3 applies, armed conflict covered by APII and IAC, where the GC's and API are applicable will be considered. It is argued that the middle point where both a minimum of LOAC and IHRL applies will converge at the point of NIAC.[181]

On the other hand, it must be noted that there is the possibility that IHRL may well be the *lex specialis* in certain conflict situations or other situations of violence.[182] The only further option is that both bodies of law are applicable during NIAC.[183] LOAC is applicable through specific treaty provisions and customary LOAC. IHRL is applicable where it governs

[174] Droege, C *op cit* note 19 at 344.
[175] Matthews, H *op cit* note 83 at 634.
[176] Lindsey, M *op* cit note 95 at 230.
[177] Kessing, PV *op cit* note 66 at 156.
[178] "In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to 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."
[179] Sassòli, M & Olson, LM *op cit* note 20 at 615.
[180] Kretzmer, D *op cit* note 100 at 179.
[181] See in general Lindsey, M *op cit* note 173 at 230-231.
[182] See in general Henderson, I 'Contemporary Law of Targeting: Military Objectives, Proportionality, and Precautions in Attack under Additional Protocol I' *International Humanitarian Law Series Vol 25* at 32-35.
[183] Lindsey, M *op cit* note 173 at 193.

relations between the State and its subjects. The decision regarding which body of rules applies is objective and is not a legal one. IHRL will apply where a law enforcement situation is applicable. The treaty rules of LOAC in NIAC are less undeveloped than those applicable for IAC and accordingly, under the *lex specialis* principle, this would allow greater scope for the application of IHRL.[184]

It may thus be possible to defend the relevance of HRL to NIAC within a State. LOAC treaty law relevant to NIAC is relatively limited and thus the argument for the application of HRL under these circumstances may seem more rational.[185] This must be measured against the development in the jurisprudence of international criminal tribunals, and the impact of IHRL and State practice that has resulted in the law applicable to NIAC becoming more identical to that of IAC. The *Tadic* case held that customary LOAC rules on IAC and NIAC are, in essence, the same.[186] The ICRC publication on *Customary International Humanitarian Law* reported that most of the customary LOAC rules found in API apply equally to NIAC's.[187] LOAC of NIAC is equally applicable to all adversaries in an NIAC.[188] This complicates the question whether IHRL indeed applies equally to all adversaries in a NIAC.

It is further submitted that the application of the *lex specialis* principle cannot exclude the application of the principle of complementarity which will continue to operate along with the *lex specialis*.[189] The reasonable conclusion, which is supported by case law, is that LOAC will continue to operate in combination with IHRL during armed conflict.[190] The inclination is accordingly to deviate from the *lex specialis* articulation of the relationship between LOAC and IHRL; therefore these fields must complement each other as opposed to being mutually exclusive.[191] It is thus argued that LOAC and IHRL should be interpreted to find similarities to determine and interpret LOAC and not to limit its application.

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[184] Sassòli, M & Olson, LM *op cit* note 20 at 601.
[185] Lubell, N *op cit* note 160 at 746.
[186] *Prosecutor v. Tadic*, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995 at paras 97–98, 117, 119–125.
[187] Sassòli, M & Olson, LM *op cit* note 20 at 602.
[188] Zegveld, E *Accountability of Armed Opposition Groups in International Law* (2002) at 9-38.
[189] Gowlland-Debbas, V *op cit* note 18 at 140.
[190] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, (2004) ICJ Rep. 136 – Case No. 123 (A) at 106; *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgement, 19 December 2005 – Case No. 236 at 216.
[191] Human Rights Committee, General Comment No. 31.

In addition the *Vienna Convention on the Law of Treaties*[192] requires that treaties be interpreted within the context of "any relevant rules of international law applicable in the relations between parties".[193] This confirms that the application of LOAC and IHRL must be inclusive and based on relationships of priority.[194]

It is submitted that the extent of control over territory where a conflict occurs is of importance to determine the *lex specialis* in a given situation. Where regular armed forces act within their own territory and where they effectively control such territory, this may indicate, in NIAC, that IHRL is the *lex specialis*.[195] This must, however, be interpreted taking into account the possibility of capturing irregular fighters, the dangers inherent in capture missions, the immediacy of such danger and the danger that the irregular fighters represent to all parties.[196] These factors may again indicate that LOAC is the *lex specialis*. Control, as above, refers to 'effective control' over a territory in order for a State to effectively and practically guarantee respect for human rights.[197] The notion of 'effective control' is, however, vague and difficult to interpret and apply.[198]

The US and Israel have consistently argued that the applicability of LOAC as *lex specialis* displaces IHRL.[199] However, the practice of other States that deviates from the existing LOAC, and even every violation where *usus* and *opinio iuris* can be established, may result in the formation of custom. The application of IHRL during armed conflicts by States may thus result in new developments. The application of LOAC in Colombia was dealt with in the *Las Palmeras* case by the Inter-American Court of Human Rights. The Inter-American Commission on Human Rights petitioned the Court to hold Colombia responsible for a breach of Article 4 of the *American Convention on Human Rights*, which confirms the right to life, and with a breach of common Article 3 of the GC's. The Court held that "the

[192] *Vienna Convention on the Law of Treaties*, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).
[193] Article 31(3).
[194] Gowlland-Debbas, V *op cit* note 18 at 141.
[195] See *Ilascu and Others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004; Reports of Judgments and Decisions, 2004-VII at para 333; *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A0 at paras 62-64 (1995) (Preliminary Objections), this case considered the effective control over territory under military occupation.
[196] *Public Committee Against Torture in Israel v. The Government of Israel*. ISR. L. REV. Vol 40, No1 at para 40.
[197] Droege, C *op cit* note 19 at 330.
[198] Provost, R *op cit* note 34 at 263.
[199] Hampson, FJ *op cit* note 23 at 188.

American Convention [. . .] has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions."[200]

The finding contradicts the Commission's decision in the *Abella* case.[201] The Inter-American Court has effectively rejected the idea that all persons, during internal or IAC, are protected by the provisions of IHRL and by LOAC.[202] The *Las Palmeras* case therefore provides a more flexible legal framework than HRL for the Colombian government in dealing with internal conflict where lethal force is foreseen. Colombia objected to the jurisdiction of the Inter-American Commission on Human Rights, contending that LOAC constitutes the *lex specialis* in the circumstances and displaces the application of HRL with regards to the assessment of whether a killing was arbitrary.[203] The Inter-American Commission held that LOAC serves as an interpretive aid for the decision on whether Colombia violated the right to life in the American Convention on Human Rights, Article 4.[204]

The application of an alternative interpretation of *lex specialis*, which opposes the application of LOAC, as found in the plain reading of the *Nuclear Weapons Case*, has not gained much momentum. The *lex specialis* debate, which favours the introduction of more IHRL norms into armed conflict, however, does have a decided influence on the current view where LOAC displaces IHRL during armed conflict. This has resulted in an evolving understanding that "[w]here LOAC is silent or its guidance inadequate, specific provisions of applicable human rights law may supplement LOAC".[205]

9. The Right to Life in Armed Conflict

LOAC and IHRL both apply to armed conflict and should specifically be considered with regards to the right to life in armed conflict. LOAC and IHRL treaties regularly use the same language, notions and concepts and here Common Article 3 and GCIV, Articles 27 and 32,

[200] *Las Palmeras v. Colombia*, Preliminary Objections, Judgement of February 4 2000, Series C No. 67 at para 33.
[201] *Serrano Cruz Sisters v. El Salvador*, Preliminary Objections, Judgement of November 23 2004, Series C No. 118.
[202] Ibid at para 112.
[203] *Ecuador v. Colombia*, Inter-State Petition PI-02, Admissibility, Franklin Guillermo Aisalla Molina, 21 October 2010 at para 114-116.
[204] Ibid at para 118.
[205] Operational Law Handbook (2013) The Judge Advocate General's Legal Center & School 47, para. II. B. 2 & 3 available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2013.pdf (last accessed on 28 December 2014).

and API, Article 75 and APII, Articles 4 & 5 are relevant. These articles make mention of human rights protections, which link the two systems of law.[206]

As one of its goals, IHRL has, for purposes of the present study, the protection of the right to life of all humans at all times, while LOAC, in general, aims to establish a balance between military necessity and humanity during armed conflict.[207] LOAC also attempts to protect the life of all persons involved in or affected by all armed conflict.[208] The security of the individual is a fundamental obligation of the State. States, accordingly, have a basis obligation to ensure that the human rights of the persons within their jurisdiction are guaranteed.[209] Human rights are universal, interdependent, interrelated and indivisible[210] and are inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.[211] Human rights are inalienable and cannot, therefore, be taken from a person. The UDHR confirms this view, based on its natural law view which states that human beings are "born free and equal in dignity and rights".[212] The right to life is fundamental[213] and is a core of human rights.[214] IHRL, accordingly, prohibits the arbitrary deprivation of life. This must be interpreted in the light of the fact that these instruments do not specify when killing will be considered to be arbitrary.[215] Common article 3 also contains the right to life and its provisions are compatible with a variety of human rights obligations.[216]

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[206] Ibid at 120.
[207] PCATI *op cit* note 193 at para 22.
[208] Keynote Address by Beerli, C 'ICRC Vice-President Scope and Application of International Humanitarian Law' *Proceedings of the Bruges Colloquium No. 43* (Autumn 2013).
[209] Yesilkaya, O 'International Human Rights Law and Terrorism' in Ersen, MU & Ozen, C (eds) *Use of Force in Countering Terrorism* (2010) at 49.
[210] *Vienna Declaration and Programme of Action of 25 June 1993* available at http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx (last accessed on 12 May 2014); See also Pradhan, RK *Terrorism, Rule of Law and Human Rights* (2009) at 128.
[211] United Nations Human Rights *op cit* note 62 at 5.
[212] UDHR, Article 1.
[213] Human Rights Committee, The Right to Life, General Comment No. 6 (30 April 1982), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HR1/GEN/1/Rev.2, 29 March 1996.
[214] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 – Case No. 62 at 506 www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last accessed on 1 May 2014), Dissenting Opinion of Judge Weeramantry. See also the *Universal Declaration of Human Rights*, Article 3; *International Covenant on Civil and Political Rights*, Article 6; *European Convention on Human Rights*, Article 2; *Inter-American Convention on Human Rights*, Article 4 and the *African Charter on Human and Peoples Rights*, Article 4.
[215] Sassòli, M & Olson, LM *op cit* note 20 at 610.
[216] Lindsey, M *op cit* note 173 at 208.

IHRL is universal and as such applies during armed conflict, regardless of whether it is incorporated into LOAC. However, HRL protects individuals from their own state; fundamental human rights would thus continue to apply during armed conflict with regards to a state and those within its jurisdiction. Fundamental rights may be universal but they are not absolute and may thus be qualified or interpreted differently in times of peace and armed conflict. The right to life is a fundamental human right and it protects individuals from "arbitrary," but not all, deprivations of life.[217] In general, this right may be "limited by competing interests such as the right to self-defense, acting to defend others, the prevention of serious crimes involving a grave threat to life or serious injury, and the use of force to arrest or prevent the escape of persons presenting such threats." The deprivation of life under these circumstances are, accordingly, not considered to be arbitrary.[218]

Human rights are, in theory, similar in IAC and NIAC. The right to life is a non-derogable right[219] but it is not regarded as to be a norm of *jus cogens*.[220] The right to life is similarly, during the existence of an armed conflict, subject to qualification. The ECHR found that deaths resulting from lawful acts of armed conflict are not prohibited.[221] The ICJ held in the Nuclear Weapons case[222] that the ICCPR continued to operate during armed conflict but that LOAC was exclusively applicable to the interpretation of the right to life.[223] The court concluded that the arbitrary depravation of life must be determined by the *lex specialis*, being LOAC. The arbitrary depravation of life must, however, be interpreted in the context of the treaty in its entirety.[224] Thus it is submitted that the right to life is limited where there is a lawful act in armed conflict, however difficult the term, 'lawful' may be to interpret. This decision was confirmed by the Inter-American Commission on Human Rights,[225] the Human

[217] Hansen, MA *op cit* note 53 at 25.
[218] Watkin, K *op cit* note 19 at 10.
[219] Gowland-Debbas, V *op cit* note 18 at 129.
[220] Bianchi, A 'Human Rights and the Magic of *Jus Cogens' The European Journal of International Law Vol 19 No 3 EJIL* (2008) at 495; Criddle, EJ & Fox-Decent, E 'A Fiduciary Theory of *Jus Cogens*' *The Yale Journal of International Law [Vol 34: 331]* at 368.
[221] ECHR, Article 15.
[222] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 – Case No. 62 www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last accessed on 1 May 2014).
[223] Ibid.
[224] See Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21? Rev.11, 31 August 2—1 at 9-10.
[225] *Coard et al. v. United States*, Inter-American Commission on Human Rights, Case 10.951, Report No. 109/99, September 29, 1999 at 39.

Rights Committee[226] and in political forums.[227] The application of human rights during armed conflict must, however, be informed by LOAC.

None of the IHRL instruments regards the right to life as absolute. The intentional use of lethal force by the State, under limited conditions, may be considered justifiable.[228] The Inter-American Commission on Human Rights held that "civilians . . , attacked the Tabata base . . . whether singly or as members of a group thereby . . . are subject to direct and individualized attack to the same extent as combatants". It was further found that these civilians forfeit the benefit of the proportionality principle and of other precautionary measures.[229] The Commission thus only applied LOAC to the situation and only those who surrendered and civilian bystanders were considered to be entitled to the right to life. The same court, however, applied IHRL in NIAC situations and found that "[i]nstead of exonerating the State from its obligations to respect and guarantee human rights, this fact obligated it to act in accordance with such obligations."[230]

The ICJ found that the test of what constitutes an arbitrary depravation of life during armed conflict must be determined by the applicable *lex specialis*, being LOAC and not from the IHRL instruments.[231] The only exception is the qualification in the European Convention that allows for derogation in respect of "lawful acts of war".[232] The European Convention on Human Rights,[233] the American Convention on Human Rights,[234] and the Convention against Torture[235] allow for derogation in times of 'war'.[236] It may be argued that war must be

[226] Human Rights Committee General Comment 31. Concluding Observation of the Human Rights Committee, Israel at para 11.
[227] Security Council Resolution 1265 (1999) at 4.
[228] Schmahl, S 'Targeted Killings – A Challenge for International Law?' in Gowlland-Debbas, V *op cit* note 18 at 238.
[229] *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. (1997) at para 178.
[230] *Bamaca Velasquez v. Guatemala*, Series C, No. 70, 25 November 2000 at para 207.
[231] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 – Case No. 62 at para 25 www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last accessed on 1 May 2014).
[232] ECHR, Article 15(2); Hampson, FJ *op cit* note 23 at 202.
[233] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Sept. 3, 1953, 213 U.N.T.S. 222, para 15.
[234] *American Convention on Human Rights*, Nov. 22, 1969, 1144 U.N.T.S. 123, Article 27.
[235] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* New York, 10 December 1984 at Article 2 available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last accessed on 14 january 2015).
[236] Droege, C *op cit* note 19 at 318.

interpreted as referring to IAC. There is, however, no concept of derogation in LOAC as the rules of LOAC are specifically intended to operate in times of armed conflict.[237]

The Inter-American Commission on Human Rights in the *Plan de Sanchez Massacre*[238] case in 1999 and the Human Rights Committee in the *Camargo v. Colombia*[239] matter dealt with arbitrary killing in NIAC's. Both the matters engaged with LOAC. The *Plan de Sanchez* case concerned a direct attack on civilians by the military. The Camargo matter dealt with an intentional attack on persons who were suspected of being members of a guerrilla organisation. The Commission applied a standard that required capture and arrest where possible before lethal force could be used. These cases thus did not discuss C-DPH.[240]

The interface between LOAC and IHRL arose from the extra-territorial application of the European Convention on Human Rights by the ICJ and the extension of human rights law during armed conflict.[241] The European Court of Human Rights favours a human rights approach to international armed conflict, notwithstanding the intensity of the fighting.[242] This is problematic as the European court's lack of substantial engagement with the interaction between LOAC and IHRL has resulted in little guidance on this issue. The Inter-American court has, however, been more prepared to engage with the interaction between these two legal systems.[243] The US has, however, constantly precluded the extra-territorial application of human rights treaty law. The Canadian Federal Court of Appeal has found, with regards the transfer of detainees in Afghanistan, that the Canadian *Charter of Rights and Freedoms* did not have extraterritorial application to that armed conflict. The court held that "[t]here is no legal vacuum, considering that the applicable law is international humanitarian law".[244] In North America there seems to be judicial unwillingness to extend domestic human rights law where LOAC may be applied instead.

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[237] Doswald-Beck, L & Vite, S *op cit* note 88 at 4.
[238] *Plan de Sanzhes Massacre v. Guatemala*, Inter-American Court of Human Rights, Judgment of 29 April 2004 (Ser. C).
[239] *Camargo v. Comombia*, 1985, Human Rights Committee, Communication No. 45/1979, UN Doc. CCPR/C/OP/1 at 112.
[240] Yorke, J *op cit* note 3 at 137.
[241] *European Convention on Human Rights* available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (last accessed on 28 December 2014).
[242] Nelson, A *op cit* note 5.
[243] Ibid.
[244] *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FCA 401, [2009] 4 F.C.R. 149, para. 36.

It may be argued that the IHRL right to life is incorporated into LOAC instruments where there is a general prohibition on attacks against civilians.[245] This prohibition against violence to life and person regardless of nationality is also evident in Common Article 3 of the GC's.[246] LOAC allows the use of lethal force and accepts the incidental killing of civilians subject to proportionality. In IHRL, lethal force may only be employed where there is impending threat[247] of serious violence that may only be prevented by such application of force.[248] The legitimate use of force to deprive a person of his life simply because of the person's status as a combatant is undoubtedly repugnant to IHRL. IHRL prohibits the use of force unless absolutely necessary with regards to an imminent threat.[249] The HRL comprehension of proportionality applied to a situation where an individual poses no direct and immediate threat would result in intentional targeting being considered as disproportionate. LOAC would, however, taking into account a proportionality assessment, regard an intentional targeting decision as legitimate.[250]

The Inter-American Commission on Human Rights accordingly found in the *Las Palmeras* case that the right to life must be interpreted with regard to "the norms embodied in both the American Convention and in customary international humanitarian law applicable to internal armed conflicts and enshrined in Article 3, common to all the 1949 Geneva Conventions".[251] The same court found elsewhere that the norms of LOAC should be regarded as a "source of inspiration".[252] The Inter-American Commission went further to find that during situations of NIAC LOAC and IHRL "must converge and reinforce each other".[253] In this matter (*Abella v. Argentina*)[254] the Inter-American Commission dealt with an attack of 42 armed persons on the military barracks located at La Tablada. The Commission, with regards to the principle of

[245] See API, Articles 48 & 57.
[246] GC's, Common Article 3, paragraphs 1(a) & (d).
[247] See the UN Basic Principles of the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September 1990, Report Prepared by the Secretariat (UN Publication, Sales No. E.91.IV.2), Chap. I, sect. B.2., annex, Articles 9 & 10.
[248] Droege, C *op cit* note 19 at 344.
[249] Matthews, H *op cit* note 83 at 640.
[250] Lubell, N *op cit* note 160 at 746.
[251] *Las Palmeras v. Colombia*, Inter American Commission of Human Rights, Case 11.237, Report No. 10/98 of 20 February 1998 at 29.
[252] *Coard et al v. United States*, Inter American Commission of Human Rights, Case 10.951, Report No. 109/99 of 29 September 1999 at 57.
[253] *John Carlos Abella v. Argentina* (La Tablada case), Inter American Commission of Human Rights, Case 11.137, Report No. 55/97 OEA/Ser.L/V/II.95 Doc. 7 rev., at 271 (1997), at 161-177 of 20 February 1998 at 29.
[254] Ibid.

distinction, found that "[s]pecifically, when civilians, such as those that attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a group, they thereby become legitimate military targets. As such, they are subject to direct individualized attack to the same extent as combatants. Thus, by virtue of their hostile acts, the La Tablada attackers lost the benefits of the above mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to peaceable victims. In contrast, these humanitarian law rules continued to apply in full force with respect to those peaceable civilians present or living in the vicinity of the La Tablada base at the time of the hostilities".[255]

The ICJ, however, interpreted IHRL in a manner that corresponds with the standards of LOAC. It is, however, not disputed that IHRL restricts the ability of States to use lethal force. The law must dictate the circumstances under which a person may be deprived of his life by State authorities. This will include action taken by military personnel, law enforcement officers and other State agents.[256] The ICJ thus used the principle of *lex specialis* to illustrate the relationship between the right to life in human rights and LOAC.[257] This interpretation is supported by the Inter-American Commission in the Coard case[258] but the African Commission on Human and Peoples' Rights and the European Court of Human Rights has not expressed an opinion herein. The European Court of Human Rights has, however, held that the right to life would be violated in security operations where State agents omitted to "take all feasible precautions in the choice and means of a security operation mounted against an opposing group with a view of avoiding and, in any event, to minimise incidental loss of civilian life."[259] This wording is consistent with that of API, Article 57(2)(a)(ii).[260]

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[255] Ibid at paras 178-179.
[256] Yesilkaya, O *op cit* note 205 at 62.
[257] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996 at para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, (2004) ICJ Rep. 136 at para 106; *Case Concerning Armed Activities on the Territory of the Congo* (DRC v. Uganda), 2005 I.C.J. 116, (Dec. 19) at para 216.
[258] *Coard v. United States*, Case 10.951, Inter-American Commission on Human Rights., OEA/ser.L/V/II.106.doc.3rev (1999) at para 42.
[259] *Ozkan v. Turkey*, Eur. Ct. H.R. Judgment of April 6, 2004 at para 297 available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%D6zkan&sessionid=1751995&skin=hudoc-en (last accessed on 1 May 2014).
[260] 1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken: . . . (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Essentially, the use of force in armed conflict is, in itself, a violation of the right to life. This was confirmed in 1986 in Tehran in that "[p]eace is the underlying condition for the full observance of human rights and war is their negation."[261] Resolution XXIII that emerged from the conference is entitled 'Respect for Human Rights in Armed Conflicts'.[262] However, it must be remembered that LOAC is an effective mechanism to protect persons during armed conflict and the considerable body of law created should not be disregarded in favour of the application of IHRL as armed conflict is a reality and will continue to be in future.

The court held in the Nuclear Weapons case[263] that the *International Covenant on Civil and Political Rights* ("ICCPR")[264] continued to apply during armed conflict and therefore the right to life, and not to be arbitrarily deprived thereof, applies in armed conflict. The ICCPR and other human rights instruments will thus continue to apply in armed conflict.[265] The United Nations Human Rights Committee has employed the ICCPR in IAC and NIAC.[266] The ICCPR[267] and other regional human rights treaties permit derogation from specified obligations in times "of public emergency which threatens the life of the nation".[268] This, by necessary implication, recognises that IHRL applies in armed conflict unless limited derogation is allowed.[269] This may be interpreted to mean that the drafters of human rights instruments with derogation clauses intended to extend the application of human rights to times of armed conflict. It must be noted at this stage that human rights, and specifically the right to life, are regarded as inherent to the human person and may only be recognised by law

[261] *International Conference on Human Rights*, Tehran, 12 May 1968 – Resolution XXIII.
[262] Fortin, K *op cit* note 104 at 1439.
[263] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 – Case No. 62 at 40 www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last accessed on 1 May 2014).
[264] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 17, 6 I.L.M. 368 (entered into force 23 March 1976).
[265] *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment 19 December 2005, (2005) ICJ Reports 168. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, (2004) ICJ Rep. 136 at 178 – Case No. 123 (A).
[266] See inter alia the *Concluding Observations on Democratic Republic of Congo*, UN Doc. CCPR/C/COD/CO/3 (Apr. 26, 2006); Colombia, UN Doc. CCPR/CO/80/COL, (May 26, 2004); Israel, 10, UN Doc. CCPR/C/79/Add. 93 (Aug. 18, 1998); *Guerrero v. Colombia*, UN Doc. CCPR/C157D/45/1979 (Mar. 31, 1982). This is supported by the observations of the UN Committee on Economic and Social Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child.
[267] *International Covenant on Civil and Political Rights*, Article 6(1): "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." - *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 17, Articles 9-14, 6 I.L.M. 368 (entered into force 23 March 1976).
[268] ICCPR, Article 4; See Lindsey, M *op cit* note 173 at 195.
[269] Cerone, J *op cit* note 17 at 99.

and therefore cannot be conferred by treaty. This is additional evidence that human rights would continue to apply in armed conflict.[270]

The *Turku Declaration of Minimum Humanitarian Standards* of 1990[271] referred to the inherent right to life in terms of the prohibition of genocide. The *Basic Principles and Guidelines on the Rights to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*[272] considered LOAC and IHRL as equal normative frameworks for the provision of remedies. LOAC and IHRL must therefore be regarded as complementary and reciprocally supporting. This reinforced a UN Human Rights Commission resolution which stated that "human rights law and international humanitarian law are complementary and mutually enforcing."[273]

The right to life in IHRL is, in itself, regarded as a limitation on the application of human rights law during armed conflict. This may, at first glance, seem counterintuitive. The right to life is exactly what it implies – a right – and this formulation is consistent with the formulation of human right. LOAC is not formulated accordingly and comprises duties that participants have, as opposed to the rights of the person. LOAC thus places an obligation on the participant and possible transgressor to protect, in this case, the civilian from intentional attack and the civilian has a right to immunity from intentional attack. The protection afforded to the civilian by LOAC is also without any discrimination and the immunity from intentional attack applies to all civilians, except those participating directly in the hostilities. Civilians are thus to be spared from the negative consequences of armed conflict. Intentional attacks are, accordingly, limited to military objectives, as defined,[274] which accepts that some "incidental loss of civilian life" may occur subject to the principle of proportionality.[275] This provision for incidental loss and the targeting of civilians based on a proportionality assessment contradicts human rights norms.

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[270] Lindsey, M *op cit* note 173 at 196.
[271] *Declaration of Minimum Humanitarian Standards*, reprinted in Report of the Sub-Committee on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provincial Agenda Item 19 at 4, UN Doc. E/CN.4/1995/116 (1995).
[272] GA. Resolution 60/147 of 16 December 2005.
[273] Commission on Human Rights, Protection of the Human Rights of Civilians in Armed Conflict, April 15 2005, E/CN.4/2005/L.82.
[274] API, Articles 48 & 52.
[275] API, Article 52(5)(b).

Based on this, an argument may be made for the application of HRL standards on the use of force during domestic operations of a limited degree and during NIAC where only common Article 3 applies, as opposed to conflicts where APII becomes applicable. This, however, elevates the threshold for the determination of an NIAC, negating attempts to accept a lower threshold for the applicability of LOAC protections. The application of more rigorous HRL rules in NIAC's would result in a decreased capacity by States to regulate the conduct of non-State groups and this would probably not be tolerated by States.

Authors, like Lubell and Kretzmer, have presented an argument which proposed that a re-examination of the relationship between LOAC and HRL, with regard to the right to life during NIAC, is required.[276] Lubel's argument initially asserts that "[w]hile there might still be pockets of resistance to this notion [that human rights law is not entirely displaced and can at times be directly applied in situations of armed conflict], it is suggested here that the resisters are fighting a losing battle and should lay down their arms and accept the applicability of human rights law in times of armed conflict."[277] These authors, who essentially propose a mixed model of applicability of LOAC and HRL during armed conflict, however, struggle to make a convincing argument. This can be illustrated where Lubell, in referring to Kretzmer, argues, while acknowledging "evident difficulties", that "an attempt to detain should be made before lethal force can be used, could indeed be advocated".[278] Any argument that contains the words, 'difficulties', 'attempt' and 'could' in the same sentence is unconvincing. The issue would have been much more complicated had the right to life constituted an international norm of *jus cogens*. A *jus cogens* rule would have to prevail as the *lex superior* over any LOAC rule. The right to life, however, does not qualify to be such a peremptory norm of international law.

The GC's refers to the term, 'life' only in Common Article 3 and this reference only applies to "[p]ersons 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

[276] Lubell, N *op cit* note 160 at 750; Kretzmer, D *op cit* note 100 at 201.
[277] Lubell, N *op cit* note 160 at 738.
[278] Ibid at 750.

place whatsoever with respect to the above-mentioned persons: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . .”

API refers to the term, ‘life’ in Article 51 (Protection of the civilian population), and specifically in subparagraph 5(b) which applies to indiscriminate attacks. Attacks are considered to be indiscriminate where the “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”. A further reference is found in API, Article 57(2) (Precautions in attack), which places restrictions on those who decide on attacks.[279]

Reference to life is also found in API, Article 75(1) (Fundamental guarantees), which only refers to those “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction”.[280]

APII, Article 4 (Fundamental guarantees), refers to the term, ‘life’ and this section applies to those “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be

[279] It requires that “[t]hose who plan or decide upon an attack shall (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) Refrain from deciding to launch any 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; (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; . . .”.

[280] Based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons”. Subsection 2 lists acts that are considered as “prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents” and these acts include “(a) Violence to the life, health, or physical or mental well-being of persons, in particular: (i) Murder; (ii) Torture of all kinds, whether physical or mental; (iii) Corporal punishment ; and (iv) Mutilation; . . .”. See also API, Article 85 (Repression of breaches of this Protocol).

no survivors". Subsection 2 then lists specific acts that "shall remain prohibited at any time and in any place whatsoever" to include "violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; . . .".

The Just War theory principle of discrimination requires that a distinction be made between legitimate and illegitimate targets.[281] This argument is expanded upon by Kaufman but reference is made by him to the morality of targeting the 'innocent'.[282] He attempts to rescue the argument by referring to the difference between harmful and harmless. He then states that all 'soldiers' pose a threat and are thus not innocent; therefore they are legitimate targets. This is referred to as 'morally acceptable warfare'. The killing of an innocent, on the other hand, intentionally violates the person's right to life. This argument fails as one might infer that the killing of a 'soldier' as a legitimate target would not violate his right to life. This is unrealistic and shows why human rights norms are not fit for application to direct participants in armed conflict. The further distinction between the violation and infringement of the right to life is also unsatisfactory for application in armed conflict. The right to life would be infringed when a civilian is unintentionally killed in terms of collateral targeting decisions and the right is violated when civilians are directly targeted. This argument does not assist as collateral targeting is allowed in LOAC but the violation of the right to life of a civilian is not allowed under any circumstances. The human rights application of these ideas is thus covered, in a specific manner, in LOAC, with the ultimate aim of overcoming the military potential of the adversary. C-DPH is defined as occurring on a sporadic or unorganised basis, as opposed to the direct participation of members of the regular armed forces or members of organised armed groups. The *Finogenov and Others v. Russia* case shows some recognition that collateral damage that occurs with reference to combatting terrorism and the likelihood of such damage may have to be accepted where a human rights framework is applicable; alternatively, it would be very difficult to apply IHRL to all hostilities.[283]

[281] Kaufman, F 'Just War Theory and Killing the Innocent' in Brough, MW (ed) *SUNY Series, Ethics and the Military Profession: Rethinking the Just War Tradition* (2007) at 99.
[282] Ibid at 99. See also Lesh, M Routledge Handbook of the Law of Armed Conflict, Part II: Principle of Distinction at 2 (Lesh also refers to 'innocence' when describing civilians) available at http://law.huji.ac.il/upload/Lesh_LossofProtection.pdf (last accessed on 14 January 2015).
[283] *Finogenov and Others v. Russia* 18299/03 27311/03 Judgment (Merits and Just Satisfaction) Court (First Section) 20/12/2011 available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108231#{"itemid":["001-108231"]} (last accessed on 28 December 2014).

10. Intentional Targeting of the Adversary in Armed Conflict

Combatants may be targeted at any time during an armed conflict unless they have surrendered or are otherwise rendered *hors de combat*. The existence of a threat to the adversary is not required as combatants are an element of the military potential of the adversary and their intentional targeting is done to weaken the cumulative military potential of the adversary.[284] This, although some may disagree, is supported by actual practice.[285]

The treaty law that applies to NIAC does not provide a clear answer to the legality of the direct targeting of an adversary in NIAC. The term, 'combatant' is not mentioned in Common Article 3 of the GC's of 1949 or in APII. This implies that no right to participate or combatant immunity applies to NIAC's under LOAC. However, Common Article 3 prohibits "violence to life and person, in particular murder" of persons taking no active part in hostilities.[286] This also applies to those participants who have ceased to actively participate in hostilities. It is submitted that the term, 'active' must be interpreted to have the same meaning as the term, 'direct' as used in direct participation in hostilities elsewhere in API[287] and APII.[288] The ICRC Commentary on APII states that "[t]hose belonging to armed forces or armed groups may be attacked at any time."[289] It must be noted that APII incorporates the term, 'civilian' herein and not the broader term, 'person'.[290]

The further important point is that the principle of distinction only operates where there is a distinction between civilians and combatants. This must be interpreted in terms of the wording of Common Article 3 that confers protection on those "taking no active part in hostilities, including members of armed forces who have laid down their arms and those *hors de combat*". The reasonable conclusion is that participants must do more than just cease their participation in the armed conflict. It seems that these participants must also take additional steps to actively disengage from such participation.[291] The further reasonable conclusion is

[284] Sassòli, M & Olson, LM *op cit* note 20 at 606.
[285] Ibid.
[286] Common Article 3 to the GC's of 1949 an APII, Article 4; Lindsey, M *op cit* note 173 at 199.
[287] API, Article 51(3).
[288] APII, Article 13(3).
[289] Sandoz, Y, Swinarski, C & Zimmerman, B *op cit* note 47 at para 4789.
[290] Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1-2 September 2005, *University Centre for International Humanitarian Law* at 34 available at www.adh-geneva.ch/events/expert-meetings.php (last accessed on 1 May 2014).
[291] Sassòli, M & Olson, LM *op cit* note 20 at 607.

that not everyone is a civilian in NIAC and that members of non-State armed groups may be intentionally targeted in the same manner as combatants may be targeted in IAC.

LOAC does not explicitly regulate the nature and degree of force that may be employed against legitimate targets.[292] It does, however, anticipate the use of less-than-lethal measures. In this regard, the "right of belligerents to adopt means of injuring the enemy is not unlimited".[293] States must further not inflict "harm greater that that unavoidable to achieve legitimate military objectives."[294] Parties may also only exercise force that is necessary and consistent with the principle of humanity.[295] It has been argued that less-than-lethal measures are proper when a State has control over the territory where the armed conflict occurs,[296] when "armed forces operate against selected individuals in situations comparable to peacetime policing,"[297] and in the context of NIAC.[298] Therefore "the international lawfulness of a particular operation involving the use of force may not always depend exclusively on IHL but, depending on the circumstances, may potentially be influenced by other applicable legal frameworks, such as human rights law and the *jus ad bellum*."[299]

11. State Practice

With regards to NIAC's, States may adopt a 'war model', which employs the instruments of warfare, including armed force and military violence. On the other hand, States may adopt a 'criminal law model', which employs domestic criminal law and human rights law.[300] Here the nature of the threat, its severity and likelihood represent the variables that influence the decision of States when deciding on an appropriate response to the conflict. The existence of

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[292] Human Rights Council, Fourteenth Session, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, A/HRC/14/24/Add.6 at 19-20.
[293] *Convention (IV) respecting the Laws and Customs of War on Land*, adopted on 18 Oct. 1907, entered into force, 26 Jan. 1910 (Hague IV Regulation); API, Article 35(1).
[294] [294] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996 at para. 78.
[295] API, Article 1(2); Hague IV Regulations, preamble; GCIII, Article 142; GCIV, Article 158.
[296] University Centre. For Int'l Humanitarian Law, Report on the Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1-2 Sept. 2005 at 36; Sassòli, M & Olson, LM *op cit* note 20 at 614.
[297] Melzer, N *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) at 80-81.
[298] Sassòli, M & Olson, LM *op cit* note 20 at 611.
[299] Melzer, M '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' *NYU J. Int'l L. and Politics 829* (2010) at 897.
[300] Steiner, HJ; Alston, P & Goodman, R *International Human Rights in Context. Law Politics Morals* (2007) at 383.

an armed conflict will, however, trigger the application of LOAC. Whether LOAC complements, totally supersedes, or discounts human rights law is a complex question.

Targeted killings have become common place since Israel started eliminating members of the Egyptian military in the 1950s.[301] Israel and the US still continue this practice and have commented that this policy represents a successful response to a real threat.[302] The first question would be whether an armed conflict is in existence at the time of the targeted killing. This would render either LOAC or IHRL applicable to the situation. Improved military technology has resulted in improved methods of targeted killing. This has been seen in contemporary armed conflicts in Iraq (2003), Pakistan and the Yemen (2002).[303]

Targeted killings outside of an armed conflict must, it is submitted, comply with the principle of necessity as understood by criminal law.[304] This is a law enforcement operation and these operations must protect the right to life. Law enforcement officials may legally deprive a person of his life but only under certain defined circumstances.[305] A law enforcement officer must, before resorting to lethal force, refer to the proportionality test wherein all other measures short of lethal force must first be exhausted, before killing a person.[306] The decision to apply lethal force must, after excluding all other possibilities, be preventative and based on the concrete danger that the person continues to pose.[307] An intentional attack against a person must, as a result, have a satisfactory legal basis in domestic law. It is thus difficult to see how a targeted killing can be justified outside of an armed conflict situation.

The legality of targeted killing in armed conflict is less challenging, as killing is an accepted component of armed conflict. The object of armed conflict is normally to weaken the

[301] Schmahl, S 'Targeted Killings – A Challenge for International Law?' in Gowlland-Debbas, V *op cit* note 18 at 233.
[302] Ibid at 237.
[303] Watkin, K 'Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing' *Duke Journal of Comparative & International Law Vol 15: 281* (2005) at 309.
[304] Schmahl, S *op cit* note 297 at 241.
[305] Ibid at 239.
[306] See *McCann v. The United Kingdom*, Application 189884/91, at 146-147; Judgment of 4 May 2001; For a full discussion of tye facts of this case, see Yilmaz, O 'The Use of Force in Law Enforcement Practices in the Light of ECHR Case-Law' in Centre of Excellence Defence Against Terrorism, Ankara, T (ed) *Legal Aspects of Combating Terrorism* (2008) at 97-98.
[307] Schmahl, S *op cit* note 297 at 240.

adversary's military potential.[308] A combatant may thus intentionally target his adversary as a military objective,[309] based on the individual's connection to the adversary as a collective.

12. Civilian Direct Participation in Hostilities and International Human Rights Law

LOAC focuses on a person's status for general targeting decisions to be made, with the only exception being that of targeting based on DPH, which is decided upon as a result of a person's actions. IHRL, however, is premised on a law enforcement model and a person may be targeted only because he poses an imminent threat. The targeting of a civilian DPH is based on the person's actions and because the person poses a threat. The notion of DPH is thus much closer to an IHRL paradigm and the interpretation thereof in light of IHRL offers real possibilities to interpret the provisions in a novel manner. The ICRC, in its Interpretative Guidance, favoured the least-restrictive-means standard. However, this interpretation regards the principles of humanity and military necessity as separate rules.[310] The Guidance assumes that the two principles operate separately during a military operation. It is submitted that the concepts form the basis of LOAC in general.[311] These principles have been described as "[m]ilitary necessity is a meta-principle of the law of war . . . in the sense that it justifies destruction in war. It permeates all subsidiary rules."[312]

LOAC authorises the use lethal force as a first resort where an adversary has been identified. This authority terminates when the adversary effectively and unambiguously surrenders[313] or becomes otherwise *hors de combat*. However, some experts have argued that LOAC incorporates an obligation to attempt to capture an adversary, where feasible, as opposed to, as a first resort, employing deadly force. This argument requires that an adversary be captured where there is no significant risk of harm to those attempting to capture the

[308] Ibid at 246.
[309] *Inter-American Commission on Human Rights*, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002 at 68.
[310] See Schmitt, MN The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis, 1 *Harv. Natl. Sec. J.* 5 at 39-40 (2010); Dinstein, Y. - that LOAC "takes a middle road, allowing belligerent States much leeway and yet circumscribing their freedom of action (in the name of humanitarianism." Reeves, SR & Thurnher, JS *op cit* note 141 at 4.
[311] See Corn, GS; Blank, LR; Jenks, C & Jensen, ET Belligerent Targeting and the Invalidity of a Least Harmful Means Rule, 89 Int'L L. Studies 536, 542-43 (2013).
[312] See Bill, BJ 'The Rendulic "Rule": Military Necessity, Commander's Knowledge, and Methods of Warfare' *12 Yearbook of International Humanitarian Law* (2009) at 132.
[313] GCIV.

adversary. However, API does not impose any positive least harmful means obligation and no such obligation should be required, based on the positive LOAC.[314]

Part IV of APII contains specific protection for the civilian population, based on LOAC, but a number of provisions have a human rights basis.[315] APII, Article 13(1),[316] states that the civilian population and individuals are to enjoy general protection against the dangers of armed conflict. Article 13(2) demands that civilians not be made the object of attack.[317] It is submitted that these provisions are essentially similar in nature as in APII, Article 4(2)(a), (d) and (h).[318] This is because attacks on the civilian population constitute violence towards life and health.[319] APII, Article 13(2), provides that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack". The ICTY interpreted the scope of this protection to include a prohibition on indiscriminate attacks, a prohibition on disproportionate attacks, a requirement of precautions, and prohibition on attacks against civilian objects.[320]

The armed conflict in Colombia is a struggle between organised and irregular armed groups and the State, and among such groups themselves.[321] The Colombian model to combine LOAC and IHRL with regards to NIAC's represents a novel interpretation of participation in hostilities.[322] It must be remembered that Colombia has been involved in an NIAC for approximately 40 years, although the government has not acknowledged the existence of such an armed conflict for political reasons. This conflict is complex and convoluted, with the

[314] Corn, GS; Blank, LR; Jenks, C & Jensen, ET 'Belligerent Targeting and the Invalidity of a Least Harmful Means Rule' *International law Studies Vol 89* (2013) at 536.
[315] Lindsey, M *op cit* note 173 at 228.
[316] The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
[317] 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.
[318] APII, Article 4(2)(a), (d) & (h) — Fundamental guarantees.
[319] Lindsey, M *op cit* note 173 at 228.
[320] *Prosecutor v. Hadžihasanovi and Kubura*, IT-01-47-T, Decision on Motions for Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence, 27 September 2004, paragraphs 29-30; *Prosecutor v. Hadžihasanovi and Kubura*, IT-01-47-T, Judgment, 15 March 2006, paragraph 45; See also Sivakumaran, S 'Non-International Armed Conflicts: The Applicable Law. Scope and Application of International Humanitarian Law' *Proceedings of the Bruges Colloquium No 43* (Autumn 2013).
[321] Lozano, GO & Machado, S 'The Objective Qualification of Non-International Armed Conflicts: A Colombian Case Study' *Amsterdam Law Forum Vol 4:1* at 58.
[322] Ministry of National Defence, Comprehensive Human Rights and LOAC Policy, 2007 at para 33; see in general Matthews, H *op cit* note 83 at 641.

regular armed forces, paramilitaries, guerrilla groups and drug lords being involved. The characterisation of the conflict is admittedly intricate.[323]

This model provides for the regulation of LOAC-based operations with regards to opponents of the State but also accommodates law enforcement-based operations against other persons who pose a threat to the security of the State. The rules of the use of force for the maintenance of security are limited to the exigencies of the situation and are more stringent than the rules of engagement for land combat.[324] The Colombian regular armed forces during NIAC distinguish between military operations where the person represents a legitimate military objective and where LOAC applies, and operations to maintain security within a law enforcement framework where IHRL is applicable.[325] The application of LOAC will thus be triggered when a military objective is pursued, but the IHRL principle of necessity will apply when State agents use force to neutralise the threat.[326]

The ICRC in their Interpretative Guidance[327] refers to a 'continuous combat function' ("CCF") for those that belong to a non-State armed group and who fulfil a combat function during NIAC. The CCF found in the ICRC's Guidance has several human rights implications, as qualifying persons may be intentionally targeted anywhere, at any time.[328] The CCF category is, *de facto*, a status-based finding. However, 'for such time' may reasonably be interpreted to equate to all the time that the person remains a 'member' of an armed group which may be collectively targeted to diminish the groups military potential.

13. Armed Groups and the Law of Armed Conflict

A transnational group cannot be a party to international conventions. State practice has also never shown that States are prepared to apply the rules of IAC to NIAC.[329] It is submitted that some activities of transnational armed groups will be covered by LOAC where the group is under the direction and control of a State.[330] It may even be argued that LOAC will apply

[323] Matthews, H *op cit* note 83 at 640.
[324] Ministry of National Defence, Comprehensive Human Rights and LOAC Policy, 2007 at para 33.
[325] Matthews, H *op cit* note 83 at 641.
[326] Ibid.
[327] Melzer, N *op cit* note 269 at 10.
[328] Melzer, N *op cit* note 269 at 66.
[329] Sassoli, M 'Transnational Armed Groups and International Humanitarian Law. Programme on Humanitarian Policy and Conflict Research' *Harvard University Occasional Paper Series, Winter 2006, No. 6* at41.
[330] Ibid at 4.

where a State is directing hostilities against a transnational armed group on the territory of another State without the agreement of that State. State practice, in classifying armed conflict between States and transnational armed groups, has been indistinct, with the US classifying the conflict with *al Qaeda* as a single worldwide IAC shortly after September 11, 2001.[331] It is submitted that such a conflict will not qualify as an IAC. APII excludes "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts."[332] Common Article 3 will probably apply and will be equally binding upon "each party to the conflict".[333]

Anwar al-Awlaki, a dual Yemeni-American citizen, was, according to the US, an operational leader of *al Qaeda* in the Arabian Peninsula.[334] Al-Awlaki publically endorsed the use of violence against US military targets and civilians.[335] He stated that "[t]he American people in its entirety takes part in the war, because they elected this administration, and they finance this war. In the recent elections, and in the previous ones, the American people had other options, and could have elected people who did not want war . . . Our unsettled account with America includes, at the very least, one million women and children . . . Those who would have been killed in the plane are a drop in the ocean."[336]

If it is accepted that the threshold for the existence of, at least, a common Article 3 armed conflict has been achieved in Yemen between AQAP and the US and the Yemeni governments, and secondly between the US and the larger *al Qaeda* network ("*al Queda al*

[331] Ibid at 4 & 16. The US asserts that members of transnational groups are 'unlawful combatants' as they do not belong to a State, do not distinguish themselves from the civilian population and do not comply with LOAC.
[332] APII, Article 1(2). The existence of an armed conflict is influenced by intensity, active participants, number of victims, duration, organisation & discipline of the parties, capacity to respect LOAC, coordinated character of hostilities, direct involvement of regular armed forces as opposed to law enforcement agencies and de facto authority by the non-State actor over potential victims – Moir, L *The Law of Internal Armed Conflict* (2002) at 278.
[333] Sassoli, M *op cit* note 326 at 12.
[334] Chesney, R 'Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force' in Schmitt, MN (et al) (eds) *Yearbook of International Humanitarian Law Vol 13* (2010) at 3-4 available at http://ssrn.com/abstract=1754223 (last accessed on 1 May 2014). The New York Times reported that al-Awlaki was considered by the CIA to be direly involved in operational planning of AQAP and that "international law permits the use of lethal force against individuals and groups that pose an imminent threat to a country." It further stated that al-Awlaki and others on the CIA list "are considered to be military enemies of the United States" within the scope of the Congressional authorization for the use of military force enacted after the events on 9 September 2001.
[335] *Al-Aulaqi v Obama* (D.D.C. 25 September 2010) (Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss) at 1; see also http://www.lawfareblog.com/wp-content/uploads/2010/09/usgbrief.pdf (last accessed on 1 May 2014).
[336] Translation available at http://www.memritv.org/clip_transcript/en/2480.htm (last accessed on 1 May 2014).

um") within and outside the geopolitical borders of Afghanistan. Chesney concludes, based on his role within *al Queda*, that al-Awlaki could be intentionally targeted as a 'functional combatant' in what qualifies as an organized, transnational armed group and adversary of the US.[337] Chesney further concludes that IHRL has no "separate impact" on an intentional attack on al-Awlaki.[338] This matter raises a challenge as to whether the intentional targeting of al-Awlaki with deadly force may only be used where necessity requires and authorises such action. Chesney argues that the temporal imminence element of IHRL regarding the use of lethal force may be partially relaxed where "there is substantial evidence that the individual is planning terrorist attacks [specific or general future attacks], there is no plausible opportunity to incapacitate the individual with non-lethal means, and there is no reason to believe a later window of opportunity to act will arise".[339] This, Chesney, argues will result in the lawful intentional targeting of al-Awlaki under IHRL.

The Yemen government, with the support of the US, conducted attacks on AQAP intended to, *inter alia*, kill al-Awlaki. This prompted al-Awlaki's father to assert that the US may not intentionally attack its own citizens but that it should attempt to arrest him and follow criminal proceedings against him should it believe that he had committed a criminal act.[340]

14. Specific Provisions in Treaty Law

APII, in its preamble, states that States acknowledge that "the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character" and that "international instruments relating to human rights offer a basic protection to the human person", also "emphasizing the need to ensure a better protection for the victims of those armed conflicts" and recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience."

[337] Chesney, R *op cit* note 330 at 5.
[338] Ibid.
[339] Ibid.
[340] Ibid.

The term, 'person' or 'persons', as opposed to the more specific term, 'civilians', is used 34 times, excluding the preamble and headings, in APII.[341] The term, 'civilian' is specifically used in APII, Article 13, as opposed to the general term, 'person', which is not used at all in APII, Article 13. Common Article 3 refers to the term, 'persons' when dealing with those "taking no active part in the hostilities". This includes "members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, . . . ".[342] The GC's, for example, in GCI, Article 22(5), later refer to "the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick." There are thus civilian wounded and sick and members of the armed forces who share the same fate. Members of the armed forces and civilians are therefore included in the term, 'persons'. GCIV, Article 10, refers to "the protection of civilian persons". Interestingly, GCIV, Article 15, refers to "civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character".[343]

APII, Article 3, further states that "[n]othing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State."

15. The Determination of the Geographical and Temporal Scope of Armed Conflict

The following has been said about the so-called 'war on terror': "[t]he United States of America is fighting a war against terrorists of global reach . . . The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time".[344]

A State that is involved in an armed conflict should be required to define or at least, as far as possible and with as much precision as may be achieved, the geographical scope and territorial boundaries of the armed conflict when defining the conflict. This is because a civilian's rights under HRL are suspended during times of armed conflict. A person's right to

[341] APII, Articles 2(1) & (2); 4(1)-(3); 5(1)-(4); 6(2)-(5); 9(1) & (2); 10(1)-(4); 12 and 25(1).
[342] GC's, Common Article 3(1).
[343] GCIV, Article 15(b).
[344] National Security Strategy, White House at 5 available at http://www.whitehouse.gov/nsc/nss.html. (last accessed on 1 May 2014).

life and the circumstances under which this right may be deprived is subject to a less restrictive regime than under during armed conflict. The US avers that they are involved in a world-wide conflict and this may indicate that they regard the legitimate suspension of HRL throughout the world to be operative.[345]

It is thus submitted that the existence of an armed conflict, whether it is an IAC or an NIAC in nature, must be determined as soon as the situation meets the threshold to qualify as such. The termination of hostilities must equally be determined and published as soon as the hostilities come to an end. Parties must also specifically be required to, insofar that it is feasible, classify the nature of the actions, whether they are military, or law enforcement. LOAC therefore applies from the initiation of armed conflicts and extends beyond the cessation of hostilities and until a general conclusion of peace is reached; or, in the case of NIAC, a peaceful settlement is achieved.[346] The ECtHR has regarded internal armed conflict, *in causa*, the conflict in Chechnya, as law enforcement operations, as opposed to NIAC's.[347] This is possibly related to the perceived or real limitations of APII to regulate NIAC's. The court held that States had a positive obligation to conduct effective investigations to protect the right to life of persons.[348] This was specifically done in relation to large scale attacks. In is submitted that where a conflict involving the use of any force has commenced and where the parties deny the existence of an armed conflict, or where there is no agreement, the principle of best protection should apply in the interim. The actions of the participants should be governed by domestic and human rights law.

The interplay between LOAC and IHRL is best served when clear instructions are provided to those actually conducting military or law enforcement operations, know what constitutes the applicable law under the circumstances. LOAC, if interpreted correctly, applied as intended, and enforced adequately, provides adequate protection for those involved and

[345] See in general Anderson, K 'Targeted Killing and Drone Warfare: How we Came to Debate Whether There is a 'Legal Geography of War'' *American University Washington College of Law. Washington College of Law Research Paper No. 2011* at 16; Corn, GS 'Geography of Armed Conflict: Why it is a Mistake to Fish for the Red Herring' *89 Int'L L. Stud. 254* (2013) available at http://ssrn.com/abstract=2179720 (last accessed on 14 January 2015).
[346] *Prosecutor v. Tadic*, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995 at para 70.
[347] Gowlland-Debbas, V *op cit* note 18 at 145; see also *Ergi v. Turkey*, ECtHR , Application No. 23818/94, Judgment of 28 July 1998, Reports 1998/IV, at 79; *Isayeva v. Russia*, ECtHR, Application No. 57950, Judgment of 24 February 2005 at 191.
[348] *Khashiyev and Akayeva v. Russia*, ECHR, Application nos. 57942/00 and 57945/00, Judgment of 24 February 2005.

affected during armed conflict. The nature of armed conflict dictates that the hostilities will have an effect on society. Armed conflict is complicated and the application of LOAC is a challenge for the average participant under abnormal circumstances. The introduction of HRL, although admirable, further complicates the issue, possibly resulting in non-compliance with both systems.

There has been a belief that LOAC applied throughout the territory of the States involved in an IAC.[349] The coalition forces did not, during the Gulf War of 1990-1991, target certain assets in Iraqi Kurdistan, which was deemed not to contribute to the Iraqi military potential. The destruction of these assets was not considered to be a definite military advantage.[350] It may thus be preferable to objectively employ the definition of a military objective to limit the geographical scope of the military operations.[351] Equally, in NIAC, LOAC should only be applied restrictively to those areas of the territory in which armed conflict is occurring and to actual military combat activities, while excluding those parts not directly affected.[352]

The US Deputy General Counsel for International Affairs at the Department of Defense commented that the US could intentionally target "*al-Qaeda* and other international terrorists around the world, and those who support such terrorists."[353] This targeting authority extended to urban areas of European cities. The US holds the view that the President may rightfully order the intentional targeting of suspected terrorists within the US,[354] based on LOAC principle of combatant immunity.[355] The US thus regards individuals, based on their association with *al-Qaeda* alone, as legitimate targets. This was confirmed in a federal court and, in response to the judge's hypothetical question, the Department of Justice attorney

[349] *Prosecutor v. Tadic*, Case No. IT-94-1-l, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 68–70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 635–36 (Sept. 2, 1998).
[350] Hampson, FJ *op cit* note 23 at 188.
[351] Ibid at 189.
[352] *Prosecutor v. Tadic*, Case No. IT-94-1-l, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction at 68 - "Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited."
[353] Dworkin, A 'Law and the Campaign Against Terrorism: The View from the Pentagon' *Crimes of War Project* (Dec. 16, 2002) http://www.crimesofwar.org/print/on news/pentagon-print.html (last accessed on 1 May 2014).
[354] Ossenova, K 'DOJ Official: President May Have Power To Order Terror Suspects Killed in US' *Jurit* (Feb. 5, 2006) available at http://jurist.law.pitt.edu/paper chase/2006/02/doj-official-president-may-have-power.php (last accessed on 1 May 2014).
[355] O'Connell, ME 'New ILA Study Committee to Report on the Meaning of War' *Abila Newsletter* (Jan. 2006) at 2–3.

acting on behalf of the US government argued that the military had the power to detain people as enemy combatants where they intentionally or unintentionally assist *al-Qaeda*.[356]

Greenwood argues that "[m]ilitary operations will not normally be conducted throughout the area of war. The area in which operations are actually taking place at any given time is known as the 'area of operations' or 'theatre of war'. The extent to which a belligerent today is justified in expanding the area of operations will depend upon whether it is necessary for him to do so in order to exercise his right of self-defence. While a State cannot always be expected to defend itself solely on ground of the aggressor's choosing, any expansion of the area of operations may not go beyond what constitutes a necessary and proportionate measure of self-defence. In particular, it cannot be assumed – as in the past – "that a state engaged in armed conflict is free to attack its adversary anywhere in the area of war."[357] Dinstein, however, argues IAC will extend to all the State's territory, regardless of the actual incidence of fighting.[358] He asserts that "[t]he combat zone on land is likely to be quite limited in geographic scope, yet naval and air units may attack targets in distant areas."[359] The actual practice of Sates shows that the rights and duties of the battlezone do not extend far beyond it. The US currently recognizes the reality that the armed conflicts it is involved in occur in Afghanistan, Iraq, and Somalia, but not within the United States.[360]

16. Summary

The relationship between LOAC and IHRL has not adequately been determined and the deprivation of life in armed conflict seems to be where these two legal systems and their application are most muddled. The right of combatants to kill during armed conflict and the obligation to protect the life of civilians and some combatants, depending on the circumstances, exist at the same time.[361] It must be accepted that civilians who directly participate and to an extent, those who indirectly participate in armed conflict, place their own lives at risk. Here LOAC does permit the lawful direct targeting of certain categories of persons, based on their status, during armed conflict. IHRL, however, is concerned with the conduct of persons and addresses the responses that may be made to a threat that is brought

[356] Liptak, A 'In Terror Cases, Administration Sets Own Rules' *N.Y. Times* (Nov. 27, 2005) at A1.
[357] Greenwood, C *op cit* note 58 at 276 – 278.
[358] Dinstein, Y *War, Aggression and Self-Defence* (2005) at 20.
[359] Ibid at 19 - 20.
[360] O'Connell, ME *op cit* note 351 at 119.
[361] Yorke, J *op cit* note 3 at 140.

about by such persons. The conceptual differences influence the manner in which the two systems of law interpret certain situations; therefore the specific set of rules in each system should be appraised separately.[362]

The obligation to respect human rights during armed conflict results from the use of force, specifically where armed conflict affects civilians. Commanders need to know what law applies in a specific situation and what the trigger is for any change in the law that applies.[363] States have, however, issued rules of engagement to resolve issues during armed conflict. These rules of engagement provide political direction and guidance to commanders regarding the application of military force.[364] The ROA may be used to provide guidance to assist in determining whether a potential target exhibits hostile intent.[365] Human rights norms have been included in rules of engagement and this is evident with regards to civilians not taking a direct part in hostilities.

The relationship between LOAC and IHRL is both problematic and constructive.[366] It has been argued that these two areas of law should complement each other to secure the full protection and care for all affected by armed conflict. Civilians caught up in armed conflict are vulnerable when compared to combatants and other armed actors and, in most cases; civilians do not possess the means to protect themselves or to survive the suffering of armed conflict. Civilians thus require special protection in armed conflict. The root causes of conflict must be addressed and removed and here IHRL will be the primary instrument.[367]

It may be argued that the rules and standards of LOAC and IHRL developed progressively along parallel lines since WWII. The human rights legal system that developed was intended to prevent gross violations of fundamental rights. These human rights commitments were, however, never really integrated into LOAC. States expressed their commitment to universal human rights standards but the real or perceived lack of an actual connection to vital national

[362] Ibid at 141.
[363] Ersen, MU & Ozen, C *op cit* note 205 at 41.
[364] See MC 362-1 NATO ROE Document; USDOD.DOD Dictionary of Military and Associated Terms: NATO Only Terms.
[365] Ersen, MU & Ozen, C *op cit* note 205 at 44.
[366] Popovski, V *Interaction of Norms of Protection in Norms of Protection: Responsibility to Protect, Protection of Civilians and their Interaction* (2012) at 268.
[367] Benedek, W 'Human Security and Prevention of Terrorism' in Yotopoulos-Marangopoulos, A & Benedek, W (eds) *Anti-Terrorist Measures and Human Rights* (2004) at 171.

State interests in armed conflict resulted in a simultaneous lack of commitment by sovereign States to integrate human rights norms into LOAC. There is an enduring belief amongst many States that LOAC should not interfere with national sovereignty, with specific reference to their conduct in NIAC's. NIAC has been regarded as a matter for domestic regulation within the State in order for governments to deal with internal conflict as they, under the circumstances, deem most appropriate. This would create a platform for an argument that IHRL applies during NIAC's.

Both LOAC and IHRL attempt to protect, *inter alia*, the right to life. These two areas of law have different formulations but the fundamental nature of some rules, including those intended to protect human life, are comparable. LOAC binds all the direct participants to armed conflict, including States and organised non-State armed groups. The rules of IHRL bind governments in their relations with individuals within their jurisdiction.[368] There is, however, evidence that organised non-State armed groups, who exercise State-like functions, should also respect human rights norms, although this issue has not been resolved totally.

The question thus, in NIAC's, specifically those covered only by common Article 3, is when the adversary may be intentionally targeted. It is submitted that those whose affiliation to an armed group meet the criteria for what may be said to be equal to membership, as is required under domestic law for members of the regular armed forces, may be intentionally targeted at any time, at least until they surrender or are otherwise rendered *hors de combat*. An armed conflict cannot exist where there are not at least two adversaries made up of armed groups and it would be counterintuitive to argue otherwise. This does not exclude attacks on those who remain civilians but whom, for a certain time, sporadically directly participate in hostilities. The existence of an armed conflict will result in LOAC applying, and not IHRL; therefore the interpretation of the terms, 'for such time' and direct participation' must be done in accordance with the *lex specialis* . IHRL will not dictate that they only be attacked when absolutely necessary to preserve human life and when an arrest is not feasible.

An attempt to uphold impractical and idealistic human rights protections of civilians during armed conflict will probably detract from the protection afforded currently to civilians under

[368] ICRC, Advisory Service on International Humanitarian Law. International Humanitarian Law and International Human Rights Law – Similarities and Differences at 1 available at https://www.icrc.org/en/download/file/1402/ihl-and-ihrl.pdf (last accessed on 14 January 2015).

LOAC. It may even result in civilians further abusing the enhanced protection under LOAC as heightened by the application of IHRL, and thus in the escalation of violations of LOAC on both sides to compensate for their increased ineffectiveness due to the unrealistic operation of the law.

Intentional targeting decisions of a participant in armed conflict have different dimensions in LOAC and IHRL. LOAC deals with group characteristics, and legitimate intentional targeting is dependant, in general, on affiliation to a regular or irregular armed group. The test is thus to assess this connection to the group, with the ultimate aim of attacking the collective and reducing or eliminating its military potential or will. IHRL deals with individual rights.[369]

The main issue is, however, related to the identification of the existence of an armed conflict. Before such a determination is made, and only where other situations of violence are identified, the more rigorous demands of IHRL will apply to the situation; the use of deadly force will only be permitted where an individual poses a concrete and imminent threat to the life of another individual or a law enforcement officer.[370] This will allow participants in these forms of conflict to operate with more impunity but as soon as an armed conflict is identified, LOAC will apply and consequently, the targeting directives that accompany it where a threat is not always required. Organised non-State armed groups often display a strong organisation, although direct operational control is not always present. Where an armed conflict has, however, started, where the required thresholds have been met, and where armed groups oppose each other, LOAC will apply as the *lex specialis*.

In the final analysis, not all action during armed conflict, even within the zone of battle, where adequately defined, will constitute action to overcome the military potential of the adversary; some action may well be aimed at restoring public order. Here domestic law and HRL will apply. The ultimate conclusion is thus that the conduct of military operations directed against members of organised non-State armed groups is to weaken the group's military potential or will to fight. Where these operations take on the character of public order

[369] See in general MacDonald, SD *op cit* note 116.
[370] Margulies, P 'Networks in Non-International Armed Conflicts: Crossing Borders and Defining "Organised Armed Group"' *The Geography of Armed Conflict 89 Int'l L. Stud. (Naval War College, Wall, A ed)* (2012) at 3 available at http://www.ssrn.com/abstract=2142851 (last accessed on 14 January 2015).

control by law enforcement personnel, the municipal law and human rights law will regulate the actions against civilians who are suspected of threatening good public order.

It must be conceded that LOAC is the primary regulator of armed conflict as it delineates the obligations of States towards other States as contracting parties.[371] LOAC directly imposes obligations on individuals rather than IHRL, which grants rights to the individual and which rights may be enforced against the State.[372] LOAC effectively balances the demands of military necessity against principles of humanity and violations thereof are usually due to an unwillingness to respect LOAC rules, insufficient enforcement means, uncertainty over the application of the , or a general lack of awareness thereof.[373] Experts have argued that IHRL does not take into account the realities of armed conflict. Its excessive application may exceed the limits acceptable to States, erode its credibility, as a result of the "emasculation" of warfare[374] and cause the possible postponement in the finalisation of the conflict, to the detriment of civilians.

LOAC was written for armed conflict and LOAC treaties may be described as practical documents. In this sense LOAC differs drastically from IHRL, which provides for rights for individuals to improve their conditions outside of armed conflict. LOAC constitutes a progressive and preventive regime at the same time and delineates protection during armed conflict.[375] The major difference may well be that LOAC allows, under certain circumstances, for the right to life, to be taken away and this is irreconcilable with IHRL.

[371] Hansen, MA *op cit* note 53 at 1 - 3.
[372] Provost, R *op cit* note 34 at 13.
[373] Henckaerts, JM 'Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts' *87 IRRC* (2005) at 175 – 176.
[374] Morgan, A *The State and International Law* (2004) available at http://info.anu.edu.au/MAC/Media/Research_Review/_articles/_Charlesworth.asp (last accessed on 23 July 2014) quoting Professor Hilary Charlesworth.
[375] Doswald-Beck, L 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?' 88 *International Review of the Red Cross* (2006) 881, 899–900.

Chapter 7

The Innocent Civilian, the Mandated Soldier and the Unlawful Fighter

An Evaluation of the 'Direct Participation in Hostilities' Dilemma

1. Introduction

Armed conflict entails persistent, widespread and collective human activity[1] wherein the principles of military necessity are applied to overcome the adversary's entire military potential or its will to continue with military action, by forceful means. The Law of Armed Conflict[2] ("LOAC") attempts to infuse this application of military force with elements of humanity. However, the nature of armed conflict dictates that humanitarian considerations can never totally displace the prescriptions of military necessity.[3]

States, in developing LOAC, essentially created a limited system of reciprocal entitlements between them during armed conflict.[4] This LOAC, *inter alia*, addresses the protection of civilians in various international instruments and by way of customary LOAC.[5] The protection of civilians is articulated in the Geneva Conventions of 1949[6] ("GC's") and clearly expressed in the two Additional Protocols of 1977 ("AP's").[7] Civilians will, however, forfeit

[1] Walzer, M *Arguing about War* (2004) at ix; *Prosecutor v. Ramush Haradinaj et. al*, Case No. IT-04-84-T, Judgement of 3 April 2008 at paras 49 and 60; Escorihuela, AL 'Humanitarian Law and Human Rights Law: The Politics of Distinction' *Michigan State Journal of International Law Vol 19:2*: 299 – 407 at 333.

[2] The terms 'Law of War', 'Law of Armed Conflict' ("LOAC") and 'International Humanitarian Law' ("IHL") are not used as synonyms herein. The difference between these terms is not regarded as academic.[2] LOAC will be used to refer to the totality of the system of international law that regulates armed conflict. One of the main functions of LOAC is to confirm that one may do all that is required to overcome the enemy, be that by overpowering the adversaries military potential or their will to continue their involvement in the conflict. This must be balanced against the humane treatment of persons during armed conflict. LOAC regulates the application of violence within armed conflict and reference to LOAC is thus, in my view, the appropriate terminology to refer to this area of international law. The constant use of the term IHL may thus create confusion and an impression that LOAC favours an interpretation of C-DPH which is mainly premised on humanitarian principles as opposed to military necessity.

[3] Dinstein, Y *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) at 1.

[4] Gordon, S *Geneva Conventions under Assault – Civilian Protection – What is Left of the Norm?* (2010) at 81.

[5] See in general Beruto, GL (ed) *The Conduct of Hostilities. Revisiting the Law of Armed Conflict 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols* (2007) at 62 – 63.

[6] The *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* of August 12 1949, 75 *UNTS* 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* of August 12 1949, 75 *UNTS* 85; *Geneva Convention Relative to the Treatment of Prisoners of War* of August 12 1949, 75 *UNTS* 135; and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* of August 12 1949, 75 *UNTS* 287.

[7] The Additional Protocols comprise *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* of 8 June 1977, 1125 *UNTS* 3, and *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* of 8 June 1977, 1125 *UNTS* 609.

their immunity against intentional[8] attack for as long as they directly participate in hostilities ("C-DPH"). The C-DPH exemption has also been included in other international instruments, the military manuals of several States,[9] and has been referenced in "official statement[s] and reported State practice".[10]

An agreed upon definition of C-DPH has not developed, and the current practice is to assess the existence thereof on a case-by-case basis.[11] The ICRC study into customary LOAC also concluded that a precise definition of C-DPH does not exist.[12] A universal definition of C-DPH would be advantageous. Such a definition could be developed by finding compromise language between the narrow and liberal interpretations of C-DPH. However, compromise generally leads to vague definitions, which is undesirable. This challenge has allowed some States to exploit the impasse by drastically changing the staffing of their armed forces and their targeting policies and methods. States are expected to interpret C-DPH "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 LOAC".[13]

[8] Reference is also made to the term 'targeting', which will be divided into 'intentional targeting' or 'direct targeting' and 'collateral targeting', which refers to 'indirect targeting'. The terms 'direct' and 'indirect' is, however, awkward and does not adequately describe the nature of targeting decisions where proportionality assessments are incorporated into the decision. The person responsible for the targeting decisions will not be referred to as the 'targeter', as others have, but as an alternative, reference will be made to 'observer', which is the term used within the military. Targeting itself is defined as the process of planning and execution, including the consideration of prospective targets, accumulation of information to meet military, legal and other requirements, the determination of which weapon and method to be employed to prosecute the target, the carrying out of the actual attack and associated activities. The practical characteristics of targeting include, *inter alia*, weapons and weapons platform characteristics, intelligence, surveillance and reconnaissance capabilities, the targeting cycle, targeting methodologies, collateral damage approximation, patterns of life analysis, etc. - Boothby, WH *The Law of Targeting* (2012) at viii.

[9] Australia; Belgium; Ecuador; El Salvador; India; Netherlands; United States; and Yugoslavia - Henckaerts, J and Doswald-Beck, L (eds) *Customary International Humanitarian Law* (2005) at 22.

[10] Melzer, N *Targeted Killings in International Law* (2008) at 337.

[11] Memorandum of Understanding on the Application of LOAC between Croatia and the SFRY at para 6; Agreement on the Application of LOAC 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; Germany; India; Indonesia; Italy; Jordan; Kenya; Madagascar; Malaysia; Netherlands; New Zealand; Spain; Sweden; Togo; United Kingdom; United States; Yugoslavia (Henckaerts and Doswald-Beck, L *Customary International Humanitarian Law* at 22).

[12] Melzer *op cit* note 10 at 41; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* at 23. See also See ICRC, *Customary International Humanitarian Law* (2005) Vol I, 173 & Vol II, 114.

[13] Melzer Ibid; See also Van Der Toorn, D 'Direct Participation in Hostilities: A Legal and Practical Road Test of the International Committee of the Red Cross's Guidance through Afghanistan' *17 AUSTL. Int'L L.J. 7, 17* (2010) at 18.

The objective of this thesis is to interpret the legal instruments which created the concept of C-DPH and to evaluate the different interpretations by States and experts attributed to C-DPH, in order to establish its meaning in the context of both IAC and NIAC. Any attempt to give meaning to C-DPH must be realistic, taking into account the international instruments wherein it was created; however, all the other relevant perspectives and reasoning thereon must also be considered. Decisions in armed conflict are often instinctive and time sensitive, without the benefit of perfect intelligence.[14] LOAC thus has to consider the realities of armed conflict and incorporate realistic alternatives to achieving military objectives, failing which the law will be ignored in practice. LOAC must also be flexible to react to new realities in armed conflict, but any development thereof must be adequately reasoned and in keeping with the basic principles of LOAC. The legal perspectives on C-DPH will be evaluated together with relevant judicial reasoning, the Guidance on the Notion of Direct Participation in Hostilities by the ICRC ("the Guidance"), expert comment and opinions, and State practice.

The assumption is that the meaning of C-DPH should be linked to the meaning of DPH. C-DPH and general direct participation in hostilities ("DPH") are normally evaluated as similar concepts. C-DPH is more contentious that DPH, since neither the GV's, nor the AP's[15] define what activities trigger the civilian exemption against intentional attack.[16] DPH, in my view, refers to the actions of combatants in international armed conflict ("IAC") and possibly that of members of the regular armed forces and members of armed groups in non-international armed conflict ("NIAC"), due to the fact that no combat status can exist in NIAC. It is argued that the C-DPH exception only applies to individual civilians who sporadically but directly participate in hostilities and only these civilians should accordingly be classified under API, Article 51(3), and APII, Article 13(3). C-DPH is not an activity which is performed based on a mandate to participate in armed conflict as this would amount to DPH. DPH thus generally refers to "combat-related activities[17] that would normally be undertaken

[14] Ibid at 1-2; Corn, G & Jenks, C 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflict' *U.P.A. J. Int'l. L. [Vol 33:2]* at 314.
[15] Fenrick, WJ 'ICRC Guide on Direct Participation in Hostilities' (2009) 12 *Yearbook of International Humanitarian Law* 287 at 292.
[16] Melzer, N *op cit* note 10 at 12; Melzer, N *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).
[17] Rogers, APV *Unequal Combat and the Law of War Yearbook of International Humanitarian Law* (2004) 3 at 19.

only by members of the regular armed forces"[18] or members of an organised armed group, acting on a mandate. The further assumption is that all the parties to an armed conflict possess armed forces. In IAC a member of the regular armed forces qualifies for combat status during the conflict. However, no combat status exists in NIAC and therefore the armed forces of parties to a NIAC would be comprised of members of the regular armed forces where a State is involved, and/or members of organised armed groups, acting for and on behalf of such a group.

2. Treaty Interpretation

The *Vienna Convention*,[19] Article 31, which reflects customary international law,[20] states that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose". The treaty law that introduced the notion of C-DPH is, arguably, Common Article 3 ("Common Article 3") of the *Geneva Conventions*[21] of 1949 ("GC's"), and, clearly, Additional Protocol I[22] ("API"), Article 51(3)[23] and Additional Protocol II[24] ("APII"), Article 13(3).[25]

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[18] Another category of persons are acknowledged, who directly participate in hostilities being the levée en masse (*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)).

[19] *Vienna Convention on the Law of Treaties*, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) ("Vienna Convention").

[20] *Bosnia v Serbia* case, ICJ Reports, 2007 at para 160; *Indonesia/Malaysia* case, ICJ Reports, 2002 625 at 645-6.

[21] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, of 12 August 1949; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, of 12 August 1949; *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, of 12 August 1949; *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, of 12 August 1949.

[22] *Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* ("AP1"), 8 June 1977.

[23] API, Article 51 confirms the customary rule that civilians should enjoy general protection against the dangers resulting from hostilities.

[24] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* ("APII"), 8 June 1977, 1125 *UNTS* 609.

[25] 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, contains the words 'active' participation. The 1977 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (1979) 1125 U.N. Treaty Series 1391 contain the words 'direct participation'. The French text of the GCIV and API contains the words "*participent directement*"' throughout. This would indicate 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 LOAC (Interpretive Guide) available at http://www.icrc.org/web/eng/siteeng0.nsf/html/directparticipation-LOAC-feature-020609 (last accessed on 1 May 2014) at 43); Melzer, N *op cit* note 10 at 335.

Common Article 3 states that, with regards to NIAC's, "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria". The provisions contained in Common Article 3 create minimum guarantees[26] applicable in all NIAC's and protects "persons taking no active part in the hostilities" against "violence to life and person, in particular murder of all kinds". From the inception of Common Article 3, States resisted the notion that non-State actors could obtain legal privilege to engage in hostilities against regular armed forces.[27] The ICRC was in favour of the development of combatant status for non-State parties as this would forbid States from punishing their own citizens for taking up arms against them.[28] The irrelevance of legal privilege for non-State Parties in NIAC now represents the most noteworthy legal distinction between the laws of IAC and NIAC.[29] As a result, the API, Article 43 definition of 'combatant' is incompatible with NIAC's.

Combat status "implies being . . . considered a legitimate military objective," and that combatants may be "harm[ed] due to their status as combatants".[30] This is supported by State practice.[31] The Commentary confirms that "[t]hose who belong to armed forces or armed groups may be attacked at any time". However, the Commentary differentiates between members and C-DPH, which is of limited temporal scope[32] and may only be done for as long as the civilian "presents any danger for the adversary". In case of doubt regarding the status of an individual, he is presumed to be a civilian.[33]

API, Article 51 and APII, Article 13 state that "[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations".[34]

[26] Kinsella, HM *The Image Before the Weapon A Critical History of the Distinction between Combatant and Civilian* (2011) at 119.
[27] See Pictet, JS *Development and Principles of International Humanitarian Law* (1985) at 43- 44.
[28] Corn, G & Jenks, C *op cit* note 14 at 328.
[29] Ibid.
[30] PCATI *op cit* note 24 at para 29.
[31] Henckaerts, JM and Doswald-Beck, L (eds) *Customary International Humanitarian Law* (2005) Vol II (Chapter I) at 190-3.
[32] International Committee of the Red Cross Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 at 4789.
[33] Ibid at 4789.
[34] API, Article 51(1), APII, Article 13(1).

Civilians, individually and as a collective, "shall not be the object of attack".[35] Civilians further enjoy the "protection afforded by this Section, unless and for such time as they [civilians] take a direct part in hostilities".[36] The "civilian population" and individual civilians are "protected as a whole in the same way as the individuals which constitute it".[37] The substance and structure of the first three paragraphs of API, Article 51, and APII, Article 13, are similar.[38] This is a clear indication that the two AP's should be interpreted in a similar manner with regards to C-DPH.

2.1 Main object and purpose of LOAC

LOAC generally incorporates a contradiction whereby States agree to cooperate in times of armed conflict between them, and reciprocal entitlements are created as a result.[39] Civilians, with certain conditions, benefit from these agreements and are, as a result, protected from some of the effects of hostilities. Civilian immunity from attack may be opportunistically manipulated by civilians who engage in attacks without subjecting themselves to the reciprocal risk normally inherent therein. This creates a motivation for combatants not to identify themselves, as this would reveal them to intentional targeting by the opposing forces. It is for this reason that LOAC denies protected status to civilians who directly participate in the armed conflict.[40] Military necessity and humanity therefore influence all the parties to the conflict uniformly.[41] The reciprocity inherent in LOAC treaties on IAC is thus absent in NIAC. APII accordingly represents a self-imposed limitation by States on military necessity in favour of humanity.[42]

The basic axiom underlying LOAC dictates that, even in an armed conflict, the only acceptable action is to weaken the military potential of the enemy. Von Clausewitz stated that "[w]ar is thus an act of force to compel our adversary to do our will."[43] LOAC does not prohibit the use of violence and it cannot protect all those affected by an armed conflict.

[35] API, Article 51(2).
[36] API, Article 51(3), APII, Article 13(3)..
[37] International Committee of the Red Cross Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 at 4766.
[38] Ibid at 4762.
[39] Gordon, S 'Civilian Protection – What is Left of the Norm?' *Geneva Conventions under Assault* (2010) at 81.
[40] See International Committee of the Red Cross, *Customary International Humanitarian Law (*2005) Vol I at 19-24.
[41] Schmitt, MN 'Deconstructing Direct Participation in Hostilities: the Constituent Elements' (2010) 42 *International Law and Politics* at 810.
[42] Ibid at 811.
[43] See Von Clausewitz, C *On War* (Michael Howard and Peter Paret trans (1986) at 75.

LOAC thus does not prohibit military action even when it results in the loss of civilian life.[44] Military success is achieved by preventing or decreasing the ability of the adversary, as a collective, to attack[45] and execute military operations.[46] This is important as the collective nature of armed conflict allows for the legitimate intentional targeting of direct participants to the conflict at any time, even where the individual poses no direct threat at the time.

The interpretation of LOAC principles must, if it is to be realistic, take into account that LOAC is the product of the pursuit of self-interest by its main actors, being States. Humanitarian principles constituted an important factor in the development of LOAC but ultimately LOAC only attempts to minimise the effects of military necessity. The primary aim of LOAC is thus to protect the victims of armed conflict between State parties and to regulate the conduct of hostilities, based on a balance between military necessity and humanity. States have not and will not agree to, or abide by, norms which are disproportionately infused with humanitarian considerations, which will result in an inability to pursue military objectives and military failure.[47] LOAC must also be flexible enough to respond to new realities in hostilities but any changes must be sufficiently reasoned and consistent with the basic tenets of the international legal system.

2.2 The circumstances prevailing at the time when the treaty was concluded

The C-DPH exception to civilian immunity has been an issue throughout history and people have sought to create rules to minimise the suffering for civilians affected by armed conflict.[48] The *Treaty of Westphalia* in 1648 effectively established the modern nation-State. The development of the State was important as it formed collectives which were identified on the basis of their relationship to a State, further facilitating the deployment of legitimate collective military power on behalf of the State. In recent times this trend has, however, changed, with many participants acting on behalf of an armed group with ultra-nationalist,

[44] Engdahl, O & Wrange, P (eds) International Humanitarian Law Series Vol 22: *Law at War: The Law as it Was and the Law as it Should Be* at 207.
[45] See API, Article 49 - "acts of violence against the adversary, whether in offence or in defence."
[46] See Nauman, JP Civilians on the Battlefield: By Using US Civilians in the War on Terror, Is the Pot Calling the Kettle Black? Vol 91, Issue 2 *Neb. L. Rev.* (2013) at 461, available at http://digitalcommons.unl.edu/nlr/vol91/iss2/5 (last accessed on 1 May 2014).
[47] Schmitt, MN The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis *Harvard Journal of National Security Law* 5 May 2010 available at http://harvardnsj.org/2010/05/the-interpretative-guidance-on-the-notion-of-direct-Participation-in-hostilities-a-critical-anyalysis/ (last accessed on 1 May 2014).
[48] Ishoy, R 'The Law of War*' in Towards New Global Strategies: Public Good and Human Rights* (2007) at 183.

ethno-centric, religious and cultural motives; the lack of a relationship with the State is accordingly interpreted from an illegitimate perspective.[49] Targeting issues developed as armed conflict moved to a public, State-sponsored activity with professional participants wearing uniforms. The codification of the modern rules of warfare initiated after the establishment of nation States. This codification started with the Lieber Code, followed by the *St Petersburg Declaration*, the *Brussels Declaration*, the *Oxford Manual* and the *Hague Conventions* of 1899 and 1907, which created restrictions in armed conflict; the criteria to qualify as a combatant were defined.

The violence of the two World Wars caused many to question the usefulness of the *Hague Conventions*.[50] After WWII the first international treaty containing human rights was adopted.[51] The *Universal Declaration of Human Rights* of 1948 ('UDHR')[52] influenced the drafting of the GC's, and specifically Common Article 3 thereof.[53] The GC's, as well as the two Protocols, were adopted by States, primarily to protect the actual and potential victims of armed conflicts[54] but also to ensure the humane treatment of all persons affected by armed conflict. This is in keeping with the dictates of the Martens Clause, which has been used as an interpretive tool in the rulings of the ICTY to establish the meaning of LOAC.[55] In cases of doubt, the clause was used to support an interpretation consistent with the principles of humanity and the dictates of public conscience.[56]

Towards the end of WWII, the UN[57] was formed, together with the International Court of Justice ('ICJ'),[58] and many other intergovernmental organizations.[59] The UN Charter was

[49] Addington, LH (2nd ed) *Patterns of War Since the Eighteenth Century* (1994) at 325.
[50] Watts, S 'Reciprocity and the Law of War *Harvard International Law Journal Vol 50 No 2* (2009) at 401.
[51] Fortin, K 'Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948 –1968' *IRRC* Vol 94 No 888 (Winter 2012) at 1436.
[52] Droege, C 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' *Isr. L. Rev*. Vol 40 No 2 (2007) 313; *Universal Declaration of Human Rights*, GA Res. 217A (III), U.N. Doc A/810 at 71 (1948).
[53] Ibid at 313; see also the Swiss Federal Political Department, Final Record of the Diplomatic Conference of Geneva of 1949 Vol 2 § B at 536 where the president of the conference noted that 'the Universal Declaration of Human Rights and the Geneva Conventions are both derived from one and the same ideal'; Fortin, K *op cit* note 51 at 1445.
[54] International Committee of the Red Cross Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 at 4438; *Prosecutor v Akayesu* at para 603.
[55] Kinsella, HM op cit note 26 at 111.
[56] Meron, T 'The Martens Clause, Principles of Humanity, and the Dictates of Public Conscience' 94 *AJIL* 78 (2000) at 89.
[57] *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI.
[58] *Statute of the International Court of Justice*, June 26, 1945, 59 stat. 1055, 33 U.N.T.S. 993 set up under the UN Charter in 1945.

designed to resist challenges to the system of well-defined States;[60] territorial integrity was emphasized and only sovereign States qualified for membership.[61] The legitimate use of force was centralized in States to maintain order[62] but the legal use of force was further restricted.[63] The UN and other international organizations accepted the legally binding nature of the State system in their assessment of conduct in armed conflict.[64] The UN Charter further represents a rejection of Just War. This is specifically confirmed in Article 2(3) thereof as States are required to settle disputes peacefully.[65] However, forty days after the UN Charter was signed on 26 June 1945, and even before it came into force on 24 October 1945, the first of two atomic bombs was detonated over Japan.[66] The pursuit of peace now became the principle ambition of the international community.

The post-WWII era saw a rise in the frequency of NIAC's, while IAC's became less prevalent,[67] in part, due to the existence of nuclear weapons.[68] Two hemispherical superpowers, which perceived each other as a threat to their continued dominance, emerged. A further World War was thus unthinkable as both the Soviet Union and the US anticipated their mutually-assured destruction, should they violently and directly oppose each other.[69] The Cold War between the US and the Soviet Union was not foreseen when the UN Charter was finalised and, as a result, the mechanism put in place was less effective than expected.[70] The Charter further presupposes that armed conflict will only take place between States and their clearly identifiable regular armed forces.[71] The rise of nationalism and self-determination in colonial areas, however, posed a challenge to this idea. In the 1960s and

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[59] Von Glahn, G & Taulbee, JR *Law Among Nations. An Introduction to Public International Law* (2010) at 37.
[60] Ibid at 38.
[61] Ibid at 37.
[62] Maogoto, JN *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (2005) at 28.
[63] Helmke, B (ed) *Under Attack: Challenges to the Rules Governing the International Use of Force* (2010) at 41. The prohibition on the threat and use of force in the UN Charter, Article 2(4) is a *jus cogens* norm – see the *Vienna Convention on the Law of Treaties* (1969), Article 53 for a definition of *jus cogens*.
[64] See for example United Nations General Assembly, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, September 25, 2009 A/HRC/12/48 available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (last accessed on 1 May 2014). S*ee also* Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, March 31, 2001, available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (last accessed on 1 May 2014).
[65] Maogoto, JN *op cit* note 62 at 36.
[66] Cassese, A (2nd ed) *International Law* (2005) at 39.
[67] Moir, L *Legal Protection of Civilians during Armed Conflict* (2002) at 1.
[68] van Creveld, M *Rise & Decline of the State* (1999) at 337; O'Connell, RL *op cit* note 26 at 296.
[69] Morris, I *op cit* note 2 at 281.
[70] Helmke, B *op cit* note 63 at 41.
[71] von Glahn, G & Taulbee, JR *op cit* note 59 at 38.

1970s, the UN General Assembly ('GA') adopted a number of resolutions regarding the colonial wars taking place in Africa and South East Asia.[72]

During this time the number of asymmetric conflicts involving guerrilla forces and other armed groups further increased[73] as numerous movements sought self-determination.[74] Guerrilla warfare evolved from tactical annoyance to strategic threat and accordingly, a major transformation occurred in the manner in which conflict is channelled, conducted and justified.[75] This new era of a fourth generation of armed conflict concerned itself with the destruction of the enemy's will to fight. It involved network warfare and was characterized by the transformation of the temporal and spatial elements of conflict, a change of the belligerents' identities, the expansion of the nature of targets to include political, social and cultural symbols, and the systematization of privatized asymmetrical armed conflict.[76]

In 1955 the ICRC proposed a set of articles published under the title, *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War*.[77] These Draft Rules confirmed some principles of customary law and presented a response to challenges flowing from changes and developments in weaponry. The Draft Rules were intended mainly to effect the protection of "civilian populations efficiently from the dangers of atomic, chemical and bacteriological warfare".[78] This Project was rejected during the 19th International Conference of the Red Cross in 1957 in New Delhi.[79] The Draft Rules were never implemented but they constituted an essential document in the development of a respected revision of LOAC and constituted an attempt to compel parties to limit their

[72] See in general Crawford, E 'Regulating the Irregular – International Humanitarian Law and the Question of Civilian Participation in Armed Conflicts' *Sydney Law School Legal Studies Research Paper* No 11/46 (August 2011) fn. 41.
[73] See Boot, M *The Evolution of Irregular War*, Foreign Affairs, January 5, 2013, http://www.foreignaffairs.com/articles/138824/max-boot/the-evolution-of-irregular-war?page=show (last accessed on 1 May 2014).
[74] Watkin, K *op cit* note 29 at 24.
[75] *See for example* U.S. Counterinsurgency Manual; see also British Army Field Manual Vol 1 Part 10: Countering Insurgency (2009).
[76] Mohamedou, MM *op cit* note 17 at 25.
[77] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, approved by the International Conference of the Red Cross, 1956 (no entry into force) (1956 Draft Rules).
[78] ICRC, Introduction to the Draft Rules, available at www.icrc.org/LOAC.nsf/INTRO/420?OpenDocument (last accessed on 1 May 2014).
[79] Spoerri, P *From the 1907 Hague Conventions to the Additional Protocols of 1977 and beyond Historical Evolution of the Law on the Conduct of Hostilities in* Gian L Beruto *The Conduct of Hostilities. Revisiting the Law of Armed Conflict 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols* (2007) at 38.

military operations to the destruction of military resources, and to protect the civilian population from armed attacks. [80]

The forfeiture of civilian immunity remained problematic during the US war in the Republic of Vietnam from 1961 to 1965, although there were rules of engagement to protect civilians.[81] The Cuban Missile Crisis in 1962 brought the world to the brink of nuclear war.[82] The ICRC thereafter offered a detailed set of regulations to States for their approval. These regulations were intended to reaffirm certain fundamental principles. The 20th International Conference of the Red Cross and Red Crescent in Vienna in 1965 resulted in the adoption of Resolution 28, which declared that all governments and other authorities responsible for armed operations should abide by a set of minimum rules during the armed conflict.[83] This resolution provided that distinction must be made at all times between persons taking part in hostilities and members of the civilian population.

The Tehran International Conference on Human Rights[84] in 1968 further entrenched the application of human rights in armed conflict when a resolution entitled *Respect and Enforcement of Human Rights in the Occupied Territories* relating to the application of the UDHR and the GC's in the occupied Palestinian territories was adopted.[85] Resolution 2444, *Respect for Human Rights in Armed Conflicts*,[86] which affirmed the principle of distinction, was also adopted at this conference.[87] The ICRC then, in 1971, organized a series of Conferences of Government Experts on the *Reaffirmation and Development of International Humanitarian Principles in Armed Conflicts*. The aim of these conferences was to establish a

[80] ICRC Commentary on Additional Protocols, 1832.
[81] Hays Parks, W 'Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect' *International Law and Politics* (2010) Vol 42:769 at 777.
[82] Copeland, DC *The Origins of Major War* (2000) at 186.
[83] *Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare*, Res. XXVIII, adopted by the XXth International Conference of the Red Cross, Vienna (1965), reproduced in Schindler, D & Toman, J (eds) *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (1988) at 29–30. Spoerri, P *op cit* note 370. The Conduct of Hostilities, Revisiting the Law of Armed Conflict, 100 Years after the 1907 Hague Conventions and 30 Years after the 1977 Additional Protocols. *Current Problems of International Humanitarian* Law (2008) at 8.
[84] Human Rights in Armed Conflicts, UN Res. XXIII, International Conference on Human Rights, UN Doc.A/Conf. 32/41 (Sales No, 68.XIV.2) (1968), reproduced in Schindler, D & Toman, J (eds) *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (1988) at 261–2.
[85] Final Act of the International Conference on Human Rights, UN Doc. A/Conf.32/41 (April 22-May 13, 1968).
[86] Respect for Human Rights in Armed Conflicts, GA Res. 2444, UN GAOR, 23rd session, Supp No 18 (A/7218) (1968), [1(c)]. The resolution affirmed resolution XXVIII of the XXth International Conference of the Red Cross.
[87] See Doswald-Beck, L & Vite, S 'International Humanitarian Law and Human Rights' *IRRC, No. 293* (30-04-1993) at 1.

process for the codification of LOAC, whereby the GC's were to be reaffirmed and not amended.[88] In 1973 mention was made of the status of "wars of national liberation" as IAC's in GA Resolution 3103 (XXVIII), which contains the "[b]asic principles on the legal status of combatants struggling against colonial and alien domination and racist regimes".[89]

At this time it had become apparent that States were not going to consent to a specific protocol wherein guerrilla warfare could be addressed *sui generis*. It had, however, also become evident that Common Article 3 required elaboration and completion.[90] This resulted in two draft protocols, in 1973, which expanded on the GC's and which addressed the question of guerrilla warfare alongside the other forms of warfare.[91] The *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts* held from 1974 to 1977 confirmed the inclusion of "armed conflicts in which peoples are fighting . . . in the exercise of their right to self-determination" in API.[92] APII regulates only certain NIAC's; internal disturbances and tensions are not regarded by APII, Article 1(2), as being armed conflicts. There are, accordingly, internal armed conflicts which fall below the threshold set by APII, but which comply with the requirements of Common Article 3.

API and APII were adopted by consensus on 8 June 1977 and entered into force on 7 December 1978.[93] The AP's were designed to curtail or prevent violence against civilians by

[88] ICRC, Report on the Work of the Conference of Government Experts (1971) 18 quoted in Suter, K *An International Law of Guerrilla Warfare: The Global Politics of Law-Making* (1984) at 110.
[89] 1973, adopted 83:13:19.
[90] 'When put to the test . . . the rules of protection in [common] Article 3 had been shown to require elaboration and completion. Government and Red Cross experts consulted by the ICRC since 1971 had confirmed the urgent need to strengthen the protection of victims of NIAC's by developing international humanitarian law applicable to such situations' – Official Records of the Diplomatic Conference on the Reaffirmation and Development of LOAC Applicable to Armed Conflicts, Geneva (1974-1977) (Berne, 1978) CDDH/I?SR.22; VIII, 201 at 201 cited in Lindsey, M *op cit* note 291 at 89.
[91] ICRC, First Draft Additional Protocol to the Geneva Conventions of 12 August 1949, 1973 (Draft Protocol I), reproduced in Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Official Records); ICRC, Second Draft Additional Protocol to the Geneva Conventions of 12 August 1949, 1973 (Draft Protocol II) (on internal armed conflict), reproduced in Official Records Vol 1–2. On the context surrounding the Draft Protocols, see ICRC, Commentary on Draft Additional Protocols to the Geneva Conventions of 12 August 1949, 1973 (ICRC Commentary on Draft Protocols).
[92] API, Article 1(4). Some has maintained that API, Article 1(4) should have been contained in APII but these conflicts of national liberation are now beyond the scope of APII as it explicitly states that conflicts listed in API, Article 1 are beyond its scope of application – Moir, L *op cit* note 40 at 90.
[93] Von Glahn, G & Taulbee, JR *op cit* note 59 at 607.

defining the principle of distinction.[94] The AP's reflect an attempt to update LOAC to address new types of armed conflict[95] and have resulted in numerous manuals relating to armed conflict.[96] The AP's acknowledge the application of human rights in armed conflict and the ICRC Commentary states that '[h]uman rights continue to apply concurrently [with LOAC] in time of armed conflict.'[97] API supplements the GC's, but APII only supplements Common Article 3. API effectively united the 'Hague' and 'Geneva' law regarding the norms that address the conduct of hostilities and the protection for persons and objects.[98] APII lost its impetus when wars of national liberation were included in API[99] but it was a noteworthy achievement which deviated from previous LOAC instruments.

2.3 Ultimately the interpretation must be based upon the text of the treaty[100]

Special meaning should only be accorded to a term where it is established that the parties thereto so intended.[101] This rule gives preference to an objective literal, systematic and teleological interpretation of treaties.[102] The ICRC Commentary on API only states that "direct participation means acts of war which by their nature or purpose are likely to cause harm to the personnel and equipment of the enemy armed forces".[103] The Commentary,[104] with reference to the term, 'direct' in the expression, 'take a direct part in hostilities'[105] states that civilians lose immunity when they participate directly in hostilities, which is interpreted to mean "that they do not become combatants".[106] Thus '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. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection against the effects of hostilities, and he may no longer be

[94] Geneva Convention IV & API, Articles 48, 51(2) & 52(2).
[95] See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* ('AP I'), 1125 UN Treaty Ser 3 (1977) and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (AP II), 1125 UN Treaty Ser 609 (1978).
[96] Boothby, WH *op cit* note 8 at viii.
[97] Sandoz, Y; Swanarski, C & Zimmerman, B *Commentary on the Additional Protocols I & II of 8 June 1977* (1987) at 4429.
[98] Schmitt, MN *op cit* note 24 at 809.
[99] Kinsella, HM *op cit* note 26. The national liberation movements that were requested to attend the conference reflected a political agenda, which is now incorporated into API, Article 1(4).
[100] The *Libya/Chad* case, ICJ Reports, 1994 at 6, 22, 100 ILR at 1, 21.
[101] Article 31(4), *Vienna Convention*. *Eastern Greenland* case, PCIJ, Series A/B, No. 53, 1933 at 49.
[102] *Vienna Convention*, Article 31(1); Cassese *op cit* note 66 at 179.
[103] ICRC Commentary on API.
[104] International Committee of the Red Cross Commentary *op cit* note 35 at 1944.
[105] See also API, Article 43 (Armed forces).
[106] International Committee of the Red Cross Commentary *op cit* note 35 at 1944.

attacked. However, there is nothing to prevent the authorities from taking repressive or punitive security measures with regard to him when capturing him in the act, or arresting him at a later stage.[107] Furthermore, it may be noted that members of the armed forces feigning civilian non-combatant status are guilty of perfidy.[108] Acts of C-DPH may thus result is criminal prosecution of civilians, in terms of domestic law.[109]

The Commentary claims that the terms, C-DPH and 'participation in the war effort' are dissimilar.[110] Mere participation does not necessarily amount to C-DPH and the difference is one of degree.[111] It is submitted that enabling C-DPH must be differentiated from the collective threat posed by members of armed forces or armed groups. Boothby states that the dictionary meaning of participation is to "be involved in, take part" and he concludes that this relates to individual acts and sequences of activities over a period of time.[112] He thus maintains that the ordinary interpretation of C-DPH would include both isolated acts and continuous loss of protection for a persistent participant. The protection of the participant would only be restored when the civilian demonstrably disengages from the series of acts.[113]

API, Article 51, and APII, Article 13, must be interpreted with regard to API, Articles 43, 48, 50, and 58. API, Article 43 states that "the armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party". The provision further requires that these armed forces be subject to an internal disciplinary system.[114] This provision deals with the right of combatants to participate directly in hostilities[115] and not with the targeting.

API, Article 48, requires that the Parties to the conflict distinguish between the civilian population and combatants, and between civilian objects and military objectives. Any

[107] In accordance with the provisions of Article 45 (Protection of persons who have taken part in hostilities) or on the basis of the provisions of the fourth Convention (assigned residence, internment etc.)
[108] Article 37 (Prohibition of perfidy), paragraph 1(c).
[109] *PCATI* at para 26 and 31; Telman, DAJ 'Introduction: Targeting in an Asymmetrical World' 46 *VAL. U. L. REV.* 697, 701–03 (2012).
[110] International Committee of the Red Cross Commentary *op cit* note 35 at 1945.
[111] Ibid.
[112] Boothby, B *op cit* note 8 at 765.
[113] Van der Toorn, D *op cit* note 13 at 21.
[114] API, Article 43(1).
[115] API, Article 43(2).

operations may, accordingly, be directed only against military objectives".[116] API, Article 51(2), confirms that "attacks against the civilian population as such and against individual civilians" are prohibited. These provisions are recorded in a similar manner in the San Remo Manual in its 'Basic Rules'.[117] The term, 'attacks' is defined by API, Article 49, and the term has the same meaning in APII.[118] API, Article 50, regarding the definition of civilians and civilian population states that "[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the GCIII and in API, Article 43. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.[119] The civilian population comprises all persons who are civilians.[120]

API, Article 57, regarding precautions in attack, states that "constant care shall be taken to spare the civilian population, civilians and civilian objects".[121] Observers are required to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives . . .".[122] API, Article 52(2), defines military objectives as far as objects are concerned, limiting them "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 neutralization, in the circumstances ruling at the time, offers a definite military advantage".[123] Obviously military objectives also include the armed forces, their members, installations, equipment and means of transport. The definition of 'military objective' is generally accepted as part of customary International Law.[124]

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[116] API, Article 48(1).
[117] Article 39 – 41; San Remo Manual on International Law Applicable to Armed Conflicts at Sea at 114.
[118] International Committee of the Red Cross Commentary *op cit* note 35 at 4783.
[119] API, Article 50(1).
[120] API, Article 50(2).
[121] API, Article 57(1).
[122] API, Article 57(5).
[123] International Committee of the Red Cross Commentary *op cit* note 35 at 1951; Dinstein, Y *op cit* note 3 at 84-5; Human Rights Watch Report (2003) Off Target: The Conduct of the War and Civilian Casualties in Iraq. Human Rights Watch at 8 available at http://www.hrw.org/reports/2003/usa1203/usa1203.pdf (last accessed on 1 May 2014). See also the 2007 Human Rights Watch Report named Civilians Under Assault: Hezbollah's Rocket Attacks on Israel in the 2006 War available at www://www.HRW.org/reports/2007/iopto807/iopto807webcover.pdf (last accessed on 1 May 2014). This Report incorrectly confused the test for objects as lawful targets with the lawful targeting of natural persons.
[124] Olasolo, H *Unlawful Attacks in Combat Situations. From the ICTY's Case Law to the Rome Statute* (2008) at 125.

2.4 Treaties should be interpreted to be effective and useful and have the appropriate effect

Military success is achieved by preventing or decreasing the ability of the adversary as a collective to execute military operations.[125] This is important as the collective nature of armed conflict allows for the legitimate collateral targeting of civilians and the intentional collective targeting of direct participants to the conflict at any time, even where the target poses no direct threat at the time. Armed conflict is, as a result, fundamentally a struggle between two or more hostile armed groups. The principle of distinction is also premised on two or more opposing armed forces. The collective nature of armed conflict dictates that a combatant, and for this purpose, a member of the regular armed forces and a member of an organised armed group that constitutes an adversary, represents a legitimate enduring military objective.[126] This is because non-State armed groups cannot be treated as a conglomeration of civilians taking a direct part in hostilities without acknowledging the nature of the structures that exist in armed groups. Non-State armed groups have a collective nature; to regard the group as a collection of civilians individually directly partaking in hostilities neglects to recognize the nature of the organization of armed groups. The armed group generally displays elements of subordination to leadership or group objectives. The group, as with regular armed forces, creates the hostile threat through the individuals participating therein as a collective. This is the reason for targeting the individual as a representative of the group and in the execution of his mandate from the group.

The *Stugar case*[127] defined C-DPH as "acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces".[128] The court further concluded that acts of C-DPH include "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 the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or

[125] See API, Article 49 - "acts of violence against the adversary, whether in offence or in defence"; Nauman, JP 'Civilians on the Battlefield: By Using US Civilians in the War on Terror, Is the Pot Calling the Kettle Black?' *Vol 91, Issue 2 Neb. L. Rev.* (2013) at 461 available at http://digitalcommons.unl.edu/nlr/vol91/iss2/5 (last accessed on 1 May 2014).
[126] Article 21 General Orders, no. 100: Instructions for the Armies of the United States in the Field, approved 24 April 1863 (Lieber Code) (reproduced in Hartigan, RS *Lieber's Code and the Law of War* (1983).
[127] *Prosecutor v Stugar*, Case No IT-01-42-A, Appeals Chamber Judgment (17 July 2008).
[128] Ibid at para 176-79.

observers on behalf of military forces".[129] In the *Galic Judgment*[130] the court referred to the standard of a reasonable person in the same circumstances, who should not have ignored the possibility of a victim's civilian status based on her clothing and the activity in which she was engaged.[131] The court thus indicated that the clothing, activity, age, or sex of the person targeted, are factors which should be considered in deciding whether the person is a civilian.[132] The Trial Chamber at the ICTY held in the matter of *Blaskic*[133] that it was ". . . content to define a civilian as the opposite of a combatant".[134]

The International Criminal Court hereafter pronounced on the *Lubanga* matter,[135] which related to whether "the use [of children under 15] to participate actively in hostilities" qualified as a war crime under the Rome Statute.[136] The main issue of dispute in the eventual judgment relates to the term, "use to participate actively in hostilities". The majority held that "[g]iven the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes 'active participation' can only be made on a case-by-case basis".[137] The dissenting judgment concluded that it potentially risks leading to divergent assessments of the respective harms suffered by different children. API states that "[t]he parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities […]",[138] and APII states that "children who have not attained the age of fifteen years shall [not be] allowed to take part in hostilities".[139] This LOAC language was included in the 1989 *Convention on the Rights of the Child*, which commits State parties to "take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities".[140] The judgment, however, failed to clarify the expression, 'to participate actively in hostilities' as opposed to the expression, 'direct participation'.[141] The

[129] Ibid at para 176-79.
[130] *Prosecutor v Stanislav Galic*, Case No. IT-98-29-T, Judgment ¶ 144 (Dec. 5, 2003).
[131] *Prosecutor v Stanislav Galic supra* at 16 & 429.
[132] *Prosecutor v Stanislav Galic supra* at para 50.
[133] See *Prosecutor v. Tihomir Blaskic*, Judgement (Trial), 3 March 2000 – Case No. 216 (A); *Prosecutor v. Tihomir Blaskic*, Judgement (Appeals), 29 July 2004 – Case No. 216 (B).
[134] See *Prosecutor v. Tihomir Blaskic supra*; *Prosecutor v. Tihomir Blaskic*, Judgement (Appeals), 29 July 2004 – Case No. 216 (B).
[135] *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-2842 14-03-2012 4/624 SL T.
[136] Article 8(2)(b)(xxvi) and 8(2)(e)(vii).
[137] *Prosecutor v. Thomas Lubanga Dyilo* supra at para 627.
[138] API, Article 77(2).
[139] APII, Article 4(3)(c).
[140] CRC, Article 38(2).
[141] *Prosecutor v. Thomas Lubanga Dyilo supra* at para 627.

court found 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".[142]

The ICC Trial Chamber, in the *Lubanga* case, interpreted the term, 'active participation in hostilities' as used in Article 8(2)(e)(vii),[143] with specific reference to whether sexual violence against children amounted to "active participation in hostilities". The majority held that 'active participation', under this provision of the ICC Statute, is distinct from, and broader than, C-DPH. The Court found that "[t]he use of the expression, 'to participate actively in hostilities', as opposed to the expression, 'direct participation' (as found in API), was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence…".[144] The court thus distinguished between 'direct' and 'active'. The Court held that "the use of the expression 'to participate actively in hostilities', as opposed to the expression 'direct participation'…was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence…". The Court further held that "[t]hose who participate actively in hostilities include a wide range of individuals, from those 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."[145] The Trial Chamber seems to regard 'direct' participation' to mean involvement in front-line combat as opposed to 'active', which is a broader concept and includes 'combat-related activities'.[146]

The Israeli Supreme Court case of *Public Committee against Torture in Israel v Government of Israel* ("PCATI")[147] embraced a broad interpretation of "hostilities," "direct," and "for such time."[148] The Israeli government implemented a policy of targeted killings . . . whereby the Israeli military eliminated those who "plan, launch, or commit terrorist attacks in Israel

[142] Ibid at para 628.
[143] http://www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/ (last accessed on 28 December 2014).
[144] The *Prosecutor v. Thomas Lubanga Dyilo supra at* 627.
[145] Ibid at paras 627 & 628.
[146] Ibid at paras 622.
[147] *PCATI judgment* available in English from http://elyoni.court.gov.il/eng/home/index.html (last accessed on 1 May 2014).
[148] Schondorf, RS *Editorial Comment The Target Killings Judgment: A Preliminary Assessment* 5. J. Int'L Crim. Just. 301, 302 (2007).

and in the occupied territories against both civilians and soldiers".[149] The government justified these killings as a preventative measure based on the past actions of civilians.[150] The Israeli government argued that the court should recognize a category of "unlawful combatants" under LOAC. This, it was argued, is because the members of the terrorist organizations are party to the armed conflict and because they take an active part in the fighting.[151] Their active participation makes them legitimate targets for the duration of the armed conflict but they do not acquire combatant privilege in terms of the *Geneva Convention Relative to the Treatment of Prisoners of War* or *The Hague Regulations*, since they do not differentiate themselves from the civilian population or obey LOAC.[152]

'Hostilities' was held to mean "acts which by nature and objective are intended to cause damage to the army".[153] The Commentary confirmed that several delegations deemed "hostilities" to include "preparations for combat and returning from combat".[154]The court also took an expansive view of the term, 'direct' to persuade civilians to remain uninvolved in conflict. Thus a definition of 'direct' that included only combat and active military options would be too narrow but "expanding it to the entire war effort would be too broad . . .".[155] The Court was mindful of the fact that the whole population indirectly participates in the war effort in modern warfare and therefore C-DPH could not be restricted to combat and active military operations, nor could the concept be extended to the entire war effort.[156] This represents a functional approach and identified guidelines and categories of persons who could be regarded as directly participating in hostilities. The court concluded that C-DPH does not only include the person committing the physical attack, but also extends to those who ordered that attack, those who decided on the act, and those who planned it.

[149] *Public Committee Against Torture in Israel v. The Government of Israel*. Isr. L. Rev. Vol. 40, No.1 ("PCATI judgment"); See also Berlin, E 'The Israeli Supreme Court's *Targeted Killings* Judgment: A Reaffrimation of the Rule of Law During War *Mich. ST. Int'L L. Rev.* Vol 21 Issue 2 (2013) at 518.
[150] Ben-Naftali, O & Michaeli, KR *We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int'L L.J. 233* at 250 (2003).
[151] PCATI *op cit* note 69 at 11.
[152] Ibid at para 11.
[153] Ibid at para 11; International Committee of the Red Cross Commentary *op cit* note 35 at 4788.
[154] Ibid at 4788.
[155] Ibid at paras 11, 28, 34 (quoting ICRC, *Commentary on the Additional Protocols to the Geneva Conventions* para. 4789 *available at* http://www.icrc.org/LOAC.nsf/WebList?ReadForm&id=470&t=com at para 1679 (last accessed on 1 May 2014).
[156] *AP Commentary* at 516, para 1679.

The Israeli Court also pronounced on the duration of C-DPH and held that "[r]egarding the wording 'and for such time' there is no consensus in the international literature . . . with no consensus regarding the interpretation of the wording 'for such time', there is no choice but to proceed from a case-to-case basis".[157] The loss of civilian immunity was therefore held to be forfeited only 'for such time' as a civilian is taking a direct part in hostilities and the assessment thereof must also be done on a case-to-case basis.[158] The test is whether the civilians are "performing the function of combatants," and "[t]he function determines the directness of the part taken in the hostilities".[159] The main consideration in targeting is the identity of the targeted person and a balancing test must be applied between military needs and humanitarian considerations.[160] This determination must be based on "well-based information" before the civilian is susceptible to attack, and the information must be "thoroughly verified . . . regarding the identity and activity of the civilian who is allegedly taking part in the hostilities".[161]

The Court concluded that a person who has ceased to take a direct part in hostilities would regain his immunity from targeting. The Court commented that it was important to differentiate between a sporadic act of C-DPH and those persons who actively joined a "terrorist organization" and, while within that organization, committed a series of hostile acts. Any intervals between hostile acts would not constitute a cessation of active participation and such members did not regain their civilian immunity during these intervals. This is because these intervals constitute transitory interludes preparatory to the participation in the next act of hostility.[162] The Court held that C-DPH included more than just those who are involved in attacks in a single causal step. Once a person has made an armed group his 'home' and thereby commits a chain of hostilities, with short periods of rest between them, then he forfeits his protection, until such time as he positively disengages from the group.[163] The rest

[157] PCATI *op cit* note 69 at para 38.
[158] Ibid at para 38.
[159] Ibid at para 35; The U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, Doc. NWP 1-14M/MCWP 5-12.1/COMDTPUB P5600.7A, The Commanders Handbook on the Law of Naval Operations, ch. 8.2.2 (July 2007) cited in Schmitt, MN *op cit* note 38 at 706A also notes that "[d]irect participation in hostilities must be judged on a case-by-case basis."; See also the *Prosecutor v. Tadic*, Opinion and Judgment, IT-94-1-T, ICTY (May 7, 1997) at 616. *See also ICRC International Humanitarian Law* (2005) 173, Vol I, 24. *See* ICRC, *Customary International Humanitarian Law* (2005) Vol II, 117.
[160] PCATI *op cit* note 69 *a*t para 23.
[161] Ibid at para 40.
[162] Ibid at para 31.
[163] Ibid at para 39.

periods between hostilities was interpreted as preparation for the next hostility.[164] The Court thus classified civilians who "made the organization their home" as "members of organized armed groups" or, for all intentional purposes, 'combatants'. This suggests that there is no requirement for a hostile act to have a direct link to likely harm, or even a proximate one. The decisive requirement is actual involvement in the armed group's operational activities.[165] The expansion of the term, 'direct', and the temporal element appear to support a membership approach to C-DPH.[166]

The Commentary defines 'hostile acts' as "acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces".[167] The Commentary concludes that a civilian "who takes part in 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".[168] Several delegations considered "hostilities" to include "preparations for combat and the return from combat".[169] "Hostilities" thus includes "the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon".[170]

The US interpretation of C-DPH is important as this State has been involved continuously in contemporary armed conflict. The US interprets C-DPH narrowly as "immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct and causal relationship between the activity engaged in and the harm done to the enemy".[171] C-DPH does not mean indirect participation in hostilities, such as gathering and transmitting military

[164] Ibid at para 39.
[165] Ibid at para 35.
[166] Eichensehr, KE 'Comment, *On Target*? The Israeli Supreme Court and the Expansion of Targeted Killings' 116 *Yale L.J.* 1873, 1875–79 (2007).
[167] International Committee of the Red Cross Commentary *op cit* note 35 at 1942.
[168] Ibid at 1942.
[169] Ibid at 1943.
[170] Ibid.
[171] United States Congressional Serial Set, Serial No. 14751, Senate Executive Reports, Issues 4-15 Congress, United States Government Printing Office at 35 available at https://books.google.co.za/books?id=ocPcWoZ0ISYC&dq=immediate+and+actual+action+on+the+battlefield+likely+to+cause+harm+to+the+enemy+because+there+is+a+direct+and+causal+relationship+between+the+activity+engaged+in+and+the+harm+done+to+the+enemy&source=gbs_navlinks_s (last accessed on 13 January 2015).

information, transporting weapons, munitions and other supplies or forward deployment".[172] The US Department of Defense Law of War Working Group regards civilians C-DPH in the light of "geographic proximity of service provided to units in contact with the enemy, proximity of relationship between services provided and harm resulting to the enemy, and temporal relation of support to enemy contact or harm resulting to enemy".[173] The US interprets C-DPH narrowly when considering their own military contractors and civilian employees but interprets the concept broadly when targeting irregular enemy fighters. These two interpretations are equally based on a membership approach.[174] In order to protect the military's civilian employees and contractors, the US has thus argued in favour of a narrow interpretation of C-DPH. The foundation of this opinion is the Commentary to API,[175] which seems to require a "direct causal relationship between the activity engaged in and the harm done," and the acts must be "intended to cause actual harm." In 2000 the US defined C-DPH as "immediate and actual action" in armed conflict likely to cause harm to the enemy.[176] The *US Department of Defense Law of War Working Group* maintained that C-DPH will occur when there is geographic proximity of service provided to units in contact with the enemy, proximity of relationship between services provided, and harm resulting to the enemy.[177] The US policy thus creates general protection from attack for US members of the armed forces, similar to that of UN Peacekeepers, by declaring that there are no lawful combatants in the war on terror, and that all hostile acts against the US armed forces constitute war crimes.[178]

[172] Message from the President Transmitting Two Optional Protocols to the Convention on the Rights of the Child, S, Treaty Doc No 106-37 (2000) available at 2000 WL 33366017 at 41; Christensen, ER *op cit* note 105 at 16.
[173] Int'L & Operational Law Dep't, The Judge Advocate General's Legal Center & School, U.S. Army, 2 Int'L & Operational Law I-10 Civilian Protections in Armed Conflict (September 2006), quoted in Christensen, ER *op cit* note 105 at 16.
[174] *See* Int'l Comm. of the Red Cross, *Summary Report: Direct Participation in Hostilities under International Humanitarian Law* 11 (2003) *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participationhostilities-LOAC-311205/ (last accessed on 1 May 2014) at 3 ("[I]t was said that treating certain civilians as more 'civilian' than other could eventually undermine the general protection afforded to civilians as such.").
[175] ICRC, Commentaries on the Protocols Additional of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987). See also Sandoz, Y, Swinarski, C and Zimmerman, B (eds) *Commentary on the Additional Protocols* (1987).
[176] Message from the President *op cit* note 172.
[177] Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center & School, U.S. Army, 2 Int'l & Operational Law I-10 *op cit* note 173.
[178] *See Rome Statute of the International Criminal Court op cit* note 48, at article. 8(2)(b)(iii) (establishing as a war crime acts of "[i]ntentionally directing attacks against personnel . . . involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations").

The US interpretation, as it relates to C-DPH of civilian employees and contractors, is supported by Hays Parks, who argues[179] that API requires an act similar to that of military operations or combat to qualify as C-DPH. This interpretation is corroborated by Schmitt, who states that the civilian must be informed that his participation was "indispensible to a discrete hostile act or series of related acts." This interpretation sets a high threshold for civilians or contractors to directly participate in hostilities.

In contrast to US practice, the *UK Manual on the Law of Armed Conflict* states that "[w]hether civilians are taking a direct part in hostilities is a question of fact".[180] It further states that civilians taking an indirect part in hostilities "are at risk from attacks on those objectives since military objectives may be attacked whether or not civilians are present (subject to the rule of proportionality)." The 1998 *Report on the Practice of Zimbabwe* states that "civilians will lose their protection if they actively assist or actively become engaged in military operations . . . A lot, however, will depend on the degree of involvement". *The Report of the Practice of Chile* states that Chile "takes a very broad view of what acts are considered to constitute support to military action, and as a result lead to the loss of civilian status and protection". The Indian Army Training Note of 1995 states "so long as an individual, may it be soldier or civilian is directly contributing towards furtherance of the war effort, he is deemed to be at war".[181]

3. Narrow and Broad Interpretation of Civilian Direct Participation in Hostilities

States have incentives to pursue narrow or broad interpretations of C-DPH, or even both.[182] The concept of C-DPH is difficult to interpret and this allows States and armed groups to implement various interpretations, based on their particular desires, objectives, and abilities. A narrow interpretation of the elements of C-DPH generates a high threshold, which makes it

[179] Hays Parks, W *Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. Int'L L. & Pol. 769, 828 (2010) at 828.
[180] Ministry of Defence, The Manual of the Law of Armed Conflict (2004) at 5.3.3 in Rogers, APV 'Direct Participation in Hostilities: Some Personal Reflections' *Military Law and the Law of War Review 48/1-2* (2009) at 149.
[181] Henckaerts, J and Doswald-Beck, L (eds) *Customary International Humanitarian Law* (International Committee of the Red Cross, 2005) Vol 1 at 3; Melzer, N *op cit* note 10 at 109.
[182] Christensen, ER *The Dilemma of Direct Participation in Hostilities* Presented to the Faculty of the Graduate School of the University of Texas at Austin in Partial Fulfillment of the Requirements for the Degree of Master of Public Affairs/Juris Doctor (2009) at 5 available at: http://ssrn.com/abstract=1398462 (last accessed on 1 May 2014); See Targeting Operations with Drone Technology: Humanitarian Law Implications. Background Note for the American Society of International Law Annual Meeting, Human Rights Institute, Colombia Law School. March 25, 2011 at 17 – 21.

demanding for civilians to directly participate in hostilities.[183] A narrow interpretation results in complications when targeting directly participating civilians.[184] The broad interpretation of the elements of C-DPH produces a low threshold, which allows civilians to directly participate in hostilities without effort. This also makes it effortless for States to justify targeting participating civilians.[185]

Cassese proposes that C-DPH should be construed in a narrow fashion,[186] meaning that only those participants actually engaged in armed action are directly participating in hostilities.[187] His opinion seems to be based mainly on a law enforcement model. It is submitted that this approach is disconnected from the realities of armed conflicts and provokes disrespect for LOAC.[188]The 'revolving door' that is created hereby is unsustainable.[189] Galvin suggests that a narrow interpretation of C-DPH actually increases the risk to the civilian population[190] as it creates confusion and promotes disrespect for LOAC among combatants. He comments that it is illogical to attach participation to the direct release of kinetic force, as non-kinetic force may be more harmful to the opposing forces in modern armed conflict.

The broad approach covers hostile acts that intend to cause harm to armed forces or civilians.[191] The *Targeted Killing* case extends the meaning of hostilities to include gathering intelligence and preparing for hostilities.[192] This approach regards an individual civilian who directly participates in hostilities as forfeiting his protection against intentional attack "until he … unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal".[193] The civilian may thus be intentionally targeted "between episodes of participation. Repeated participation can be the basis of a determination that the

[183] ICRC, Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities 60 (2005) available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/ (last accessed on 1 May 2014).
[184] Ibid.
[185] Christensen, ER *op cit* note 105 at 5.
[186] Cassese, A *op cit* note 66.
[187] Ibid at 12 & 13.
[188] Keller, H & Forowicz, MA 'Tightrope between Legality and Legitimacy: an Analysis of the Israeli Supreme Court's Judgment on Targeted Killing' *21 Leiden J. Int'l L.* 185 (2008) at 209.
[189] Kretzmer, D *op cit* note 27 at 193.
[190] Galvin, JE 'Direct Participation in Hostilities: A Proposition for U.S. Reaction to the ICRC's Interpretive Guidance and Formulation for a Practicable Definition' A Thesis submitted to The Faculty of The George Washington University Law School In partial satisfaction of the requirements for the degree of Master of Laws (May 20, 2012).
[191] *Targeted Killings* case (2006) HCJ 769/02, [33].
[192] Ibid.
[193] Schmitt, MN *op cit* note 20 at 38.

individual is continuously engaged and thus continuously liable to attack".[194] This is confirmed in the *Targeted Killing* case which found that if a civilian who has joined a "terrorist organisation" and "in the framework of his role in that organisation . . . commits a chain of hostilities" then "the rest between hostilities is nothing other than preparation for the next hostility".[195] The burden rests on the civilian to contradict the assumption that he is continually C-DPH. This obligation on the civilian may be difficult in practice to accomplish but this is a risk that the civilian undertakes when deciding to directly participate in hostilities. I agree with this notion that civilians who join the regular armed forces or organised armed groups take responsibility for their participation in armed conflict and its possible consequences.

4. The Interpretation of Direct Participation in Hostilities by Legal Experts

The understanding of LOAC was historically influenced by the comprehension of the theory of just war. The initial understanding was based on Christian doctrine and natural law theory wherein just warfare was regarded as a collective form of punishment for wrongdoing. However, the interpretation of LOAC has changed. The interpretation of LOAC changed to a more realistic issue and more sensitive to pragmatic concerns.[196] LOAC now acknowledges the moral equality of combatants notwithstanding whether the armed conflict is just, civilians are immune to intentional targeting and prisoner of war status of combatants in IAC.

It is evident that academic opinion on the interpretation and meaning of C-DPH will continue to differ, with some favouring a more humanitarian interpretation as opposed to those experts that advocate military necessity. State practice continues to support military necessity also will probably persist accordingly. Ultimately, academic opinion must recognise that law is a practical endeavour; it considers real problems and challenges in real world circumstances.[197] These multifaceted challenges continue to inhibit the application and understanding of C-DPH at national and international levels. While it is evident that there are no uniform measures to address the issue because of the varying interpretations and contexts, there are

[194] Boothby, B 'And For Such Time As: The Time Dimension to Direct Participation in Hostilities' *42 New York University Journal of International Law and Politics* (2010) at 767–8.
[195] Ibid at 767–8; *Targeted Killings case* (2006) HCJ 769/02, [39].
[196] Rodin, D & Shue, H *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* Oxford University Press (2008) 19.
[197] Daly, E Democracy, Citizenship and Constitutionalism: Dignity Rights: Courts, Constitutions and the Worth of the Human Person at 54.

specific measures that can be undertaken which could significantly enhance the understanding of C-DPH. LOAC is reasonably adaptable and it has analytical tools which make the provision of reliable legal advice on unanticipated conditions achievable. In fact, it has been argued that LOAC is sufficiently flexible to overcome abstract challenges and to ensure the enforcement of IHL.[198]

C-DPH must therefore be considered in light of military necessity, failing which LOAC rules will be disregarded in armed conflict. The ICRC will not support this interpretation as their mandate focuses on humanitarian consideration, leaving the Interpretative Guidance on DPH disputed and unsupported. The three cumulative criteria required for a specific act to qualify as C-DPH in the Guidance are not likely to be incorporated into the military manuals of States as observers cannot be expected to, nor will they evaluate potential military objectives based on the academic and time-consuming criteria therein. The definition may be of assistance where military objectives are selected in advance for intentional targeting with the benefit of credible intelligence. The criteria, which effectively require a threshold of harm, direct causation and a belligerent nexus evaluation, are not practical during armed conflict.[199]

Schmitt argues that the threshold of harm determination requires that "the harm contemplated may either adversely affect the enemy or harm protected persons or objects".[200] This standard only requires an 'objective likelihood'[201] that the consequence of the act will cause harm and the actual 'materialisation of harm'[202] is not required. An objective 'likelihood' will be present when a civilian exhibits subjective intent to cause the harm which is objectively identifiable.[203] The nature of the intended harm determines whether the threshold of harm is

[198] Statement by Kellenberger, J. 60 Years of the Geneva Conventions and the Decades Ahead. (2009) available at www.icrc.org/eng/resources/documents/statements/geneva-convention-statement-091109.htm (last accessed on 1 May 2014).
[199] Melzer, N *op cit* note 10 at 47.
[200] Examples of activities which satisfy the threshold of harm requirement are, inter alia, 'acts of violence against human and material enemy forces'; sabotaging or causing 'physical or functional damage to military objects, operations or capacity'; restricting or disturbing military 'deployments, logistics and communications'; Schmitt, MN *op cit* note 87 at 715; Melzer, N *op cit* note 10 *a*t 48; Melzer *op cit* note 178 at 859 & 860. Examples of activities which fall short of the threshold of harm requirement are, inter alia, 'building fences or roadblocks'; interrupting 'electricity, water, or food supplies'; appropriating cars and fuel; manipulating computer networks; etc. - Melzer, N *op cit* note 10 at 48; Schmitt, MN *op cit* note 87 at 719.
[201] Melzer, N *op cit* note 10 at 47.
[202] Ibid at 33; Schmitt, MN *op cit* note 87 at 724.
[203] Schmitt, MN *op cit* note 87 at 724

achieved and the 'quantum of harm caused' is immaterial.[204] Jensen notes that the 'actual harm' standard is excessively restrictive as it does not deal with non-members of an armed group that is party to the conflict.[205] He argues for some differentiation between hostile civilians and those "who disdain hostilities and comply with their status".[206] His interpretation of C-DPH includes "not only those who cause actual harm, but those who directly support those who cause actual harm . . . this would also 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 tactics".[207] Heaton supports Jensen and argues that the threshold requirement excludes the "essential links in the chain immediately preceding that final step".[208] He argues that the final hostile act depends on the "support personnel", without whom the harm cannot be carried out.[209]

Schmitt favours military necessity when interpreting C-DPH[210] and argues for loss of immunity "for support activities which do not adversely affect the enemy",[211] including "unlawful conduct such as the deportation of civilians or hostage taking".[212] He maintains that any harmful acts directed against protected persons or objects as part of the armed conflict's 'war strategy', or within an obvious relationship with on-going hostilities, should qualify as C-DPH. Schmitt states that "acts that directly enhance the military capacity or operations of a party, without resulting in direct and immediate harm to the enemy"[213] certainly would add to ultimate success.[214] According to him "the key is whether the acts in question are sufficiently causally related to the resulting harm/benefit to qualify as directly

[204] Ibid at 716 - He observes that the word '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'.
[205] Jensen, ET "Direct Participation in Hostilities" in Banks WC (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (2011) at 2221-28.
[206] Ibid .
[207] The PCATI judgment endorsed this conclusion in their judgment ((2006) HCJ 769/02 at para 35).
[208] Van der Toorn, D *op cit* note 13 at 37.
[209] Ibid at 37.
[210] Ibid at 714; Melzer, N *op cit* note 16 at 859.
[211] Melzer N Ibid - 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' at 861.
[212] Schmitt, MN *op cit* note 87 at 723.
[213] Schmitt, MN *op cit* note 87 at 736.
[214] Ibid at 725.

caused".[215] Schmitt proposes an 'integral part test',[216] which "extend[ed] participation as far up and downstream as there is a causal[217] link".[218]

McBride argues that a civilian that has lost his protection from attack due to C-DPH becomes a 'member of an organized armed group' and that person does not have to directly inflict harm in one causal step on a recurrent basis to be classified as such. An accurate reflection of who is a legitimately targetable member of an organized armed group is based, not on the harm the individual causes, but simply on conduct that shows they intentionally enable the operational activities of the group. 'Members of organized armed groups' are therefore part of the 'combatant' class rather the 'civilian' class.[219] This evaluation is preferable and I will further conclude that continuous direct participation by members of the regular armed forces and members of armed groups should be evaluated accordingly; taking into account the fact that armed conflict should be directed towards the military ability of the enemy.

Watkin argues that C-DPH includes the "role of logistics or the scope of such a function in a military sense".[220] He is more concerned with the capacity of a party to plan and attack in the future rather than only on specific acts.[221] In this regard, Rogers correctly mentions that it may be impossible to determine the intent of a civilian committing an apparent hostile act, which makes this recommendation exceptionally complicated to apply in practice.[222] Van der Toorn recommends that C-DPH should not be restricted to specific operations.[223] He reasons that C-DPH includes "precursor operational activities" that facilitate and are "closely connected with the materialisation of harm".[224] The Guidance, however, equates participation to single, discrete acts, which accept that civilians may interrupt their hostilities with "intervening periods when they are engaged in their peaceful civilian vocations".[225]

[215] Ibid at 736.
[216] Ibid at 729.
[217] Melzer, N *op cit* note 16 at 867.
[218] Ibid at 866.
[219] *McBride, D* 'Who is a Member? Targeted Killings against Members of Organized Armed Groups' *Australian Year Book of International Law Vol 30 at 5.*
[220] Watkin, K *op cit* note 156 at 684.
[221] Ibid at 658.
[222] Rogers, APV *op cit* note 180 at 157.
[223] Van der Toorn, D *op cit* note 13 at 39.
[224] Van der Toorn Ibid at 40; Watkin, K *op cit* note 156 at 658.
[225] Ibid at 30.

The *US Law of War Handbook* states that loss of civilian status will follow for those intending to cause actual harm to the personnel and equipment of the enemy.[226] Intending to cause actual harm has an implication of collective conduct. It has been reported that the US considers drug traffickers, who constantly provide funds to the Taliban, to be "members of an organized armed group".[227] These civilians do not directly cause harm but they intentionally enable the Taliban. There has been criticism of this policy but commanders have maintained that they are only targeting members of organized armed groups with links to the drug trade.[228] The US therefore rejects the Guidance's formulation of a member of an organized armed group based on the infliction of harm directly, rather than simply significant and intentional support for the armed group in its collective operational action. This is supported by the *US Rules of Engagement* for the armed conflict in Iraq in 2005.[229] It defined members of organized armed groups[230] as persons providing support to, or a member of specifically named armed groups. This recognises that the purpose of the use of force in armed conflict is to cause the opposing party to submit. Persons who are capable of causing imminent harm may be targeted as much as those not posing an immediate threat.

Watkin[231] states that the 'revolving door' challenge[232] "creates a significant operational advantage for civilians who alternate between civilian life and engagement in hostilities".[233] This advantage arises from their non-compliance with LOAC and from their adversary's compliance with the law.[234] Irregulars benefit from this by "repeatedly claim[ing] the protection associated with that status",[235] whilst also being able to attack others in an

[226] Puls, KE (ed) *The Law of War Handbook* (International and Operational Law Department of the Judge Advocate General's Legal Center, 2004) 143.
[227] U.S. Congress, Senate, Committee on Foreign Relations, *Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents*, 111th Cong., 1st sess., 2009, S. Prt.
[228] See, eg Akande, D 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?' *(13 September EJIL: Talk! (2009)* available at < http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent/ (last accessed on 1 May 2014).
[229] These rules of engagement were leaked to Wikileaks - See *SECRET//REL TO USA, IRQ, MCFI//20151003 Display Only To IRQ* (2005) Wikileaks < http://wlstorage.net /file/us-iraq-rules-of-engagement.pdf> (last accessed on 1 May 2014).
[230] While the ROE does not mention the legal framework, it would seem that the US treated this conflict in 2005 as a NIAC, with specifically designated 'organized armed groups'.
[231] Watkin, K *op cit* note 156 at 687.
[232] Roberts, A *op cit* note 122.
[233] Van der Toorn, D *op cit* note 13 at 24 & 45.
[234] Rosen, RD 'Targeting Enemy Forces in the Law of War on Terror: Preserving Civilian Immunity' *42 Vand J Transnat'l L683* (2009) 691.
[235] Watkin, K *op cit* note 156 at 682.

unstructured and unpredictable manner.[236] This ability to persistently make use of this benefit provides an incentive for the protection to be abused by non-State actors.[237] It is, however, accepted that "the fact that one side in a conflict violates humanitarian law does not justify its adversary in disregarding the law".[238]

Boothby,[239] argues that '"he ICRC interprets the concepts of preparation, deployment, and return too restrictively".[240] Boothby insists that customary law does not acknowledge the 'revolving door' of protection and that the interpretation of "participates" by the ICRC in the treaty rule greatly restricts the notion of C-DPH by incorrectly excluding continuous participation[241] and refers to the idea of a "persistent civilian participator". He argues that a distinction should be made between "isolated and sporadic acts by civilians", and "repeated or persistent acts" of C-DPH. He recommends that the temporal element to the rule must allow the direct targeting of both a member and non-member of an irregular armed group who elects to participate on a persistent or recurring basis in the conflict. He is of the opinion that neither the US nor Israel would allow protection for 'unorganised but regular direct participation by a civilian', and 'while such persistent or repeated involvement in hostilities continues'. [242] Jensen comments that the 'for such time' requirement incorporates the entire duration of directly participating, as opposed to only the period that result in actual harm.

Chesney reasons that "members of organised armed groups who perform a continuous combat function[243] in an NIAC are not civilians and may be targeted in a manner comparable to that of a combatant, not just when engaged in specific acts of direct participation".[244] Chesney then argues that the US will probably interpret the category of targetable persons in

[236] Boothby, B *op cit* note 8 at 757 & Roberts, A *op cit* note 122 at 41.
[237] Van der Toorn, D *op cit* note 13 at 45.
[238] Greenwood, C 'Historical Development and Legal Basis' in Fleck, D (ed) *The Handbook of International Humanitarian Law* (2008) 1 at 12.
[239] *Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance*, 1 International Humanitarian Legal Studies 143,163-64 (2010).
[240] Boothby, B *op cit* note 8 at 743.
[241] Ibid at 743.
[242] Ibid at 763.
[243] See also Lewis, MW *The War on Terror and the Laws of War A Military Perspective* (2009) at 47.
[244] Chesney, R *Is DPH the Relevant Standard in Pakistan? An Important Element in the Debate Missing from BIJ's Report in Lawfare* (blog) (6 February 2012) available at http://www.lawfareblog.com/2012/02/is-dph-the-relevant-standard-in-pakistan-an-important-element-in-the-debate-missing-from-bijs-report/ (last accessed on 1 May 2014).

armed conflict in a broader manner than the Guidance provides for. Rogers[245] concurs that a civilian who becomes a member of an irregular armed group in an armed conflict will forfeit immunity for the duration of his participation in the activities of the group.[246] Rogers supports a narrow interpretation of direct participation based on the fear that the rule of distinction and civilian immunity may be diminished otherwise.[247]

Watkin suggests that membership should be defined to accord with that of a regular State armed force[248] and this should incorporate components of an armed force normally separated from operational activities, such as caterers, warehouse operators, pay clerks and a number of different medical disciplines.[249] Watkin qualifies this determination to incorporate "all those carrying out a combat function (combat, combat support and combat service support functions) operating under a command responsible for its subordinates".[250] He rejects the 'continuous combat function' test and supports a functional approach. He concludes that a combat function implies a comprehensive assortment of activities, including the performance of a logistics function as an integral part of an organized armed group.[251] Watkin argues that terms like, 'revolving door of protection', 'continuous combat function', and "persistent recurring bases introduce unusual, confusing, and indefensible concepts into the vocabulary of LOAC".[252] Watkin argues that the first involvement of a civilian will set the tone for "any subsequent act demonstrating direct participation". This would require the identification of "patterns of conduct that reflects an intention to regularly engage in the hostilities".[253] Recurrent participation would result in a finding of continuous engagement in hostilities.[254] This assessment has merit as a wide interpretation of the continuous combat test may result in

[245] Rogers, APV *op cit* note 180 at 158; Rogers is the Honorary President of the International Society for Military Law and the Law of War, Senior Fellow of the Lauterpacht Research Centre for International Law, University of Cambridge, and a former Director of Army Legal Services, United Kingdom and York Distinguished Visiting Fellow at the faculty of Law, University of Cambridge; former Vice-President of the International Fact-Finding Commission and author of Law on the Battlefield in 2004.
[246] Rogers, APV *op cit* note 180 at 19.
[247] Ibid at 19.
[248] Watkin, K *op cit* note 156 at 641.
[249] Ibid at 691.
[250] API, Article 43; See also *Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention*, opened for signature 18 October 1907, (1910) UKTS 9 (entered into force 26 January 1910), Article 1*;* Watkin, K *op cit* note 156 at 691.
[251] Ibid at 683.
[252] Ibid at 693.
[253] Melzer, N *op cit* note 16 at 856.
[254] Watkin, K *op cit* note 156 at 692.

exceptionally lenient targeting of civilians under LOAC.[255] This will be counter to the aim of LOAC to allow an "unacceptable degree of error and arbitrariness".[256]

Fenrick too is of the opinion that "members of organised armed groups are treated more favourably than members of State armed forces, in so far as a smaller percentage of them may be lawfully subjected to direct attack".[257] Protection from attack is afforded to civilians that perform an integral part of the combat effectiveness of an organised armed group but members of the regular armed forces who perform an equivalent function have no immunity.[258] Melzer, however, argues that "the actual practical effect will have very little consequence,[259] as the very same person normally performs numerous roles within an organised armed group, which generally includes a continuous combat function".[260]

Schmitt questions the Guidance's presumption of civilian status to assessments of C-DPH. He supports a liberal interpretation in favour of finding direct participation.[261] He argues that this interpretation "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".[262] Melzer disapproves of this interpretation, as a liberal approach to targeting is contrary to the philosophy of LOAC and in violation of several of its fundamental provisions.[263] He further states that there is "no support in State practice and jurisprudence"[264] for such an approach to the presumption of civilian status. Melzer concludes that an obligation exists to assess the proportionate result of the imminent attack.[265] Boothby criticizes the feasible precautions formulation, as the "implicit assumption embedded" therein is that the functions of members of organised armed groups and civilians never change. He asserts that it is the civilians' decision to directly participate that renders them liable to attack.[266]

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[255] Melzer, N *op cit* note 16 at 913.
[256] Ibid at 913.
[257] Fenrick, WJ *op cit* note 135 at 291.
[258] Watkin, K *op cit* note 156 at 664 and 675; Melzer, N *op cit* note 140 at 837.
[259] Melzer, N *op cit* note 16 at 851.
[260] Ibid at 852.
[261] Schmitt, MN *op cit* note 146 at 505 and 509; Melzer, N *op cit* note 263 at 875.
[262] Ibid at 505 & 509; Melzer, N *op cit* note 140 at 505 and 875.
[263] Melzer, N *op cit* note 16 at 875.
[264] Ibid at 876.
[265] Gasser, H 'Protection of the Civilian Population' (1995) in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* (2008) at 211.
[266] Boothby, B *op cit* note 8 at 755.

5. Evaluation of Civilian Direct Participation in Hostilities

Legal experts have attempted to determine the meaning of C-DPH by exponentially legalising the issue. Legally trained persons are usually comfortable to argue by relying on authoritative texts[267] and also usually appeal to a shared set of authoritative sources. The ICRC and most of the other experts have interpreted C-DPH from a legalistic perspective. Complicated terms like, 'three cumulative criteria', 'likely to adversely affect', 'direct causal link', 'directly cause the required threshold of harm', 'direct causation', 'one causal step', 'belligerent nexus' and 'objectively likely' have been proposed to explain C-DPH. This practice is understandable but it creates confusion and a sense of detachment between the law and the actual situation of a participant during armed conflict.[268] The interpretation of LOAC must not be legalistic or complex as this is self-defeating. C-DPH is often linked to a privilege or a right to directly participate in hostilities or equated with the domestic criminal law interpretation of a criminal act. Thus the law enforcement personnel may attempt to arrest the participant at that time and may even use lethal action to effect the arrest and defend their and others right to life. Once the person has concluded his criminal act, he must be arrested and prosecuted. This approach does not reflect the reality of armed conflict, the burdens of targeting decisions and demands of military necessity.

The 1972 *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict* noted the "importance of succeeding in laying down . . . rules which were clear, precise and easily understood and applicable by combatants and by civilians alike".[269] The basic principles of LOAC must therefore be used to guide interpretations and find solutions to novel challenges and to preserve and protect the law's core values. The rules of LOAC are likely to deliver the required outcomes when they are appropriate to the conditions in which they are applied. Compliance with LOAC will, however, flow mainly from practical needs and reasonable legal guidance. The meaning of C-DPH could be opportunistically manipulated to afford some parties to armed conflict strategic and tactical advantages, which results from their own

[267] Including statutes, legal reasoning in court cases and other regulations and opinions.
[268] Lesh, M *Routledge Handbook of the Law of Armed Conflict, Part II: Principle of Distinction* at 1 – 14 available at http://law.huji.ac.il/upload/Lesh_LossofProtection.pdf (last accessed on 13 January 2015).
[269] ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict Vol I, Report on the Work of the Conference (1972) at 127.

non-compliance with LOAC and their adversaries' compliance with the law.[270] This result is undesirable and must be avoided.

The starting point in determining an acceptable meaning for C-DPH is that "[c]ivilians who take up arms . . . lose their immunity from attack during the time they are participating in hostilities, whether permanently, intermittently, or only once, and become legitimate targets".[271] The second fundamental point is that C-DPH confirms that humanity demands the protection, against intentional attack, of non-participating and indirectly participating civilians.[272] C-DPH thus only deals with the loss of immunity of a civilian against intentional targeting based on the civilian's decision to directly participate in the armed conflict and not with the right to participate in hostilities. The rights to legitimately participate in armed conflict is based on domestic law and the incorporation into the regular armed forces or another authorised group, but this right must not be confused with targeting decisions.

Targeting decisions start with the initial positive identification of legitimate military objectives.[273] All other objects are, in theory, civilian by nature and immune from attack and where there is doubt, the target must be presumed to be civilian.[274] In NIAC the law does not distinguish between combatants and civilians, but persons who directly participate in hostilities forfeit their civilian immunity from attack and they become legitimate military targets for the duration of their participation.[275] Experts agree that persons who actually take part in hostilities as members of the regular armed forces, or who have a function within an organised armed group, commit acts that constitute direct participation in hostilities.[276]

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[270] Rosen, RD Targeting Enemy Forces in the Law of War on Terror: Preserving Civilian Immunity 42 *V and J Transnat'l L* 683 (2009) 691.
[271] Blank, L & Guiora, A *op cit* note 41 at 63; see also McDonald, A *op cit* note 41. ("The most serious consequence of taking a direct part in hostilities has already been alluded to: the civilian loses his or her protected status and may be attacked, for the duration of his or her participation, however long that is determined to be."). See also the *Targeted Killings Case* [2006] HCJ 769/02 (13 December 2006) [31].
[272] Camins, E 'The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity' (2008) 90 *International Review of the Red Cross* 853 at 855.
[273] API, Article 52(2).
[274] API, Articles 52(1) & 52(3).
[275] See API, Article 51(3) & APII, Article 13(3).
[276] Sassoli, M & Olsen, LM 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Interments of Fighters in Non-International Armed Conflicts' 90 *IRRC* 871 (2008) at 26-28.

The relevant main instruments to C-DPH remain API, Articles 48, 51 and 52, and APII, Article 13. API, Article 48, and API, Article 52(2), specifically demand that military operations "shall be limited strictly to military objectives". Military objectives are defined in API, Article 52,[277] to include "objects which by their nature, location, purpose or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage".[278] The Commentary defines the term, 'military operations' to mean "all the movements and activities carried out by armed forces related to hostilities"[279] or "movements of attack or defence by the armed forces in action".[280]

The term, 'military objective' was introduced through various instruments,[281] State practice,[282] statements[283] and juridical reasoning.[284] This term, 'military objective' was

[277] Para 2 thereof.
[278] International Committee of the Red Cross Commentary *op cit* note 35 at 4779.
[279] Ibid at 1936.
[280] Ibid at 4769.
[281] St. Petersburg Declaration,[281] preamble; Hague Convention (IX); Draft Additional Protocol II, Article 24(1); Convention on Cluster Munitions, preamble; The Hague Rules of Air Warfare, Article 24(1); The New Delhi Draft Rules,[281] Article 7; the 1994 San Remo Manual, Paragraph 41.
[282] Australia's Defence Force Manual; Australia's LOAC Manual; Belgium's Teaching Manual for Soldiers; Belgium's Law of War Manual (1983); Benin's Military Manual (1995); Burundi's Regulations on International Humanitarian Law (2007) ; Cameroon's Instructor's Manual (1992); Cameroon's Instructor's Manual (2006); Canada's LOAC Manual (1999); Canada's LOAC Manual (2001); Canada's Code of Conduct (2001); Rule 1 of Canada's Code of Conduct (2005); The Central African Republic's Instructor's Manual (1999); Chad's Instructor's Manual (2006); Colombia's Circular on Fundamental Rules of IHL (1992); Colombia's Instructors' Manual (1999); Côte d'Ivoire's Teaching Manual (2007); Croatia's Commanders' Manual (1992); Djibouti's Manual on International Humanitarian Law (2004); Ecuador's Naval Manual (1989); France's LOAC Manual (2001); Germany's Military Manual (1992); Germany's Soldiers' Manual (2006); The Hellenic Navy's International Law Manual (1995); Guinea's Soldier's Manual (2010); Indonesia's Military Manual (1982); Ireland's Basic LOAC Guide (2005) Israel's Manual on the Rules of Warfare (2006); Italy's IHL Manual (1991); Italy's LOAC Elementary Rules Manual (1991); Italy's Combatant's Manual (1998); Kenya's LOAC Manual (1997); Lebanon's Teaching Manual (1997); Madagascar's Military Manual (1994); Mexico's Army and Air Force Manual (2009; Mexico's IHL Guidelines (2009); The Netherlands' Military Manual (1993); The Military Manual (2005) of the Netherlands; New Zealand's Military Manual (1992); Nigeria's Military Manual (1994); Peru's IHL Manual (2004); Peru's IHL and Human Rights Manual (2010); The Soldier's Rules (1989) of the Philippines; The Republic of Korea's Military Law Manual (1996); Romania's Soldiers' Manual (1991; The Russian Federation's Combat Manual (2005); Sierra Leone's Instructor Manual (2007); South Africa's LOAC Manual (1996); South Africa's Revised Civic Education Manual (2004); Spain's LOAC Manual (1996; Spain's LOAC Manual (2007); Sweden's IHL Manual (1991); Switzerland's Basic Military Manual (1987); Togo's Military Manual (1996); Ukraine's IHL Manual (2004); The UK Military Manual (1958); The UK LOAC Pamphlet (1981); The UK LOAC Manual (2004); The US Rules of Engagement for Operation Desert Storm (1991); The US Naval Handbook (1995); The US Naval Handbook (2007); Zimbabwe's Code of Conduct for Combatants (1993); Colombia's Directive No. 10 (2007); France's Code of Defence (2004), as amended in 2008; Peru's Decree on the Use of Force by the Armed Forces (2010); Denmark's Ministry of Defence and Ministry of Foreign Affairs; Report on the Practice of the Islamic Republic of Iran; Report on Israeli operations in Gaza between 27 December 2008 and 18 January 2009; The Report on the Practice of Kuwait; The Report on the Practice of Malaysia.

initially developed in the Lieber Code, the St Pietersburg Declaration, Oxford Manual and, arguably, in the Hague Conventions of 1907. The 1923 *Hague Rules of Air Warfare*, Article 24, specifically refers to military objectives. This was followed by the GC's of 1949 and the *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Times of War*. During this time the GA adopted Resolution 2675 (XXV) which requires that a distinction must be made between "persons actively taking part in hostilities and civilian populations . . .". The Institute of International Law in Edinburg adopted a Resolution in 1969 that defined military objective as an object, which by its "nature and purpose or use, make an effective contribution to the military action, or exhibit a generally recognised military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them".[285]

This was followed by the AP's in 1977, containing specific reference to the principle of distinction in Articles 48 and 52. API, Article 52, specifically introduced the definition of military objectives 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".[286] Military objectives thus require a two-stage test in that "their nature, location or use" must make an effective contribution to military action, and secondly, their "total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage". The definition of military objectives in API, Article 52(2), is repeated *verbatim* in Protocols II and III, Annexed to the 1980 *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be*

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[283] In 1991, in reports submitted to the UN Security Council on operations in the Gulf War, Saudi Arabia stated that its air force attack only "military targets in Iraq and Kuwait, while avoiding civilian targets"; The UK Government Strategy on the Protection of Civilians in Armed Conflict (2010).

[284] *Ballestas case* (2002) - the Chamber of Criminal Appeals of Venezuela's Supreme Tribunal of Justice stated that "[The] … laws [of war] … seek to limit any attack only to specific belligerents or military targets;" *Galić case* (2003) - [I]n accordance with the principles of distinction and protection of the civilian population, only military objectives may be lawfully attacked".

[285] Institute of International Law at Edinburgh, September 9, 1969 in Robertson, HB 'The Principle of Military Objective in the Law of Armed Conflict' *Journal of Legal Studies* at 39.

[286] Human Rights Watch Report (2003) Off Target: The Conduct of the War and Civilian Casualties in Iraq. Human Rights Watch at 8 available at http://www.hrw.org/reports/2003/usa1203/usa1203.pdf (last accessed on 1 May 2014). See also the 2007 Human Rights Watch Report named Civilians Under Assault: Hezbollah's Rocket Attacks on Israel in the 2006 War available at www://www.HRW.org/reports/2007/iopto807/iopto807webcover.pdf (last accessed on 1 May 2014). This Report incorrectly confused the test for objects as lawful targets with the lawful targeting of natural persons.

Excessively Injurious or to Have Indiscriminate Effects;[287] and the 1999 Second Protocol to the *Hague Cultural Property Convention*.[288]

The term, 'effective contribution to military action' is defined by the US in its *Commanders Handbook on the Law of Naval Operations* to mean "[o]nly military objectives may be attacked. Military objectives are combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking force."[289] The noun, "objects," used in the definition, undoubtedly includes material and tangible things[290] and thus includes enemy military personnel.[291]

These instruments which introduced the term, 'military objective' refer to the terms, 'enemy', 'hostile fleet or army', 'parties to the conflict', military resources, 'military objectives', 'enemy armed forces', 'objectives which, by their nature, location [or] use, contribute to the military effort and … whose total or partial destruction, neutralization or capture, offers a net military advantage in these circumstances', 'unlawful combatants', 'legitimate targets', 'opposing forces, 'warriors', 'enemy combatants', 'military targets', 'adversary', 'persons engaged in hostile actions', 'belligerents', 'targets of military importance' and 'strategic targets'. The implication is that military necessity in armed conflict requires "the destruction, capture, or neutralization of an object contributing to the military action" . . . is "militarily advantageous" when such an object "somehow contribute to the military action of the enemy".[292] The definition of 'military objective'[293] normally

[287] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, Documents on the Laws of War.
[288] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, Documents on the Laws of War.
[289] NWP 1-14M, § 8.1.1.
[290] Pilloud, C & Pictet, J *Article 52, in* Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 633–4 (Yves Sandoz et al. eds., 1987).
[291] Rogers, APV *Law on the Battlefield* (2012) at 33.
[292] Waldemar S *Article 52, in* New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, at 318, 325 (Bothe, M; Partsch, K & Solf, W (eds) 1982).
[293] Schmitt, MN *op cit* note 87 at 717.

excludes political, economic and psychological contributions which might support the realization of a military success.

The definition of 'military objective' thus represents the basis for any enquiry into targeting to determine if a specific objective represents a legitimate military objective and therefore the subject of a legitimate intentional targeting decision.[294] The term, 'military objective' is derived from the principle of distinction, which requires that a distinction be made between civilians and combatants and civilian and military objectives. Distinction evolved from Canon Law, knighthood and Rousseau's proclamation that armed conflict constitutes disputes between States and not people. This idea in NIAC would translate to disputes between opposing forces or parties, including non-State armed groups, and not the individuals. It must be accepted that members of organized armed groups do not act as atomised individuals, but as part of a controlled collective whose objective is to make use of armed force. This approach results in status-based continuous targeting of members of armed groups in an attempt to reduce their collective military capability. The obligation to obtain the necessary intelligence to determine the status of a person results from the requirement that Parties to an armed conflict do everything feasible to verify that targets are military objectives in armed conflict.[295] In cases of doubt, the general presumption of civilian status[296] will apply.

An object must satisfy two cumulative criteria to qualify as a military objective. API states that "[a]ttacks shall be limited strictly to military objectives". API, Article 52, states that a military object is "[t]hose objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[297] This article thus refers to "a definite military advantage" that must be gained from the (total or partial) destruction, capture or neutralization[298] of the targets. The phrases, "a definite

[294] Boothby, WH *op cit* note 39 at viii & 4. See also the United States Joint Forces Command Glossary at http://www.jfcom.mil/about/glossary.htm (last accessed on 1 May 2014).
[295] Rule 16 of Henckaerts, JM and Doswald-Beck, L (eds) *Customary Law Study* (2005) at 51, 55 available at http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng (last accessed on 1 May 2014). See also the judgment in the *Targeted Killings case* of the Israel Supreme Court Sitting as the High Court of Justice, *The Public Committee against Torture in Israel et al v. The Government of Israel* et al, HCJ 769/02, judgment of 11 December 2005.
[296] API, Article 50(1); Moir, L *The Law of Internal Armed Conflict* (2002) at 59.
[297] API, Article 52(2).
[298] The term "neutralization" in this setting means denial of use of an objective to the adversary without destroying it. See Solf, W *Article 52, in New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* at 318, 325 (Bothe, M *op cit* note 60).

military advantage" and "military objectives" originate from the phrase, "a distinct military advantage" in *The Hague Rules of Air Warfare*.[299] LOAC, accordingly, does not characterize a potential target as a military objective where the target only potentially offers an inconsequential, marginal or speculative advantage to an adversary. Military objectives, military objects and other non-military objects must be interpreted in good faith,[300] meaning those that directly and meaningfully contribute to the adversary's military capability.

The determination of military objectives must incorporate the function of the principle of 'proportionality'.[301] Proportionality in LOAC is considered customary law and has been defined as the launching of an attack is prohibited, 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.[302] Ordinarily, an attack will be proportionate "if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it."[303] This rule requires those responsible for targeting decisions to take all reasonable steps to ensure that the objectives are identified as military objectives and that these objectives may be targeted without probable loss of life and damage to property disproportionate to the military advantage anticipated.[304]

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[299] Hague Rules of Air Warfare, 1923, Documents on the Laws of War, Article 24(1) at 144. This definition is repeated in a number of later instruments including Protocols II and III, Annexed to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, Documents on the Laws of War at 515; APII on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, id., Article 2(4), at 528; APIII on Prohibitions or Restrictions on the Use of Incendiary Weapons, Article 1(3) at 533); and the 1999 Second Protocol to the Hague Cultural Property Convention (Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, Article 1(f), at 701). It is also reproduced in Doswald-Beck, L 'San Remo Manual of 1995 on International Law Applicable to Armed Conflicts at Sea' (San Remo Manual on International Law Applicable to Armed Conflicts at Sea at 114. Based on this, various researchers consider this definition as representing customary international law (See Meron, T *Human Rights and Humanitarian Norms as Customary Law* (1989) at 64–65).

[300] LOAC includes a degree of flexibility to address an unusual targeting challenge but reasonableness is required when targeting a potential target, especially marginal targets.

[301] Further principles that relate to the targeting process include, inter alia, qualified warning requirements, and the principle that an adversary does not secure immunity from attack by locating military objectives in close proximity to civilians or civilian objects; Walzer, M *Just and Unjust Armed Conflict* (2006) at 153.

[302] See Henckaerts, JM et al "Customary International Humanitarian Law" online: ICRC <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> at 46 (last accessed on 1 May 2014).

[303] PCATI *op cit* note 27 at para 45.

[304] Lewis, MW *The War on Terror and the Laws of War. A Military Perspective* (2009) at 45; API, Article 57(2)(a)(i) requires those who plan or decide upon an attack to do "everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects" and "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."

5.1 Criticism on the Current Understanding of Military Objective with regards to C-DPH

API, Article 48, and API, Article 52(2), specifically demand that military operations "shall be limited strictly to military objectives". The Institute of International Law in Edinburg's definition of a military objective adopted in 1969 which states that a military objective is any object which by its nature and purpose or use, make an effective contribution to the military action, *or* exhibit a *generally recognised military significance*, such that their total or partial destruction in the actual circumstances gives a substantial, *specific and immediate military advantage*. The determination of military objectives thus require an inquiry into the *nature, location or use*, which is required to *make an effective contribution to military action*, and secondly, in that its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a *definite military advantage*.

It is obvious that the definition of military objective was conceived to accommodate military action between adversaries and not to specific incorporate acts of C-DPH. However, where a person, who cannot be identified as a combatant, member of the regular armed forces or of an armed non-State group, acts in a manner, within an armed conflict, that, had that person been a combatant or a member, would have resulted in his legitimate intentional targeting, then that participant is based on the C-DPH exception a military objective. The difference is that such intentional targeting would only be legitimate for such time as the participant, in the circumstances ruling at the time, offers a definite military advantage. It is submitted that most of the acts of C-DPH would amount to those which constitute a threat to the party to the conflict as a collective. However, the civilian *nature* of the participant would be compromised by the *location* and *purpose* of the civilian at the time and the *effective contribution to military action* and *military advantage* to be gained would have to be considered. It is thus logical that a person who cannot be identified as a member of the regular armed forces or non-State armed group will remain a civilian but that such a civilian will in the same manner as such participants become a military objective subject to legitimate intentional targeting, should the civilian comply with the requirements to become a military objective. There need not be a threshold of harm, direct causation or belligerent nexus. This test is too onerous for practical application within a theatre of hostilities. Observers make decisions based on the circumstances ruling at the time and based on military necessity to effectively ensure success for the party they represent.

A direct participant in armed conflict, whether based on general DPH or on C-DPH, thus represents a military objective. Armed conflict is essentially the progressive use of force, by way of targeting, against the military objectives of the enemy, as a collective, to cumulatively weaken or exclude their military potential and thus to achieve military success. The adversarial and collective nature of armed conflict accordingly allows for the legitimate intentional targeting of military objectives at any time and even where the objective poses no direct threat at the time. DPH and C-DPH must, as a result, be interpreted in terms of, and as interconnected with, the meaning of military objective.

A combatant, as defined, in IAC would constitute a continuous legitimate intentional target based on his status but even this must be tempered and considered in the light of the requirements of a military objective. Combat status affords a person the right to participate in the hostilities and no prosecution for this participation should follow, provided that no war crimes were committed. Civilian status, which is the default status, to the extent that such status must be inferred in case of doubt, refers to those who 'by definition do not bear arms,' are 'outside the fighting' and 'take no active part in hostilities'. A member of an armed non-State group, who qualifies as the adversary or enemy in an armed conflict, will thus constitute a continuous military objective, to be legitimately and intentionally targeted at all times during the conflict, to cumulatively achieve military success and to overpower the enemy.

Civilians who commit acts of C-DPH accept the risk that they may be intentionally targeted at all times as their involvement may legitimately be perceived by an observer as constituting ongoing involvement on behalf of the adversary, they may be identified as members of the regular armed forces or of a non-State group or their actions may result in their intentional targeting based on a determination, in the circumstances, as providing a definite military advantage. This is based on the fact that State practice has interpreted past events as the best predictor of future action and conduct. Past action is not a good predictor of future actions but it can assist in the understanding of possible future conduct.[305] One of the principal consideration in C-DPH is, therefore, that of the acceptance of risk. The civilian who enters the armed conflict as a direct participant has to accept the risk of being intentionally targeted, even where he has terminated his participation, as the adversary may still regard him as a military objective, based on available intelligence and a subsequent reasonable assumption

[305] Bennet, DS *Behavioral Origins of War* (2003) at 8.

therefrom. Civilians who opportunistically manipulate the law to achieve an unjustified military advantage should not receive favourable treatment from the law. Military necessity and humanity therefore require the intentional targeting of C-DPH.

General DPH may be defined as status that causes the person, as part of a collective, (combatant or member of organized armed group) to become a legitimate military objective, and C-DPH as a person acting sporadically and in such a manner that he constitutes a military objective for that time that he so acts. DPH or C-DPH both thus cause persons to be perceived as the 'enemy', part of the 'hostile fleet or army', a party 'to the conflict', part of the 'enemy armed forces', as 'objectives which, by [its] nature, location [or] use, contributes to the military effort and … whose total or partial destruction, neutralization or capture, offers a net military advantage in these circumstances', as 'unlawful combatants', part of the 'opposing forces, a 'warrior', an 'enemy combatant', an 'adversary', a 'person engaged in hostile actions', a 'belligerent', a 'target of military importance' or a 'strategic target'. This ensures compliance with API, Article 48, which will be equally applicable in NIAC, providing for directing of "operations only against military objectives".

The LOAC, as opposed to IHRL, aims to protect collectives and not individuals. The main collectives to be protected are civilians and combatants but there are sub-groups within these collectives. These include combatants that have become *hors de combat* and civilians that have lost their immunity against attack. Ultimately the argument here is that civilians are immune from intentional targeting but the civilian has an obligation not to act in a certain manner, which would result in an undesirable consequence, to wit, loss of protection against intentional targeting. This obligation must thus be interpreted from the civilian's perspective and importantly brings the consideration of acceptance of risk inherent in certain forms of behaviour into the equation.

Most interpretations of, 'for such time' and 'direct participation' have been done from the perspective of the military. This reasoning excludes the responsibility placed on the civilian and thus lacks an essential consideration. The observer seldom has perfect intelligence and specifically does not know the subjective state of mind of the civilian. The civilian, however, when entering the hostilities with the aim of assisting a party to that adversarial process or in attempting to cause damage to such a party, has knowledge of his own aspirations. The

civilian then accepts the risk inherent in that undertaking, which interpretation is consistent with the risk associated with civilians (journalists, civilian contractors, etc.) who are expected to accept the risk of targeting when they are in close proximity to a military objective. The main objective of the C-DPH exception is to protect indirectly and non-participating civilians. There is no obligation to protect those civilians who commit acts of C-DPH; in fact those that make them guilty of such acts endanger the civilian population as a collective. Their acts should thus be interpreted and met with the potential for intentional targeting to impede them from acting as such.

The implication is that observers are only expected to identify military objectives in their intentional targeting practices. C-DPH must thus generally be evaluated from the civilian's perspective. Civilians are expected to act reasonably and the test would be that of the reasonable person who is expected to foresee the possibility that certain actions during armed conflict would amount to direct participation and are accordingly expected to take precautions against such perception arising during the intentional targeting practices of an observer. This test changes not only the obligations on the persons involved, but also influences the level of intelligence required by observers before a legitimate 'open fire' order is given. This interpretation may not receive widespread support from those who favour humanity above military necessity. The counter argument is, however, that such an interpretation would, more often than not, result in brevity of hostilities and would ultimately result in enhanced protection of civilians as a collective. The detrimental effects on those civilians that opportunistically manipulate their immunity by sporadically committing acts of C-DPH would not outweigh the protection afforded to the collective, which is consistent with the main aim of the LOAC, as opposed to the protection of individual rights by IHRL. This interpretation places an obligation on the ICRC, which is in line with their mandate to educate civilians not to enter the hostilities, and of the possible consequences thereof.

The person to be prosecuted after the hostilities is probably the observer responsible for an erroneous targeting decision and the test would be whether the object of the intentional targeting, objectively valued, constituted a military objective. The test from the observer's perspective thus focuses on the term, 'military objective'. The test of what constitutes C-DPH, evaluated from the civilian's perspective, is based on the fact that possibility of prosecution for C-DPH is negligible. The Commentary states that the implementation of the

protection of civilians "requires that precautions are taken both by the party launching the attack during the planning, decision and action stages of the attack, and by the party that is attacked".[306] Each party must therefore, in good faith, take responsibility for the protection of the civilian population.[307] The Commentary specifically refers to the term, 'enemy' when discussing intentional targeting and 'persons' when referring to C-DPH and the direct advantage anticipated from an attack, as well as the harmful effects of an attack.[308]

Initially when this research started I was of the opinion that I could define C-DPH by dividing and classifying the concept into three distinct actions. These referred to, firstly to individual conduct based intentional targeting focused on battlefield conduct threat identification. Here a civilian, in an armed conflict, may forfeit immunity and may be intentionally targeted as an imminent threat, by the regular armed forces of a party to the armed conflict, for such time that the person is unlawfully and actively engaged in a voluntary offensive activity, whether undertaken independently or jointly, and which act is likely, in the estimation of a reasonable member of the armed forces, in the prevailing circumstances and based on observation, to directly endanger persons or to cause harm to the military operations or capacity of a party to an armed conflict or to directly benefit the military operations or capacity of a party to the conflict.

The second classification was founded on previous conduct based positive threat identification. Here a civilian, in an armed conflict, may forfeit civilian immunity and may be intentionally targeted as an intermittent threat, by the regular armed forces of a party to the armed conflict, for such time that the person is a potential or actual threat to persons or to the military operations or capacity of a party to an armed conflict by way of current conduct and previous unlawful and active voluntary offensive or defensive activities, whether undertaken independently or jointly, and which act is likely, based on observation of the current act by a reasonable member of the armed forces and established reliable intelligence of previous acts of DPH to, intentionally and directly endanger combatants or civilians cause harm to the military operations or capacity of a party to an armed conflict or to directly benefit the military operations or capacity of a party to the conflict.

[306] ICRC Commentary *op cit* note 35 at 4772.
[307] Ibid.
[308] Ibid.

The third category refers to intelligence based continuous threat identification, whereby a civilian, in an armed conflict, may forfeit civilian immunity and may be intentionally targeted as a continuous threat, by the regular armed forces of a party to the armed conflict for such time that such person is unlawfully, purposefully and materially engaged in voluntary offensive or defensive activities, whether undertaken independently or jointly, and which activities are likely, based on established intelligence to intentionally and directly endanger persons or cause harm to the military operations or capacity of a party to an armed conflict or to directly benefit the military operations or capacity of a party to the conflict.

The forth category is based on group status based intentional targeting where intelligence is employed to ascertain a continuous combat function of a person. Here persons, in an armed conflict, may permanently forfeit civilian status and immunity and may be intentionally targeted as a functional combatant and a continuous threat, by the regular armed forces of a party to the armed conflict for such time as the person is integrated, by way of recruitment, training, being equipped by, or membership of, an armed group, which acts as the armed forces of a non-state party to the armed conflict, whose continuous function is to participate purposefully and materially in voluntary offensive or defensive activities, whether undertaken independently or jointly, on behalf of such group and corresponding to the objectives collectively exercised by the group as a whole, and which activities are likely, based on established intelligence, to intentionally and directly endanger persons or to cause harm to the military operations or capacity of a party to an armed conflict or to directly benefit the military operations or capacity of a party to the conflict and can be considered to assume a continuous combat function even before that functional combatant carries out a hostile act.

The conclusion of this research removes the removes the references to the term ‘threat’ from the first three categories and replaces it with ‘military objective’. Thus, where a civilian meets the definition of a military objective, then that civilian forfeits civilian immunity and becomes liable to intentional targeting. The forth category fall away in total as my conclusion now is that membership of a non-State armed group allows for targeting as a military objective, not based on conduct but on status. The C-DPH exception therefore does not apply to membership and permanent targeting or continues targeting of members of armed groups.

6. Conclusion

International law addresses itself mainly to a horizontal system of abstract separate and independent political and territorially defined units called States.[309] Although certain international organisations and even individuals have attained some status in international law, States are still regarded as the original and primary subjects of international law. The political community with the status of a sovereign State then becomes entitles and bound to the fundamental rights and duties of the State.[310] This statehood was considered to be the best way to ensure the progressive development of the common good of the community within the territorial boundaries of the State.[311] State sovereignty, although contested and flexible, is also still regarded as a foundational term in international law.[312] Sovereignty, as understood in the Westphalian manner, is based on absolute authority as determined by physical boundaries and recognised by other States.[313] The divergent disciplinary perspectives between States have, however, undermined the continued superiority and universal acceptance of Westphalian sovereignty.[314] The loyalty of individuals are also increasingly based on ideological considerations and directed to bodies and groups other than the State. The benefits and effectiveness of the State system to further the common good of a community is debatable but it is without doubt the main imputes and idea in many NIAC today. Many communities within existing States or dispersed across various States see separate Statehood as indispensable for their future survival and is linked to self-determination issues. The independent nature of States is, however, entrenched, within the international legal system and the development of international law will follow and ensure that these features endure. The evolution of the LOAC, and specifically the C-DPH exception, must, as a result, be interpreted in light of the nature and objectives of the State. States, however, desire this Westphalian sovereignty to be maintained in order for them to exert absolute authority over their territory.

The corollary of State sovereignty, non-intervention, is also important in the understanding of the development of the LOAC. These developments require that a State display an ability to

[309] Raic, D *Statehood and the Law of Self-Determination* (2002) at 9.
[310] Dekker, IF & Werner, WG (eds) *Governance and International Legal Theory* (2004) at 144.
[311] Raic, D *op cit* note 310 at 9.
[312] Dekker *op cit* note 311 at 126.
[313] Jacobsen, T *Re-envisioning Sovereignty* (2008) 356.
[314] Ibid at 349.

effectively, by way of a central government, uphold the 'essence of the State'[315] and specifically to maintain a monopoly over the use of force. The legitimacy over the use of force by the State is, however, currently subject to criticism and it renders all revolutionary movements as unjust.[316] It may be argued that the State's regular armed forces are the only guarantee of the State's continued sovereignty. States require the control over the legitimate use of force to ensure their own survival. Membership of the regular armed forces is, accordingly, regulated by way of domestic policies and laws as opposed to the LOAC.[317]

These concepts therefore ultimately, with regards to armed conflict, cumulate in the principle of proper authority to engage in armed conflict and the moral equality of combatants. The political community within a State vest certain powers in the government and that government may then use force on behalf of those members. The members therefore give up certain rights to obtain a measure of security by way of common laws that are enforced by the State. Those members who do not make use of the State apparatus to resolve disputes and who make use of force pose a real threat to the State system. States do not act rationally in the furtherance of their interests[318] but the actions of States are seen as legitimate. However, what is important for the purposes of the interpretation of C-DPH is that the above issues relate to the right to take part in armed conflict either as a combatant or as a member of the armed forces in a NIAC. These issues do not relate, nor should they be interpreted, to influence targeting decisions where acts of C-DPH are committed.

Those directly participating on behalf of the State may indeed acquire certain rights, including the right to kill. API, Article 43 states that "[M]embers of the armed forces of a Party to a conflict are combatants, that is to say, they have the right to participate directly in hostilities'. However, a targeting decision must still be based on considerations of, *inter alia*, military necessity and the presence of military objectives. It does not provide that participant with the right to target people or objects indiscriminately. It is further trite that States do not want to accord their non-State adversaries in NIAC formal status as a party to the conflict and specifically to prisoner of war status. This status is in any event not recognised in NIAC's.

[315] Dekker, IF & Werner, WG (Eds) *op cit* note 313 at 12.
[316] Rodin, D & Shue, H *op cit* note 115 at 215.
[317] See in general Gilroy, C & Williams, C (eds) *Service to Country: Personnel Policy and the Transformation of Western Militaries* (2007).
[318] Goldsmith, JL & Posner, EA *Limits of International Law* (2005) at 4.

Those committing acts of C-DPH do not act on behalf of the regular armed forces, do not obtain the right to do so from domestic law and therefore commits criminal acts under domestic law. This does not influence the right of the belligerents to target such direct participants and their targeting must be interpreted in terms of the rules relevant to military objectives. The rules regarding military objectives must in turn be interpreted in light of the collective nature of armed conflict and the collective targeting to eliminate or minimise the ability of the enemy to engage and persist with armed action. A combatant in an IAC and, arguably a member of the regular armed forces within a NIAC, remains a legitimate military objective at all times during the conflict. A participant committing acts of C-DPH becomes a legitimate military objective based on military necessity during these hostile acts. In this manner the rules relating to targeting applies equally to all participants within an armed conflict. It may also be substantiated by the fact that the LOAC was intended to apply equally to all participants with regards to their protection, the protection of civilians and targeting decisions. All issues of just war, must be seen as an *ad bellum* evaluation and possibly a *post bellum* consideration. This also excluded inconsequential arguments regarding innocence in armed conflict with regards to direct participants as this is not the determining feature for targeting decisions.

The C-DPH exception is essentially a rule that amounts to a restriction on civilians regarding their actions in times of armed conflict. This rule protects indirectly and non-participating civilians as a collective and precludes individual acts of C-DPH from potentially making the civilian population the object of intentional attack. The rule applies only to those civilians who reject the rule and who directly participate in hostilities and expose them to potential intentional attack. If it is accepted that civilians should refrain from directly participating in armed conflict. It will be argued that targeting decisions should focus on the responsibility of the participant and the ensuing risk associated with his entry into the conflict. There must thus be a responsibility on this person to withdraw from the hostilities in an unambiguous manner to avoid possible future intentional attack.[319] In this regard it is submitted that a person tasked with making targeting decisions cannot, under all circumstances, be expected to draw a distinction between plunder, looting, robbery, C-DPH and members of organised armed groups who participate in hostilities as opposed to those mentioned first that abuse the

[319] See in general Schmitt, MN *op cit* note 23 at 137.

armed conflict situation to commit criminal acts.[320] This participant enjoys no right to participate in the armed conflict and thus will be at risk when he decides to participate.

The C-DPH rule cannot be interpreted by arguing that a person, who during an armed conflict, poses a threat, becomes liable to defensive attack. The posing of an individual threat cannot be interpreted, within a collective effort, as providing justification for legitimate intentional targeting as this would amount to arguments on justifiable threats from law enforcement officials and human rights considerations of self-defence. C-DPH must not be interpreted in light of the individual threat or even on an unjust threat but on considerations of the collective responsibility created by the participant for a collective threat from the enemy. Armed conflict cannot exist in the absence of two or more groups violently opposing each other and it is the group who poses the threat by way of the collective actions of the individual members. So-called unjust-participant members of a non-State armed group may intentionally target the members of the regular armed forces and therefore the argument regarding membership hold water. Innocence plays no part, nor do the arguments regarding consent of participants give credibility to intentional targeting. Intentional targeting is based on the considerations of military objectives and ultimately, on military necessity. This intentional targeting will be based on membership, with regards members of the regular armed forces or members of the non-State armed group, and not on conduct, which is the defining characteristic of C-DPH. C-DPH is thus any action by a civilian, interpreted as neither a member of the regular armed forces nor a member of a non-State armed group, involved in an armed conflict, which causes the civilian to become a military objective, as defined and to become subject to possible domestic criminal prosecution.

During armed conflict, an adversary must be collectively targeted for the basic tenant of armed conflict, the cumulative weakening of the enemy by way of progressive attack, to be achieved. The right to legally participate, and the intentional targeting during armed conflict, are, therefore, subject to different rules and assessments. The legal determination of C-DPH *ex post facto* is not the object of the DPH-exception clauses. It was thus not foreseen that a court would have to find the legal blameworthiness of a civilian for acts of C-DPH. The

[320] See in general Uhler, OM (et al) 'IV Commentary on the Geneva Convention Relative to the Protection of Civilian Person in Time of War' 62 (Picte, JS (E); Griffin, R & Dumbleton trans 1958) at 4; See the resentations by Watkin, K; Kleffner, JK; Melzer, N & Parks, G in Beruto, GL (Ed) *The Conduct of Hostilities. Revisiting the Law of Armed Conflict 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols* (2007) at 59 – 77.

intention is to protect the civilian population during armed conflict while considering military necessity and not to create status or a test to find criminal accountability. The establishment of a legal test, as was done in the Guidance, is therefore, in my view, unnecessary. For intentional targeting purposes, what is required is a determination of a measure to limit harm to the civilian population and an obligation on civilians not to act in a manner that would cause the civilian collective to become a legitimate military objective. The adversarial nature of armed conflict, as action between two or more armed groups, is then acknowledged and the infusion of hostilities with humanity is respected as military necessity which is directed only at those who act collectively as the adversary and not towards civilians.

DPH and C-DPH may, therefore, be defined as any action where a person becomes a legitimate military objective, either via membership and status or actions. The GC's and API contain the principle of distinction and participants may "*direct their operations only against military objectives*."[321] API, Article 51(2), confirms that *"[t]he civilian population as such, as well as individual civilians, shall not be the object of attack*."[322] The prohibition on indiscriminate attacks comes from API, Article 51(4), which prohibits attacks that are "*not directed at a specific military object*" and "those which employ a method or means of combat which cannot be directed at a specific military objective" or "which employ a method or means of combat the effects of which cannot be limited as required by API; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[323]

The prohibition on intentional attacks on civilians is further supported by API, Article 57, which requires that commanders do "*everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects*"[324] and "*take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to*

[321] See Geneva Convention Relative to the Treatment of Prisoners of War, Articles. 3, 4, 6, Aug. 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135; API, Article 48.
[322] Geneva Convention Relative to the Treatment of Prisoners of War, Articles. 3, 4, 6, Aug. 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135; API, Article 51(2). The US Marine Corps Field Medical Training Battalion (East Camp Lejeune (FMST 1304) refers to the notion of 'Positive Identification' ("PID") which requires reasonable certainty that the object of attack is a legitimate military target. Reasonable certainty is described as "far more than 'maybe' or 'might be' and is greater than 'probably'. 'Very likely' or 'highly probable' better describes the term 'reasonable certainty'. Identifying someone as a military aged male (MAM) is not PID and this term should NOT be used".
[323] Geneva Convention Relative to the Treatment of Prisoners of War, Articles. 3, 4, 6, Aug. 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135; API, Article 51(4).
[324] See API, Article 57(2)(a)(i).

minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[325] API, Article 85, further declares that virtually all violations of distinction constitute grave breaches,[326] and the Rome Statute likewise criminalizes attacks on civilians and indiscriminate attacks.[327]

API, Article 52(2) thus states that "*[a]ttacks shall be limited strictly to military objectives"*.[328] Combat status "implies being . . . considered a legitimate military objective," and further combatants may be "harm[ed] due to their status as combatants".[329] This is supported by State Practice.[330] Military objectives are interpreted to be members of the armed forces, other persons taking a direct part in hostilities who are targetable for the duration of their participation, and "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*".[331]

The definition of military objective is generally accepted as part of customary International Law.[332] The definition is thus the starting point for any enquiry into targeting to determine if a specific objective represents a legitimate military objective and therefore a legitimate target.[333] An object must satisfy two cumulative criteria to qualify as a military objective. API states that *"[a]ttacks shall be limited strictly to military objectives*". API, Article 52, states

[325] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API) 1125 U.N.T.S. at 29 at Article 57(2)(a)(ii).
[326] API, Article 85.
[327] See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) at Articles. 8(2)(b)(i), 8(2)(b)(ii), 8(2)(b)(iv), 8(2)(b)(v), 8(2)(b)(vi), 8(2)(e)(i), 8(2)(e)(ii), 8(2)(e)(iv) available at http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf (last assessed on 1 May 2014).
50. GC III at Article 4(A)(2).
[328] 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 neutralization, in the circumstances ruling at the time, offers a definite military advantage.
[329] PCATI *op cit* note 24 at para 29.
[330] Henckaerts, JM and Doswald-Beck, L (Eds) *op cit* note 27 Vol II (Chapter I) at 190-3.
[331] Human Rights Watch Report (2003) Off Target: The Conduct of the War and Civilian Casualties in Iraq. Human Rights Watch at 8 available at http://www.hrw.org/reports/2003/usa1203/usa1203.pdf (last assessed on 1 May 2014). See also the 2007 Human Rights Watch Report named Civilians Under Assault: Hezbollah's Rocket Attacks on Israel in the 2006 War available at www://www.HRW.org/reports/2007/iopto807/iopto807webcover.pdf (last assessed on 1 May 2014). This Report incorrectly confused the test for objects as lawful targets with the lawful targeting of natural persons.
[332] Olasolo, H *Unlawful Attacks in Combat Situations. From the ICTY's Case Law to the Rome Statute* (2008) at 125.
[333] Boothby, WH *op cit* note 39 at viii & 4. See also the United States Joint Forces Command Glossary at http://www.jfcom.mil/about/glossary.htm (last assessed on 1 May 2014).

that a military object is *"[t]hose objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage*".[334] Article 52(2) refers to "*a definite military advantage*" that must be gained from the (total or partial) destruction, capture or neutralization[335] of the targets.

The determination of military objectives must incorporate the function of the principle of 'proportionality'.[336] Proportionality in the LOAC is considered customary law and has been defined as the launching of 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, is prohibited.[337] Excessive damage must not be equated to disproportionate.[338] Ordinarily, an attack will be proportionate "if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it."[339] This rule requires those responsible for targeting decisions to take all reasonable steps to ensure that the objectives are identified as military objectives and that these objectives may be targeted without probable loss of life and damage to property disproportionate to the military advantage anticipated.[340]

C-DPH thus ultimately refers to any object, including a person, which by its nature, location, purpose or use, makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Observers are therefore to intentionally target any person who complies

[334] API, Article 52(2).
[335] The term "neutralization" in this setting means denial of use of an objective to the adversary without destroying it. See Solf, W 'Article 52' in *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* at 318, 325 (Bothe, M *op cit* note 60).
[336] Further principles that relate to the targeting process include, inter alia, qualified warning requirements, and the principle that an adversary does not secure immunity from attack by locating military objectives in close proximity to civilians or civilian objects - Walzer, M *Just and Unjust Armed Conflict* (2006) at 153.
[337] See Henckaerts, JM (et al) "Customary International Humanitarian Law" online: ICRC <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> at 46 (last assessed on 1 May 2014).
[338] This term is used both in API, and in Field Manual 27-10.
[339] PCATI *op cit* note 27 at para 45.
[340] Lewis, MW *The War on Terror and the Laws of War. A Military Perspective* (2009) at 45; API, Article 57(2)(a)(i) requires those who plan or decide upon an attack to do "everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects" and "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."

with this definition and requirements and the determination of C-DPH then becomes, as intended, a practical endeavour, which is performed as part of targeting operations and specifically does not award rights to such participants but may subsequently result in domestic criminal liability and even, although unlikely, international criminal prosecution.

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