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### International human rights law and the law of armed conflict in the context of counterinsurgency: With a particular focus on targeting and operational detention

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## Chapter VII LOAC

In Chapter V, we have identified the valid normative frameworks available in LOAC relative to the concept of targeting. In view of its place in the waging of war – killing being a traditional form of forcing the enemy in submission – it does not come as a surprise that LOAC offers a comprehensive body of law governing targeting. It is therefore equally unsurprising that the vast majority of this body pertains to the concept of hostilities. Underlying this law of hostilities is a number of requirements, encapsulated in principles, prohibitions and restrictions, which characterize the permissible and prohibited conduct in hostilities and targeting in particular. These requirements need to be further explored, for they inform us on their compatibility with the requirements pertaining to the prohibition of arbitrary deprivation of life, identified and examined Chapter VI. This will take place in paragraph 1 of this Chapter. Besides this vast body governing the conduct of hostilities, LOAC also provides some norms of relevance to the use of force outside hostilities – norms that regulate the State’s conduct in *law enforcement*-situations during armed conflict. These norms will be further explored in paragraph 2. Both paragraphs will finalize with some observations.

### 1. Normative Substance of the Valid Normative Framework Relative to Targeting in the Context of Hostilities

As noted, the law of hostilities is a vast body of norms. Many of these norms impose requirements that follow from principles, prohibitions and restrictions within the law of hostilities. These concern (1) the principle of *distinction* (paragraph 1.1); (2) the principle of *proportionality* (paragraph 1.2); (3) the requirement to take *precautionary measures* (paragraph 1.3); and (4) restrictions and prohibitions relative to the *means* and *methods* of warfare (paragraph 1.4). It is also imperative to examine the notion of *military necessity*, which has been subject of extensive academic debate following assertions by some that it contains a restrictive element that is fervently opposed by others for imposing, arguably IHRL-based restrictions that are alien to the law of hostilities (paragraph 1.5). Paragraph 1.6 offers some final observations.

#### 1.1. The Principle of Distinction

The first, most pivotal requirement of the law of hostilities is the requirement of distinction. Conceptually, LOAC is a regime of categorization: in order to determine the lawfulness of conduct in armed conflict, persons (and objects) must first be placed in distinct categories. These categories and the commensurate rules attached to them determine their status and treatment under LOAC.<sup>1206</sup> In the law of hostilities, this concept of categorization also determines which persons in the conduct of hostilities may be lawfully deprived of their lives as a result of the application of combat power by a party to the conflict. A key notion in this respect is that of “attacks”. As Article 52(1) AP I stipulates: “attacks shall be limited

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<sup>1206</sup> Gill & Van Sliedregt (2005), 29.

strictly to military objectives.”<sup>1207</sup> Indeed, it is a fundamental obligation for all parties to the conflict to identify persons as persons who may be directly attacked, and those who are protected from such attack: the principle of distinction. Today, the principle of distinction is a rule of customary law,<sup>1208</sup> and has attained the status of *ius cogens*.<sup>1209</sup> It is a reflection of the notion of military necessity that the sole legitimate aim of war is limited to “the weakening of the *military forces of the enemy*.”<sup>1210</sup> As a result, only the military apparatus of the opposing party to the conflict can constitute legitimate military objectives, since only that

[...] constitutes a real threat to the security of a party to an armed conflict and endangers the very survival of a State and the self-determination of its people. Thus only the attempt to overcome the opposing military apparatus is needed in order to fight back an illegitimate use of force, and to reconstruct peace.<sup>1211</sup>

It follows that individuals who may become subject to the effects of attacks in the context of hostilities fall in one of two mutually exclusive, but complementary categories.<sup>1212</sup> One such category comprises of persons who qualify as lawful military objective because they are not, or no longer immune from the consequences of hostilities. This category is hereinafter referred to as the *authoritative personal scope of attack*. The opposing category consists of persons protected against the effects of hostilities and in particular the effects from direct attack, because they *do not or no longer directly participate in hostilities* (hereinafter: DPH). This category is hereinafter referred to as the *prohibitive personal scope of attack*.

The purpose of this paragraph is to determine when individuals labeled as ‘insurgent’ qualify as lawful military objectives within the authoritative personal scope, and when they are protected from direct attack. Such legal distinction is of decisive relevance in the validation of targets in various stages of the targeting process. It is recalled that, for the purposes of the present study, the term ‘insurgent’ refers to non-State actors.

As concluded in Chapter V, it is not unconceivable that the law of IAC applies to situations of OCCUPCOIN and non-consensual TRANSCOIN. In so far it does not, it would be the law of NIAC that applies (assuming the existence of an armed conflict). Therefore, the law of IAC and NIAC will be examined separately in paragraphs 1.1.1 and 1.1.2 respectively. In each paragraph, a preliminary identification of the authoritative and prohibitive personal scope of attack on the basis of the relevant normative frameworks will take place and it will be examined when persons can be categorized in a recognized status in the law of hostilities. Paragraph 1.1.3 assesses a person’s position under the law of hostilities as a result of a shift in protective status due to change in circumstances, either as a result of a civilian’s DPH (emanating in the loss of protection), or as a result of an individual’s rendering *hors de combat* (emanating in the benefit of protection). The law governing such shift in immunity is similar in the law of IAC and NIAC, so there is no need for a separate analysis under both regimes. The paragraph finalizes with some observations (paragraph 1.1.4).

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<sup>1207</sup> According to Article 49(2) AP I, “attacks” means “acts of violence against the adversary, whether in offence or in defence.”

<sup>1208</sup> Rule 1, ICRC (2005a).

<sup>1209</sup> ILC (2001), commentary on Draft Article 40, § 5, 284; (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 78 f.

<sup>1210</sup> 1868 St. Petersburg Declaration (emphasis added).

<sup>1211</sup> Oeter (2010), 171-172.

<sup>1212</sup> Melzer (2008), 300.

As a point of reference, the following analysis builds on the view of the ICRC on the principle of distinction as expressed in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.<sup>1213</sup> This document, which aims to clarify the notion of DPH,<sup>1214</sup> also contains the ICRC's current view on the operation of the requirement of distinction in the conduct of hostilities in both IAC and NIAC.

This is not to imply that the present study adopts the views of the ICRC. The views expressed in the Interpretive Guidance are non-binding and, on many points, remains controversial in the eyes of States and commentators.<sup>1215</sup> While the controversy aims at specific topics related to the notion of DPH and the requirement of distinction, the general line of argument in opposition of the Interpretive Guidance is that it upsets the delicate balance between military necessity and humanity by stressing the latter to the detriment of the former.<sup>1216</sup> The following examination also aims to point out where such imbalance may arise.

### 1.1.1. The Law of IAC

#### 1.1.1.1. Preliminary Identification of the Prohibitive and Authoritative Personal Scope of Attack

As previously concluded, in the context of OCCUPCOIN and non-consensual TRANSCOIN it cannot be excluded that the relationship between the counterinsurgent State and insurgents relative to the latter's targeting is governed by the law of IAC. This may be so because one supports the view that in those situations the law of IAC always applies, or, in the alternative, that the conflict between the counterinsurgent State and the insurgents qualifies in principle as a NIAC. In the latter instance, in the event the threshold of CA 3 has not been crossed, or in the event the targeting concerns individuals affiliated to the insurgency, but are not a member of the armed forces of the insurgency, the question arises how such insurgents qualify under the law of hostilities.

The primary source within the law of IAC for identifying which individuals enjoy immunity from direct attack, and who do not, is Article 48 AP I:

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

As may be noted, its principal focus lies on the distinction between combatants, who may be directly attacked, and civilians, who are protected from direct attack. Indeed, the law of hostilities in IAC maintains a closed status-circuit consisting of mutually exclusive and, simultaneously, complementary *status*-compartments according to which individuals present in the arena of armed conflict are either combatants or civilians. However, in as much as the concepts of combatant and civilian form a closed status-circuit, the mere identification of an individual's status under the law of hostilities in IAC is not, in itself, conclusive of that individual's immunity from direct attack under LOAC. In that respect, one is cautioned to view

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<sup>1213</sup> Hereinafter: Interpretive Guidance, available at [http://www.icrc.org/Web/Eng/Siteeng0.nsf/htmlall/p0990/\\$File/ICRC\\_002\\_0990.pdf](http://www.icrc.org/Web/Eng/Siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.pdf).

<sup>1214</sup> The study was carried out in cooperation with the T.M.C. Asser Institute, The Hague, the Netherlands between 2003 and 2009 and included the participation of around forty international legal experts. While the initial aim was to release a document reflecting a consensus, the controversy surrounding certain issues forestalled overall agreement with the final text and led some experts to request that their names be deleted. It was eventually released to express the view of the ICRC alone.

<sup>1215</sup> Dinstein (2010), 146; Schmitt (2010a); Schmitt (2010c);

<sup>1216</sup> Schmitt (2010c), 6.

Article 48 AP I as the sole guiding norm in identifying the prohibitive and authoritative personal scopes of direct attack.

To the contrary, LOAC takes account of the fact that, in practice, the factual circumstances surrounding combatants and civilians may change and demand a reevaluation of the balance between military interests and considerations of humanity. For example, combatants may be left vulnerable on the battlefield due to the injuries sustained from combat. Similarly, civilians may decide to take up arms and resist an invading force. Thus, LOAC is designed such that individuals belonging to either one of the status-categories may gain or lose immunity from attack as a result of changing circumstances either attributable to their own conduct, or as a result of conditions sustained as a result of conduct attributable to the enemy. It therefore follows from several provisions in the GCs and AP I, as well as customary law, that while a combatant may be lawfully made subject to direct attack, he or she enjoys protection from direct attack when rendered '*hors de combat*'. However, conversely, once a combatant '*hors de combat*' commits 'hostile acts', he loses protection from direct attack. Similarly, whilst a civilian enjoys protection against direct attack, he loses such protection once, and for the time he or she directly participates in the hostilities. In addition, the law of IAC offers protection to medical, religious and civil defense personnel of the armed forces of a party to a conflict, unless such personnel engages in 'acts harmful' to the adversary.

In sum, it may be concluded that, pursuant to the relevant provisions of LOAC pertaining to IAC, the *prohibitive* personal scope of direct attack involves the following categories of individuals:<sup>1217</sup>

- civilians<sup>1218</sup>
- medical, religious and civil defense personnel of the armed forces<sup>1219</sup>
- combatants and civilians directly participating in the hostilities who are rendered *hors de combat*, as a result of their capture, sickness or injury.<sup>1220</sup>

Likewise, the *authoritative* personal scope of direct attack in IAC includes the following categories of individuals:

- combatants
- civilians directly participating in the hostilities
- medical, religious and civil defense personnel carrying out acts 'harmful to the enemy'
- combatants '*hors de combat*' who commit 'hostile acts'.

To limit our examination to the most relevant categories, we will solely concentrate on the distinction between civilians and combatants.

#### 1.1.1.2. Status-Identification

In order to classify an insurgent as belonging to the prohibitive or authoritative personal scope of direct attack in the law of IAC, this paragraph, as stated, aims to determine whether an insurgent may qualify as *combatant* or *civilian* under the law of IAC.

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<sup>1217</sup> The protective scope also stretches to belligerent reprisals that constitute a direct attack against the various protected categories of individuals. See Article 46 GC I; Article 47 GC II; Article 20 AP I; Article 13(3) GC III; Article 33(3) GC IV; Article 51(6) AP I; Rule 146 ICRC (2005a).

<sup>1218</sup> Article 51(1) AP I.

<sup>1219</sup> Medical and religious personnel: Article 24 GC I; Article 36 GC II, Rules 25 (medical personnel) and 27 (religious personnel) ICRC (2005a); Article 8(2)(b)(xxiv) ICC Statute; civil defense personnel: Article 67(1) AP I.

<sup>1220</sup> Article 41(1) and (2) AP I; Rule 47, ICRC (2005a). For rules on general protection, particularly against arbitrary power, see the relevant norms in GC I-IV.

The law of IAC defines civilians negatively, to include any person that does not belong to “one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.”<sup>1221</sup> Individuals falling into any of these categories are combatants. In its *generic*<sup>1222</sup> or *functional*<sup>1223</sup> meaning, a combatant is a member of the armed forces who fights. In *legal* terms, a combatant is a person (1) who belongs to a *levée en masse* or (2) is a member of the armed forces of a party to the conflict, so designated by domestic law.

The implications of the combatant-status are significant. On the one hand, a combatant is – under fulfillment with strict conditions<sup>1224</sup> – privileged to participate directly in the hostilities, whilst enjoying immunity (“combatant immunity”) from prosecution “for those warlike acts that do not violate the laws and customs of war but that might otherwise be common crimes under municipal law.”<sup>1225</sup> In addition, upon capture, combatants must be afforded POW-status.<sup>1226</sup> If a person cannot qualify as belonging to either category, or when in doubt, he must be considered a civilian.<sup>1227</sup>

On the other hand, combatants are “persons who do not enjoy the protection against attack accorded to civilians.”<sup>1228</sup> Such loss of protection is *permanent*, until the combatant “disen-

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<sup>1221</sup> Article 50(1) AP I. The relevant parts of Article 4(A) GC III refer to “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” (Article 4(A)(1)); “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” (Article 4(A)(2)); “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power” (Article 4(A)(3)); and “Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war” (Article 4(A)(4)).

Article 43(2) AP I states: “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.”

<sup>1222</sup> Ipsen (2008), 81.

<sup>1223</sup> Melzer (2008), 327.

<sup>1224</sup> The privileges are subject to strict conditions: a combatant (1) is subordinate to a responsible command; (2) is recognizable by a fixed distinctive emblem; (3) carries his arms openly; and (4) conducts hostilities in accordance with LOAC. Article 44(3) AP I (contentiously) allows (particularly irregular) combatants to keep these privileges if only they carry their arms openly “during each military engagement” and “during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launch of an attack in which he is to participate.” See Article 1, 1907 HVR; Article 4A(2) GC III; Article 43 AP I; Article 44(3) AP I.

<sup>1225</sup> Solf (1983), 57. This immunity does not extend to violations of LOAC or ICL. Also: Gill & Van Sliedregt (2005), 31; Dinstein (1989), 103-106.

<sup>1226</sup> Article 3, 1907 HVR; Articles 4(A)(1) and (2) GC III. As to the conditions underlying POW-status, see Part D2, Chapter III.

<sup>1227</sup> Article 50(1) AP I. The combatant privilege and immunity also ensures that combat is waged between combatants (and military objects), and not against those protected from the consequences of hostilities. The absence of combatant-privilege and immunity with civilians functions as a logical barrier against direct attack, as they are not supposed to pose a threat to those who are privileged to fight, i.e. combatants. ICRC (2009), 23.

<sup>1228</sup> ICRC (2005a), 3.

gages from active duty and reintegrates in civilian life, whether due to a full discharge from duty or as a deactivated reservist.”<sup>1229</sup>

In the event that a combatant does not comply with the individual conditions attached to ‘privileged combatancy’,<sup>1230</sup> he forfeits his privileges and immunity but this does not remove his membership in the *armed forces of a party to the conflict*,<sup>1231</sup> and he may still lawfully be attacked on that basis alone, unless rendered ‘*hors de combat*’.<sup>1232</sup>

The question left to be answered is: do insurgents – as understood in the present study – lose immunity from direct attack as a result of their identification as *combatants*? The answer is: no. This will be explained below.

*Firstly*, the *levée en masse* involves inhabitants of *unoccupied* territory who spontaneously take up arms to resist the *invading* armed forces without having time to organize themselves into an armed force.<sup>1233</sup> In view of the situational contexts of NATCOIN, OCCUPCOIN, SUPPCOIN and TRANSCOIN, the concept of *levée en masse* is irrelevant.<sup>1234</sup>

*Secondly*, while LOAC accepts that members of irregular forces - more specifically militia and volunteer corps as well as organized resistance movements – may become members of the armed forces of a State party to the IAC,<sup>1235</sup> it is also required that a *belligerent nexus* exists between the armed forces of which the insurgent is a member and a party to the IAC. In this context, an essential element implied in Article 43(1) AP I is that the position of the ‘armed forces’ in the law of IAC vis-à-vis the party to the conflict is premised on the as-

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<sup>1229</sup> ICRC (2009), 25.

<sup>1230</sup> Article 44(3) AP I. It must be stressed that the presumption that a combatant-member of the armed forces complies with these conditions is very strong. Regular combatants generally fulfill combatant-conditions. Therefore, the above is of particular relevance to combatants of irregular armed forces.

<sup>1231</sup> See below. If the party to the conflict fails to prosecute its members that violate LOAC on a continuous basis, the party may not conform to its obligation under LOAC to effectively run an internal disciplinary system and the armed forces may no longer be viewed as those belonging to a party to the conflict, as a result of which its members will lose combatant status.

<sup>1232</sup> To argue that a combatant’s unprivileged participation in the hostilities removes the combatant-status would imply that he then is to be placed under the more protective regime afforded to civilians. This would contradict the logic underlying the principle of distinction in the law of hostilities in general, and the concept of combatant in particular. In sum, the consequences of unprivileged combatancy become manifest not in the realm of permissibility of direct attack, but in the realm of post-capture treatment and immunity from criminal prosecution. ICRC (2009), 23.

<sup>1233</sup> Article 4(A)(6) GC III; Article 2, 1907 HIVR. Participants in a *levée en masse* are not members of the armed forces; neither are they civilians. They are, however, combatants, required that they carry their arms openly and comply with the laws and customs of war.

<sup>1234</sup> In essence, they can be seen as insurgents. However, as explained by Dinstein, the status of the *levée en masse* “lapses *ex hypothesi* after a relatively short time:” “The trajectory of subsequent events will go in one of three different directions: either (i) the territory is occupied (despite the *levée en masse*); or (ii) the invading force is repulsed (thanks to the *levée en masse* or to the arrival of reinforcements); or else (iii) the battle of defence stabilizes, and then there is ample opportunity for organization and meeting all four Hague conditions.” Dinstein (2009c), 97. As to the *levée en masse* in a contested area, see also (1945), *Bauer et al. Trial (Permanent Military Tribunal at Dijon)*, 18. From the moment that a *de facto* occupation has materialized, those partaking in the *levée en masse* lose their combatant status and become civilians directly participating in hostilities. In terms of insurgency, they switch from insurgents in an unoccupied territory to insurgents in an occupied territory. The former situation – insurgency in unoccupied territory – remains outside the scope of the present study.

<sup>1235</sup> See Article 1 HIVR, Articles 13 GC I, Article 13 GC II, Article 4 GC III. With respect to militia and volunteer corps, Article 43(1) AP I embraces both militia and volunteer corps that form an integral part of a State’s army, and those that are additional to that army. Ipsen (2008), 85. See also Article 1, 1907 HIVR and Article 4(A)(1) and (2) GC III, which both make a distinction between both organizational forms.

sumption that the ‘party to the conflict’ is a *subject of international law* to which the conduct of its armed forces can be attributed.<sup>1236</sup> In essence, that subject of international law implies a State; after all, the concept of IAC is limited to armed conflicts between States only.<sup>1237</sup> Indeed, insurgents become combatants when they belong to the armed forces of an insurgency movement that ‘belongs’ to a State party to the conflict. The Interpretive Guidance explains that such is the case when there is

[...] at least a “de facto” relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting.<sup>1238</sup>

As noted, Article 43 AP I foresees this possibility by explicitly referring to militia and volunteer corps and organized resistance movements. Generally, a State’s national law determines that certain militias and volunteer corps are or become fully incorporated in the regular armed forces.<sup>1239</sup> This, however, need not necessarily be the case. If so, the degree of *control* must be established independently.<sup>1240</sup> Such control may result from a State’s direct or indirect support to the insurgents, e.g. when it finances, trains, equips or otherwise provides operational support to the insurgents, or assists or has a leading role in the organization, coordination and planning of the military actions of the insurgents.<sup>1241</sup> To date, it remains ambiguous as to when a State exercises control over an irregular organized armed group sufficient to conclude that it can be said to ‘belong’ to the organ of the armed forces of that State. The different tests for identifying such a relationship of control are not clear and appear to be diverging.<sup>1242</sup> The ICJ requires ‘effective control’ by the State over each operation,<sup>1243</sup> thus control on the tactical level.<sup>1244</sup> The ICTY, instead, requires ‘overall control’, i.e. overall control over the actions of the insurgents, so that not every operation on the

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<sup>1236</sup> Ipsen (2008), 80; Melzer (2008), 307. This is also reflected in the two conditions laid down in Article 43(1) AP I that: (1) the armed forces must be “under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party;” (2) “[s]uch 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.”

<sup>1237</sup> The exception is a conflict under Article 1(4) AP I, but these conflicts are left outside this study.

<sup>1238</sup> ICRC (2009), 23, referring to the ICRC Commentary to Article 4 GC III, see Pictet (1960), 57.

<sup>1239</sup> If so, the State party is under an obligation to notify the other parties to the conflict. Failure to comply with this obligation has no consequences for the status of the incorporated irregular forces, groups or units, but does entail a violation of LOAC.

<sup>1240</sup> (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), § 115; (1995h), *The Prosecutor v. Tadic*, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)*, § 145; (1999m), *The Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber), § 93 ff.

<sup>1241</sup> (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), §§ 75-125; (1999m), *The Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber), §§ 88-145; Paulus & Vashakmadze (2009), 111. This was for example claimed by Congo in *DRC v. Congo*, arguing that the DRC supported or tolerated anti-Congo insurgents. The ICJ found there was insufficient evidence. (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment of 19 December 2005, § 276, 298, 301 and 304.

<sup>1242</sup> Holland (2011), 20-24; Spinedi (2007), 832.

<sup>1243</sup> (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), § 64-65; (2007c), *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Judgment of 26 February 2007 (Merits), §§ 399-400.

<sup>1244</sup> Kleffner (2010b), 57.



tactical level needs to be carried out on the effective control of the State.<sup>1245</sup> As noted by the ICRC, “[i]n practice, in order for an organized armed group to belong to a party to the conflict, it appears essential that it conduct hostilities *on behalf and with the agreement* of that party.”<sup>1246</sup>

However, this construct sits uncomfortably with the concept of insurgency as understood in this study. To recall, within this concept the insurgency movement acts *independently* from any State, to the extent that there is no belligerent nexus between the insurgency movement and a State to the extent that its conduct can be attributed to a State.

In the absence of such belligerent nexus with a State it would follow that an insurgency movement, *as a group*, cannot be viewed to partake in the hostilities between the parties to the IAC, notwithstanding the fact that the armed violence it uses through its armed forces to attain its political goals geographically and temporally coincides with an ongoing armed conflict.<sup>1247</sup> As a result, individuals who belong to the armed forces of an insurgency movement, while perhaps identifiable as combatants in the *generic* sense, *cannot be regarded as combatants in the legal sense* and thus cannot be attacked on a permanent basis, but are, as a matter of legal logic, to be regarded *a priori* as *civilians* and are, on that basis, *in principle* immune from attack by a (counterinsurgent) State. While this outcome is in itself uncontroversial, the fact remains that, *de facto*, insurgents resort to armed violence against a State party to the conflict. This implies that the application of combat power against these insurgents is limited to that permissible as a measure of law enforcement, unless the armed violence amounts to hostilities triggering the loss of immunity against attack on a basis recognized under the law of hostilities.

A first basis for such loss forms civilian DPH, but, notwithstanding the ICRC’s Interpretive Guidance on the issue, this notion is controversial in many respects, and most arguably fails to accommodate the operational challenges posed by non-State actors such as insurgents who operate as an organized unit with features similar to that of regular armed forces, but who on the basis of their the status as civilian may not be attacked on a continuous basis, *but only “unless and for such time” they directly participate in hostilities*. Whereas the intricacies of civilian DPH will be further examined below, it is of relevance here to note that in relation to attacks on insurgents who must be qualified as civilians, the “belonging to”-condition has been criticized for being out of sync with operational reality, the principal argument being that it is not so much relevant whether insurgents are fighting *for* a party, but rather whether they are fighting *against* a party to the conflict for reasons related to the conflict, for example in the case of belligerent occupation, where insurgents fight against the presence of the Occupying Power. As explained by Schmitt, the logic expressed by the ICRC that the principle of distinction precludes protection as civilians of irregular armed forces belonging to a party to the conflict also when they do not conform with the conditions of privileged combatancy should also apply to organized armed groups not belonging to a party to the conflict. In his view, the “belonging to”-condition does not regulate the relationship between a State and individuals in targeting matters, but only in relation to detention issues: “[i]t may be sensible to shape detention issues by relationship to a belligerent, as states understandably wish to protect those who fight on their behalf. However, in targeting matters, the ap-

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<sup>1245</sup> (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)*, §§ 115, 122, 137.

<sup>1246</sup> ICRC (2009), 23 (emphasis added).

<sup>1247</sup> Melzer (2010b), 841.

appropriate relationship logically should be determined by whom the individuals to be attacked are fighting against.”<sup>1248</sup>

It has therefore been proposed that the armed forces of insurgent movements are either to be treated on an equal basis as a State’s regular armed forces, regardless of their ties to a party to the conflict, or its members should be treated, in so far they do not belong to a party to the conflict, as civilians directly participating in the hostilities on a *continuous* basis, throughout the duration of their membership in the armed forces.<sup>1249</sup> The added benefit is that upon capture of such individuals a detailed framework governing their subsequent deprivation of liberty is available, in contrast to NIAC.<sup>1250</sup>

A *second* basis for lawful attack on insurgents engaged in armed violence against a party to an IAC entails that the insurgent movement could be viewed as a party to a *distinct* NIAC with the counterinsurgent State (which also is party to an IAC), provided the threshold-criteria for NIAC – protracted violence and sufficient level of organization – are fulfilled.<sup>1251</sup> Based on this construct, insurgents who qualify as members of the armed forces belonging to a party in a NIAC can – under conditions – be attacked permanently. We will more closely examine this in the next paragraph.

### 1.1.2. The Law of NIAC

#### 1.1.2.1. Preliminary Identification of the Prohibitive and Authoritative Personal Scopes of Attack

A *conventional* norm defining the principle of distinction in the conventional law of NIAC similar to Article 48 AP I is absent. It is therefore necessary to fall back on *customary* law. The ICRC Customary Law Study formulates the rule of distinction as follows:

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.<sup>1252</sup>

It must be noted that the reference to the term ‘combatants’ here must be interpreted in its generic, *functional* manner, i.e. it refers to members of the armed forces that fight.<sup>1253</sup> It does not imply reference to the notion combatant privilege as embodied in the law of IAC. To date, this has not been accepted in the context of NIAC. As a result, the term ‘combatant’ is absent in the conventional law of NIAC.<sup>1254</sup>

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<sup>1248</sup> Schmitt (2010c), 17. As explained by Schmitt,”

<sup>1249</sup> Schmitt (2010c), 18; Lubell (2010), 149 ff.

<sup>1250</sup> See also Part 2, Chapter III. This is particularly so when members of organized armed groups not belonging to a party to the conflict are viewed as civilians, which are then governed by GC IV and/or AP I. An important issue remains, nonetheless, whether the members of such organized armed groups, when equalized with members of regular armed forces, are to fall under the protective scope of GC III. In any case, they are covered by AP I and GC IV (when classified as ‘protected person’ under Article 4 GC IV).

<sup>1251</sup> ICRC (2009), 23.

<sup>1252</sup> ICRC (2005a), Rule 1.

<sup>1253</sup> For further use of the term ‘combatant’ in the context of NIAC, see also Article 8(2)(e)(ix) of the ICC Statute; (1999), *Third Report on the Situation of Human Rights in Colombia, LACiHR (26 February 1999)*, § 55; (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, 325.

<sup>1254</sup> It was feared that the adoption of the notion of combatant would be used as an instrument further legitimizing insurgencies, and not to view insurgents as civilians subject to attack only when, and for such time they took a direct part in the hostilities. Melzer (2008), 323.

Nonetheless, even if one were to accept the existence of combatants in a generic sense, it is submitted that the prohibitive and authoritative personal scopes of the principle of distinction in NIAC go beyond the definition proposed by the ICRC. In fact, they are quite similar to those in an IAC.

In short, the *prohibitive* personal scope<sup>1255</sup> consists of civilians,<sup>1256</sup> medical and religious personnel of the armed forces<sup>1257</sup> and persons ‘*hors de combat*.’<sup>1258</sup>

The *authoritative* personal scope consists, *firstly*, of members of the armed forces of a party to the conflict, save those serving in medical and religious functions and whilst not ‘*hors de combat*’.<sup>1259</sup> *Secondly*, civilians who take a direct part in the hostilities lose immunity from direct attack from the moment and for the time they do so.<sup>1260</sup> *Thirdly* and *fourthly*, medical and religious personnel and members of the armed forces who are ‘*hors de combat*’ may lawfully become subject to direct attack when they engage, respectively in ‘acts harmful’ to the adversary<sup>1261</sup> or ‘hostile acts’, or try to escape.<sup>1262</sup>

It follows that, pursuant to the relevant provisions of LOAC pertaining to NIAC, the *prohibitive* personal scope of direct attack involves the following categories of individuals:<sup>1263</sup>

- civilians;<sup>1264</sup>
- medical, religious and civil defense personnel of the armed forces;<sup>1265</sup>
- members of the armed forces of a party to the conflict who are *hors de combat*.<sup>1266</sup>

Likewise, the *authoritative* personal scope of direct attack in NIAC includes the following categories of individuals:

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<sup>1255</sup> The resulting prohibition of direct attack includes reprisals constituting a direct attack. See Rule 148, ICRC (2005a).

<sup>1256</sup> Article 13 AP II; Rule 1, ICRC (2005a); Article 8(2)(e)(i) ICC Statute.

<sup>1257</sup> Article 9(1) AP II; Rules 25 (medical personnel) and 27 (religious personnel); Article 8(2)(e)(ii) ICC Statute. Conventional law of NIAC remains silent on civil defense personnel, but it may be assumed that direct attacks against civil defense personnel is unlawful. See also Melzer (2008), 312.

<sup>1258</sup> Article 7(1) AP II; Rule 47, ICRC (2005a). For general protection (not specifically against direct attack in hostilities) see CA 3 GC I-IV and Article 4(1) AP II.

<sup>1259</sup> CA 3 provides that all 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” are entitled to protection from “violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture.” It follows therefore that members of the armed forces who do take an active part in the hostilities are not entitled to immunity from direct attack for so long they do not lay down their arms or are placed ‘*hors de combat*’. This principle finds further support in Article 4(1) AP II, which affords immunity from direct attack to “[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.” See also Sandoz, Swinarski & Zimmerman (1987), § 4520 (Article 4 AP II): “*Ratione temporis* combatants are protected as soon as they are *hors de combat*.”

<sup>1260</sup> Article 13(3) AP II; Rule 6, ICRC (2005a).

<sup>1261</sup> Article 11(2) AP II; Rules 25 and 27, ICRC (2005a).

<sup>1262</sup> Rule 47, ICRC (2005a).

<sup>1263</sup> The protective scope also stretches to belligerent reprisals that constitute a direct attack against the various protected categories of individuals. See Article 46 GC I; Article 47 GC II; Article 20 AP I; Article 13(3) GC III; Article 33(3) GC IV; Article 51(6) AP I; Rule 146 ICRC (2005a).

<sup>1264</sup> Article 51(1) AP I.

<sup>1265</sup> Medical and religious personnel: Article 24 GC I; Article 36 GC II, Rules 25 (medical personnel) and 27 (religious personnel) ICRC (2005a); Article 8(2)(b)(xxiv) ICC Statute; civil defense personnel: Article 67(1) AP I.

<sup>1266</sup> CA 3; Article 5 AP II.

- members of the armed forces of a party to the conflict, to include members of (1) the regular armed forces of a State party to the conflict and (2) non-State organized armed groups;
- civilians directly participating in the hostilities;
- medical, religious and civil defense personnel carrying out acts ‘harmful to the enemy’;
- members of the armed forces ‘*bors de combat*’ who commit ‘hostile acts’ or try to escape.

### 1.1.2.2. Status-Identification

The starting point to identify the status of individuals potentially subject to attack is the position awarded in the (customary) law of NIAC to civilians. Similar to IAC, civilians can be defined negatively, i.e. all persons who are not members of the armed forces of a party to the conflict<sup>1267</sup> and enjoy immunity from direct attack unless and for such time as they take a direct part in the hostilities.<sup>1268</sup> In the absence of the status of combatants in NIAC, individuals either have the status of civilian, or that of member of the armed forces of a party to the conflict.

While the relevant sources apply the term ‘armed forces’ differently, thereby confusing the interpretation of what is meant by ‘armed forces’,<sup>1269</sup> in the view of the ICRC it follows from a teleological interpretation of the texts of CA 3 and Article 1(1) AP II<sup>1270</sup> that the notion of ‘armed forces’ refers to (1) the regular armed forces of a State, party to the conflict; (2) dissident armed forces; and (3) other organized armed groups of a party to the conflict, such as the armed forces of an insurgency movement.<sup>1271</sup>

For the purposes of the present study, the concept that requires further examination is that of dissident armed forces and organized armed groups. After all, insurgencies may consist of dissident armed forces and organized armed groups.<sup>1272</sup> The examination of the concept of regular armed forces of a State has no further significance for the present study, as we are here examining the lawfulness of attacks on insurgents by the regular armed forces, and not *vice versa*. So, the question before us is: when do insurgents qualify as members of dissident armed forces or organized armed groups, and when are they to be regarded as civilians?

<sup>1267</sup> As may be concluded from Article 1(1) AP II and Article 13(1) AP II. Also Melzer (2008), 322; Goldman (1993), 84.

<sup>1268</sup> Article 13(3) AP II.

<sup>1269</sup> Zegveld (2002), 134; Watkin (2010), 653.

<sup>1270</sup> It is, *firstly*, of importance to stress that while Article 1(1) AP II fails to make a distinction between the ‘dissident armed forces’ and ‘other organized armed groups’ and the non-State party to the conflict to which they belong, the armed forces itself cannot and should not be equated with the non-State party to the conflict as a whole, but only refers to its fighting components. *Secondly*, the use of the term ‘armed forces’ in relation to the regular armed forces of a High Contracting Party and dissident armed forces, and the use of the word ‘group’ in relation to organized armed groups must not be interpreted to imply that, while the former are clearly armed forces, the latter are to be viewed as civilians, who may not be attacked unless and for such time they take a direct part in the hostilities, as contended by Moodrick Even-Khen (2007), 12, as well as by experts, see University Centre for International Humanitarian Law (2005), 35. As argued by Melzer, “this view is a misconception of major proportions, which 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.”

<sup>1271</sup> ICRC (2009), 30; For an analysis, see Melzer (2008), 322; Bothe, Partsch & Solf (1982), 672.

<sup>1272</sup> This is demonstrated by the armed conflicts in Libya until the removal of Colonel Khadaffi’s regime, and Syria in 2011 and 2012, where the insurgencies have, in part, been led by, or been characterized by the participation of dissident members of the armed forces of Libya and Syria.

In view of the negative formulation of the concept of civilians, the main focus is on membership of the armed forces of a party to the conflict. The principal issues are: (1) when is an insurgent a member of dissident armed forces or an organized armed group; and (2) when does the organized armed group belong to a party to the conflict?

#### 1.1.2.2.1. *Members of the Armed Forces of a Party to the Conflict*

As concluded previously, the premise underlying membership to the armed forces of a party to an IAC is that all members are combatants, and are subject to lawful attack, with the exception of medical, religious and civil defense personnel. The question that arises is whether in the law of NIAC membership in the armed forces is based on the same presumption, i.e. whether it equally applies to (the regular armed forces of a State-party to the conflict),<sup>1273</sup> dissident armed forces or organized armed groups.

According to the ICRC, membership in dissident armed forces can be established on the basis of the organizational structures of the State armed forces to which they formerly belonged.<sup>1274</sup> Individual membership of organized armed groups is far more *contentious*.<sup>1275</sup> At the foundation of the problem is the fact that where membership in regular armed forces depends on an individual's *formal* integration, as regulated by domestic law, into armed units, such domestic law is absent in relation to organized armed groups. Membership of an organized armed group generally takes place by simply taking up a *function* within the armed forces, whether voluntarily, involuntarily or based on traditional notions of clan or family.<sup>1276</sup> In many cases, the beginning and end of membership is difficult to establish for the outside world because of the lack of uniforms, insignia and other distinctive signs. In addition, non-State parties, e.g. insurgent movements, operate in a mix of contexts – e.g. cultural, political, military – as a result of which mere affiliation to the non-State party cannot necessarily be viewed as membership of the armed forces, as understood in LOAC.<sup>1277</sup> For example, civilians often provide supporting services to an organized armed group. While their support constitutes an affiliation with the non-State party, it does not imply that they are to be viewed as members of the organized armed group.

##### 1.1.2.2.1.1. Continuous Combat Function

One way of dealing with this issue is to argue that members of organized armed groups are in essence civilians who may or may not directly participate in hostilities on a *continuous* basis and subsequently lose protection from direct attack for the entire duration of their membership. The ICRC, however, rejects this approach, its justification being that it

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<sup>1273</sup> As for *regular* armed forces, “membership in State armed forces is generally defined by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia and equipment” and lasts until a member disengages from active duty and reintegrates into civilian life. ICRC (2009), 31.

<sup>1274</sup> ICRC (2009), 32. Yet, the Interpretive Guidance, however, has been criticized for its failure to offer guidance as to when, and with what consequences, the organizational structure is no longer sufficient to determine membership. Watkin (2010), 655.

<sup>1275</sup> As noted, its relevance stretches to irregular armed forces belonging to armed forces of a State-party to an armed conflict (whether IAC or NIAC); to organized armed groups taking part in the hostilities of an IAC, but not belonging to a party to the IAC; and to organized armed groups of a non-State party to a NIAC.

<sup>1276</sup> ICRC (2009), 33.

<sup>1277</sup> Melzer (2008), 320.

would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire forces remain part of the civilian population.<sup>1278</sup>

Instead, the ICRC prefers to uphold the dichotomy between on the one hand civilians proper, who may not be attacked unless and for such time as they directly participate in hostilities, and on the other hand members of armed forces of a party to the conflict. In the view of the ICRC, only this distinction upholds the mutual exclusivity between civilians and armed forces.<sup>1279</sup> However, it does not accept that *all* members of an organized armed group indeed lose immunity from direct attack. Arguing that, “[f]or the practical purposes of the principle of distinction, [...], membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse,” the ICRC has proposed that

[...] membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Consequently, under IHL, decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: “*continuous combat function*”). Continuous combat function does not imply de jure entitlement to combatant privilege. Rather, it distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.<sup>1280</sup>

In terms of consequence, the ‘continuous combat function’ (hereinafter: CCF) implies “lasting integration into the organized armed group acting as the armed forces of a non-State party to an armed conflict.”<sup>1281</sup> This implies that an insurgent in a CCF ceases to be a civilian and loses immunity from attack on a *continuous* basis *throughout the duration of his CCF*.<sup>1282</sup> It also follows that an insurgent, engaged in a ‘continuous *non-combat* function’ within the organized armed group, must be viewed as a civilian and enjoys immunity from direct attack unless and for such time as he takes a direct part in the hostilities. The existence of a CCF must be determined in view of the concrete circumstances. In the case of doubt, an insurgent must be regarded as a civilian.

The seminal question remains: what is the *scope* of acts or functions within the organized armed group amounting to a CCF? As follows from the above, the identification of a CCF is relative to the interpretation of the notion of DPH.<sup>1283</sup> While we will address this issue in more detail below, the view of the ICRC is that besides genuine fighting functions, functions within CCF *include* the preparation, execution and command of acts or operations themselves amounting to DPH, as well as the recruitment, training and equipment of indi-

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<sup>1278</sup> ICRC (2009), 27-28.

<sup>1279</sup> In doing so, the ICRC adopts a viewpoint that stands in contrast with previous viewpoints. It may be noted in that respect that the ICRC Customary Law Study recognized that “practice is *ambiguous* as to whether members of armed opposition groups are considered to be members of armed forces or civilians.” ICRC (2005a), 17.

<sup>1280</sup> ICRC (2009), 33-34. (emphasis added).

<sup>1281</sup> ICRC (2009), 34.

<sup>1282</sup> ICRC (2005b), 64; Melzer (2008), 352. According to the Interpretive Guidance, this approach found support with the majority of the experts during the ICRC/Asser-expert meetings. ICRC (2009), 71, footnote 192. Also: de Cock (2008), 94.

<sup>1283</sup> ICRC (2009), 69.

viduals by an organized armed group with the aim to continuously and directly participate in the hostilities, without actually carrying out a hostile act.<sup>1284</sup> It is acknowledged that personnel in *combat* support functions are engaged in a CCF, for their activities “would almost invariably constitute an integral part of combat operations, because they generally involve direct support to combat units (such as tactical intelligence, communications, logistics, and engineering) having relatively immediate impact on the hostilities.”<sup>1285</sup>

In contrast, the ICRC *excludes* from the scope of membership of the armed forces, and subsequently regards as *civilians*, *firstly*, persons who can be regarded as non-combatants of the insurgency and have assumed *exclusively* “combat service support” functions, and *secondly*, civilian supporters who contribute via their function to the *general war effort* by continuously accompanying or supporting an organized armed group, but whose function does not involve direct participation in the hostilities. This applies to political and religious leaders, instigators, militants, recruiters, trainers, financiers, collaborators,<sup>1286</sup> as well as individuals engaged in the “purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature.”<sup>1287</sup> These functions do not constitute CCFs. The principal reason for such exclusion of both categories is that

the informal, fluctuating, and often clandestine membership and command structures of most irregularly constituted armed groups make it not only practically impossible, but also conceptually meaningless to distinguish between “non-combatant” members of such groups and civilian supporters accompanying them without taking a direct part in the hostilities.<sup>1288</sup>

As civilians, these individuals may only be lawfully attacked for such time as they take a direct part in the hostilities. In the absence of DPH, the application of combat power by the counterinsurgent is restricted to law enforcement measures.

#### 1.1.2.2.1.2. Criticism

While finding support among many, the ICRC’s preference for members of organized armed groups as members of armed forces of a party to the conflict over civilians that continuously directly participate in the hostilities, and the introduction of the CCF has been viewed as highly contentious.

From a purely *humanitarian* perspective, the ICRC-approach is feared to undermine civilian protection. For example, Alston criticizes the CCF for extending the notion of direct participation beyond the limits set in positive law. In his view, “the creation of CCF category is, *de facto*, a status determination that is questionable given the specific treaty language that limits direct participation to “for such time” as opposed to “all the time.”<sup>1289</sup> This is particularly troublesome, as noted by Hampson, because the CCF is difficult to establish and thus prone to mistakes, abuse or arbitrariness. It would risk the designation of civilians as members of the armed forces of the insurgency which may be targeted at all times even in situa-

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<sup>1284</sup> ICRC (2009), 34. For that matter, the ICRC excludes individuals commensurate to reservists in the regular armed forces. While recruited, and trained, they generally reintegrate into civilian life until called to active duty.

<sup>1285</sup> Melzer (2010b), 848.

<sup>1286</sup> Melzer (2008), 320-321; ICRC (2009), 34-35.

<sup>1287</sup> ICRC (2009), 34-35.

<sup>1288</sup> Melzer (2010b), 849-850.

<sup>1289</sup> United Nations General Assembly (2010), 20-21, §§ 64-65.

tions where the government exercises effective control over the territory and would be able to arrest or capture him as measure of law enforcement.<sup>1290</sup>

Besides humanitarian concerns, others also take into account the *operational* consequences of the CCF. The principal point of criticism is that the CCF-approach creates a “pseudo-status in non-international armed conflicts”<sup>1291</sup> which is more advantageous for members of organized armed groups than for members of regular armed forces, and which in the end negatively impacts the ICRC’s purpose for the introduction of the CCF, which aimed to increase the protection of peaceful civilians in view of the differences between State armed forces and irregularly constituted organized armed groups and the practical difficulties these pose.

The requirement of CCF places States at a disadvantage in several ways. Members of regular armed forces, pursuant to the regulation of their membership in domestic law, have a right to directly participate in the hostilities. They also have a commensurate *obligation* to distinguish themselves from the civilian population, as a result of which they are generally easily recognizable as legitimate military targets to organized armed groups. In fact, members of regular armed forces may be attacked based merely on the *presumption* that every member is a lawful target, unless they can be recognized as medical and religious personnel, or unless they are *hors de combat*.

In contrast, members of organized armed groups have no right of direct participation, nor an obligation, or other legal incentive, to distinguish themselves from the civilian population. In fact, from an operational point of view, they have every reason not to do so, and indeed, in practice, they are generally difficult to recognize as legitimate military targets.<sup>1292</sup> While this legal and operational asymmetry in itself places regular armed forces at a disadvantageous position, the requirement of a CCF makes matters worse. The CCF-approach has been criticized for creating an artificial distinction between two groups of fighters based on “potentially deceptive” assumptions adopted by the ICRC. As critics argue, the ICRC wrongly assumes that the function of a member of an organized armed group is more or less permanent, while it may very well be subject to change; conversely, civilians directly participating in hostilities do not necessarily have ‘loose’ ties with a party to a conflict, but may be of consistent support.<sup>1293</sup> Even if they were to use identification cards or uniforms, these may provide an indication of membership, but they are not particularly helpful in identifying the precise *function* of an individual within the organized armed group.<sup>1294</sup> In operational context, the extra obligation of identifying someone’s CCF requires extra output from the intelligence branch, who are not only tasked with the difficult job of mapping out the organizational structure of organized armed groups and the identification of its members purely for intelligence purposes, but are now also forced to determine the specific function of each individual within that organization and to value that function in view of their eligibility within the scope of targetable members for the purpose of the principle of distinction in the law of hostilities, while there is no obligation in the *lex lata* or following State practice to do so.<sup>1295</sup> This may slow down and postpone operations at times when speed is of the essence. In fact, the realization of such inequality and disadvantages among

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<sup>1290</sup> Hampson (2011), 201.

<sup>1291</sup> Hayashi (2010a), 2.

<sup>1292</sup> Hayashi (2010a), 2.

<sup>1293</sup> Boothby (2010), 754; de Cock (2010), 119.

<sup>1294</sup> Schmitt (2010c), 23.

<sup>1295</sup> Watkin (2010), 643, who argues that the ICRCs approach to organized armed groups “directly calls into question the observation found in the Interpretive Guidance that it “does not purport to change the law, but provides an interpretation of the notion of direct participation in hostilities within existing parameters” (referring to ICRC (2009), 6).



members of regular armed forces may undermine the credibility of LOAC and their willingness to comply with its norms.

Beyond the difficulty of establishing CCF in the first place, once CCF has been established, the possibility for attack is limited. In contrast to regular armed forces, where only medical and, religious personnel are immune from attack, the scope of (non-CCF) functions immune from attack with organized armed groups is much larger, as noted. Thus, while non-combatant combat support personnel, such as cooks, or administrative personnel of organized armed groups may not be attacked by regular armed forces, the reverse is not true with their counterparts in regular armed forces: as members of the regular armed forces they are combatants not immune from attack.<sup>1296</sup>

In practice, the above implies that only a relatively small group of individuals within an organized armed group may be lawfully attacked, whereas the vast majority enjoys, in principle, protection from such attack as non-CCF, *unless and for such time* as they directly participate in hostilities. As will be outlined in more detail below as well, this temporal aspect has additional consequences in terms of military practice, particularly in relation to those members not in a continuous combat function that nonetheless frequently directly participate in the hostilities.

To remove this inequality between non-organized armed groups and regular armed forces<sup>1297</sup> it has been proposed to consider *all* those identifiable as members of organized armed groups as either members of the armed forces, analogous to regular armed forces, or as civilians *continuously* participating in hostilities.<sup>1298</sup> Not surprisingly, those advancing humanitarian concerns look upon these approaches with concern.

As follows from the above, the law has not crystallized on this issue. Yet, all sides appear to agree that besides actual fighters, also those persons involved in the planning of an operation can be regarded as CCF.

#### 1.1.2.2.2. Members of the Armed Forces of a *Party to the Conflict*

As the above examination has made clear, the issue of membership is crucial in distinguishing between the non-State party to the conflict and its armed forces. This determination serves to distinguish between “irregularly constituted armed groups conducting organized hostilities on the one hand, and civilians directly participating in hostilities on a merely unorganized, sporadic or spontaneous basis on the other.”<sup>1299</sup>

According to the ICRC, it must therefore be established that the organized armed group operates functionally *on behalf* of the non-State party. This is expressed in the requirement that the organized armed group must act under a command responsible to a party to the conflict for the conduct of its subordinates.<sup>1300</sup> As with irregular armed groups in IAC, an

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<sup>1296</sup> This, however, does not exclude the possibility that in order to maximize the combat capability of the insurgent movement combat support tasks may be carried out in addition to, rather than instead of a continuous combat function.<sup>1296</sup> Melzer (2010b), 849-850; Mao (1962), Table 1 (“Organization of an Independent Guerrilla Company”), Note 4.

<sup>1297</sup> Clearly, it does not remove the difference between functional membership and formal membership inherent to these forces.

<sup>1298</sup> Watkin (2010), 675. For the analysis, see 674 ff.

<sup>1299</sup> Melzer (2008), 319.

<sup>1300</sup> ICRC (2005a), Rule 4. Such command need not be equivalent to a hierarchical system of military organization generally found in regular armed forces. Sandoz, Swinarski & Zimmerman (1987), § 4463. It seems reasonable to demand that they possess the features required for resistance movements in IAC. Melzer (2008), 319.

organized armed group may be considered to ‘belong’ to a non-State party to the conflict when it can be determined that a *de facto* relationship exists which finds expression by tacit agreement or an official declaration, or may be concluded from its behavior.<sup>1301</sup> As noted by Melzer

[...] these elements appear to provide margins which are flexible enough to take into account organizational, structural, cultural, political and other contextual diversities while maintaining the core content of what functionally constitutes the armed forces of a party to the conflict in contradistinction to the civilian population.<sup>1302</sup>

Some perceive the condition of ‘belonging’ to a party to the conflict as a limiting factor. After all, it would exclude from attack all members of armed forces of an organized armed group *not* belonging to a party to the conflict, but which nonetheless reflect all the other necessary requirements of an organized armed group.<sup>1303</sup> These persons must in principle be regarded as civilians protected from attack, unless and for such time as they directly participate in the hostilities. This would thus bar the counterinsurgent forces from attacking them on a continuous basis.

### 1.1.3. Shift in Immunity

In both IAC and NIAC, the mere identification of an individual’s status is a crucial, but not always a conclusive exercise in answering the question of attackability. It may be that circumstances surrounding a member of the armed forces of a party to the conflict or a civilian change such that the principle of distinction – as a reflection of notions of military necessity and humanity – affords immunity from direct attack, or suspends that immunity.

The immunity of the following individuals otherwise protected from direct attack is *suspended* or *terminated* due to their own conduct when:

- Civilians take a direct part in the hostilities;
- Medical, religious and persons *hors de combat*, as well as civil defense personnel engage in acts harmful to the adversary;

Of these categories, particular attention will be paid below to civilians who take a direct part in the hostilities (paragraph 3.3.1). As concluded above, the CCF-requirement introduced by the ICRC implies that only part of the armed forces of an insurgent movement can be considered as members of the armed forces to a party to the conflict, and hence, and has lost immunity from attack on a continuous basis. This implies that all other individuals who are part of an insurgency movement, including members of the armed forces of an organized armed group in a non-CCF function, must be considered civilians. The same applies to all individuals affiliated with an insurgency movement that is not a party to the conflict, to include members of its armed forces regardless of their CCF. They become subject to attack only when and for such time as they lose immunity from attack due to their DPH.

A second category of individuals subject to a shift in immunity concerns individuals otherwise subject to lawful direct attack, but *afforded* immunity due to their being rendered *hors de combat* (paragraph 3.3.2). In essence, this concerns all individuals belonging to the authoritative personal scope of hostilities. For the purposes of the study, the focus will be on ‘insurgent’-civilians directly participating in hostilities, and members of the armed forces of an insurgency movement party to the conflict.

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<sup>1301</sup> Analogous to resistance organizations in IAC, see Pictet (1960), 57; Melzer (2008), 320.

<sup>1302</sup> Melzer (2008), 320.

<sup>1303</sup> Schmitt (2009a), 817.

### 1.1.3.1. Civilian DPH

It is generally accepted in both the conventional and customary law of IAC and NIAC that civilians are to be protected from direct attacks “unless and for such time they DPH.”<sup>1304</sup> Unlike combatants, civilians have no right to DPH: they lack combatant privilege.<sup>1305</sup> Nevertheless, DPH is not prohibited in international law,<sup>1306</sup> and it is not in itself a war crime.<sup>1307</sup> Upon DPH, civilians are obliged to comply with LOAC. If they fail to do so they may become subject to prosecution for war crimes.<sup>1308</sup> In addition, and as a result of the absence of combatant privilege, they lack combatant immunity: DPH-civilians may be prosecuted for acts violating a State’s domestic law. Finally, DPH-civilians in an IAC are not entitled to post-capture POW-status.<sup>1309</sup>

The general underlying premise of the concept of DPH is that, while civilians are generally protected from direct attack because they do not pose a military threat, their engagement in hostile acts does; and that for the time civilians engage in such acts (“unless and for such time”) their immunity from direct attack is *suspended*. The phrase “unless and for such time” implies therefore an important *temporal* element, in that the immunity from direct attack is restored from the moment the civilian ceases to DPH.<sup>1310</sup>

The concept of civilian DPH therefore triggers two primary questions: (1) what does the general concept of DPH entail; and (2) what is the scope of the phrase “unless and for such time”? Both questions will be addressed below.

#### 1.1.3.1.1. The General Concept of “Direct Participation in Hostilities”

Given the *factual* significance of the role of civilians in contemporary conflicts (resulting from the shift of military operations to population centers in contemporary conflicts, the deliberate mixture of violent non-State actors among the civilian population, and the increase in the participation of hostilities of civilians),<sup>1311</sup> the need for legal clarity of the concept of DPH has become paramount. Clearly, such clarity serves the interest of civilians.<sup>1312</sup> As noted by Melzer,

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<sup>1304</sup> Article 51(3) AP I; Article 13(3) AP II; Rule 6, ICRC (2005a).

<sup>1305</sup> Civilians directly participating in hostilities are often designated as ‘unlawful combatants’ or ‘unprivileged combatants’. One is, however, cautioned in the use of both terms. As noted, the term ‘unlawful combatant’ is absent in conventional and customary LOAC and must be primarily viewed as descriptive and, for legal purposes, in light of its interpretation in domestic law. In addition, the term ‘unprivileged combatant’ is reserved for combatants in an IAC who have forfeited their combatant privilege, for example because they do not comply with the conditions as set out in Article 44 AP I. See Watkin (2005c), 139; Dörmann (2003b), 46 f.

<sup>1306</sup> The only exception is found in Article 67(1) AP I, which prohibits civil defense personnel from directly participating in the hostilities whilst in the performance of their civil defense duty. Direct participation in hostilities may constitute a criminal offence in domestic law. See Rule 6, ICRC (2005a). See also Melzer (2008), 330-331.

<sup>1307</sup> It does not appear, for example, as a war crime in the statutes of the ICTY, ICTR, ICC or SCSL.

<sup>1308</sup> (2002n), *The Prosecutor v. Kumarac and Others, Case Nos. IT-96-23 & IT-96-23/1, Judgment of 12 June 2002 (Appeals Chamber)*, §§ 57 ff; (2002o), *The Prosecutor v. Mitar Vasiljevic, Case No. IT-98-32, Judgment of 29 November 2002 (Trial Chamber)*, §§ 24 ff.

<sup>1309</sup> As for the normative framework of deprivation of liberty applicable to civilians during an armed conflict, see Part 2, Chapter III.

<sup>1310</sup> This stands in contrast to the other categories of individuals mentioned above, whose immunity from direct attack is *terminated* once they engaged in harmful acts or hostile acts. Melzer (2008), 330.

<sup>1311</sup> For a brief historical overview, see Schmitt (2010c), 7-11.

<sup>1312</sup> Bothe, Partsch & Solf (1982), 302.

[i]n the absence of such clarity, armed forces operation in a hostile environment might be inclined to consider any civilian showing the slightest enmity as directly participating in hostilities, which would amount to a *de facto* presumption of loss of protection irreconcilable with the fundamental principle of distinction.<sup>1313</sup>

Clarity, however, also benefits military interests. As noted in the discussion of the concepts of insurgency and counterinsurgency, abidance to notions of distinction, security for the civilian population, and legitimacy are tactical, operational and strategic imperatives that cannot be ignored. Frustratingly, while frequently appearing in conventional and customary LOAC, the term ‘direct participation in hostilities’ remains undefined. No clear guidance can be derived from the *travaux préparatoires*,<sup>1314</sup> State practice, or jurisprudence.

As a result, views to the concept differ. Those in favor of maximum protection for civilians interpret the concept *restrictively* and limit it to direct combat and active military operations posing an immediate threat only; thus excluding its extension to support of the general war effort.<sup>1315</sup> Others support a *liberal* approach, implying direct participation to hostilities not only to include direct acts of hostilities, but also second tier activities sustaining the general war effort, such as planning, organization, recruitment and the exercise of logistical functions.<sup>1316</sup>

In the view of the ICRC, DPH, whether in the context of an IAC or a NIAC, amounts to “*specific* hostile acts carried out by *individuals* as part of the conduct of *hostilities* between *parties* to an armed conflict.”<sup>1317</sup> This definition thus combines two elements: *firstly*, the concept of ‘hostilities’, i.e. the “(collective) resort by the *parties to the conflict* to means and methods of injuring the enemy” and, *secondly*, “the *individual involvement* of a person in these hostilities”<sup>1318</sup> through specific acts. The choice of the ICRC for *specific* hostile acts is deliberate, and aims to avoid the possibility that a party to the conflict regards the concept of DPH to include an individual’s continuous loss of immunity from direct attack based on his

[...] *continued* intent to carry out unspecified hostile acts in the future. However, any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction made in IHL between temporary, activity-based loss of protection (due to direct participation in hostilities), and continuous, status or function-based loss of protection (due

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<sup>1313</sup> Melzer (2008), 333.

<sup>1314</sup> Rule 6, ICRC (2005a); Watkin (2005c), 140; Schmitt (2004), 507 ff; Gehring (1980), 17 f; Melzer (2008), 333.

<sup>1315</sup> Gehring (1980), 19; Sandoz, Swinarski & Zimmerman (1987), § 1944-1954 (Article 51 AP I); § 1679 (Article 43 AP I); § 4787 (Article 13 AP II); (2005d), HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (11 December 2005), § 37; (1999), *Third Report on the Situation of Human Rights in Colombia*, LACiHR (26 February 1999), § 53-54.

<sup>1316</sup> Hays Parks (1989), 6 f (proposing that civilians within military objectives are subject to lawful direct attack and arguing that the distinction between civilians and civilians directly participating in hostilities needs to be resolved along policy lines, as the law does not provide a clear answer); Schmitt (2004), 509 (proposing that civilians in ‘grey areas’ (e.g. working in munitions factory) must be presumed to have lost their immunity, until proven otherwise by that civilian); Watkin (2005c), 145, 153 (proposing that in relation to members of an organized armed group direct participation need not be established on an individual basis, but on a group basis, using a functional approach by equalizing an organized armed group with the organizational military staff structure of regular armed forces). Opposing the liberal approach: Melzer (2008), 341.

<sup>1317</sup> ICRC (2009), 43.

<sup>1318</sup> ICRC (2009), 43. As explained by Melzer, the concepts of ‘hostilities’ and ‘direct participation’ “cannot be separated because the collective ‘conduct of’ hostilities essentially corresponds to the sum total of all military operations or hostile acts carried out by those ‘directly participating in’ hostilities.” Melzer (2008), 342.

to combatant status or continuous combat function). In practice, confusing the distinct regimes by which IHL governs the loss of protection for civilians and for members of State armed forces or organized armed groups would provoke insurmountable evidentiary problems. Those conducting hostilities already face the difficult task of distinguishing between civilians who are and civilians who are not engaged in a specific hostile act (direct participation in hostilities), and distinguishing both of these from members of organized armed groups (continuous combat function) and State armed forces. In operational reality, it would be impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurrent basis and whether they have the continued intent to do so again. Basing continuous loss of protection on such speculative criteria would inevitably result in erroneous or arbitrary attacks against civilians, thus undermining their protection which is at the heart of IHL.<sup>1319</sup>

To determine an individual's direct participation of hostilities, the ICRC proposes that three, cumulative constitute elements need be fulfilled: (1) the threshold of harm; (2) direct causation; and (3) belligerent nexus.<sup>1320</sup> All three will be briefly addressed below.

#### 1.1.3.1.1.1. Threshold of Harm

According to the Interpretative Guidance,

[i]n order to reach the required threshold of harm, a specific 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.<sup>1321</sup>

Harm to military operations or the military capacity of a party to an armed conflict concerns damage as a result of any specific act that *reasonably* may be expected to have a negative influence on the *military* operations or the *military* capacity of a party to the conflict, irrespective of its scope.<sup>1322</sup> The threshold of harm implies that DPH does not arise in the absence of conduct that causes harm of *other* than military nature or death, injury or destruction on protected persons or objects, such as that resulting from “the building of fences or roadblocks, the interruption of electricity, water, or food supplies, the appropriation of cars and fuel, the manipulation of computer networks, and the arrest or deportation of persons [...]”<sup>1323</sup>

The *actual materialization* of harm is *not required*.<sup>1324</sup> Nor is it required that the harm reach a certain quantitative threshold: “any consequence adversely affecting the military operations or military capacity of a party to the conflict” is sufficient harm.<sup>1325</sup> Besides death, injury, or destruction on military personnel and objects, this includes harm resulting from sabotage and other armed and unarmed activities, such as the disruption or restrictions of deployments, logistics or communication, the denial of the use of means, objects or terrain, capturing prisoners or communicating target-information at an approximating attack.<sup>1326</sup> In the

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<sup>1319</sup> ICRC (2009), 45.

<sup>1320</sup> Generally speaking, some exceptions aside, these elements found support with the experts during the ICRC/Asser expert meetings.

<sup>1321</sup> ICRC (2009), 47.

<sup>1322</sup> Schmitt argues that the concept of ‘harm’ should also include acts of a party that may strengthen its capacity, in other words: any specific act that reasonably may be expected to have a *positive* influence on the military operations or the military capacity of a party to the conflict. Schmitt (2010c), 27.

<sup>1323</sup> ICRC (2009), 49.

<sup>1324</sup> See also: Schmitt (2010c), 27.

<sup>1325</sup> ICRC (2009), 47.

<sup>1326</sup> ICRC (2009), 48 (also, for more examples).

view of the ICRC harm does not arise when a civilian's conduct fails to positively affect the military operations or military capacity of a party to the conflict.<sup>1327</sup> An example is the civilian who refuses to collaborate with a party to the conflict.

The threshold of harm is also crossed when the conduct does not adversely affect the military operations or capacity of a party to the conflict, but still inflicts death, injury or destruction on persons or objects protected against direct attack.<sup>1328</sup> Examples are sniper attacks against civilians<sup>1329</sup> or the bombardment or shelling of civilian villages or urban residential areas.<sup>1330</sup>

#### 1.1.3.1.1.2. Direct Causation

For participation in hostilities to result in the loss of immunity from direct attack it is required that such participation is 'direct'.<sup>1331</sup> The ICRC has formulated the meaning of the condition 'direct' as follows:

[i]n order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific 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.<sup>1332</sup>

It is only in the event of a direct connection between the specific act and the harm that military necessity overrides humanitarian considerations.<sup>1333</sup> The emphasis on 'specific' and 'concrete' is made to point out that, at the collective level of the opposing parties to an armed conflict, 'direct' participation "is restricted to specific acts that are so closely related to the hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities."<sup>1334</sup> In the view of the ICRC, it is this conduct that brings about the required harm in "*one causal step*": direct causation.<sup>1335</sup> This is not to imply that the conduct must be indispensable. At the same time, the mere fact that the conduct is indispensable is not in itself sufficient.<sup>1336</sup> For example: while the financing of the armed forces may be indispensable, it does not in itself amount to an act of direct participation in hostilities. In contrast, an individual functioning as one of several 'spotter' (i.e. a lookout) may not

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<sup>1327</sup> ICRC (2009), 49.

<sup>1328</sup> ICRC (2009), 49. The underlying rationale is that the concept of attacks, as defined in LOAC (as "acts of violence against the adversary, whether in offence or in defence" (Article 49(1) AP I)), is target-neutral, but merely demands a belligerent nexus of an attack. Schmitt questions "why the criterion should be limited to death, injury, or destruction. Would it not, for instance, constitute direct participation to force inhabitants of a particular ethnic group to leave an occupied area during a conflict in which ethnicity factored? A more useful criterion in this regard would distinguish actions directly related to the armed conflict from those that are merely criminal in nature." Schmitt (2010c), 28.

<sup>1329</sup> (2003o), *The Prosecutor v. Galic, Case No. IT-98-29-T, Judgment of 5 December 2003 (Trial Chamber)*, § 27 jo. § 52.

<sup>1330</sup> (2008n), *The Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment of 17 July, 2008 (Appeals Chamber)*, § 282 jo § 289.

<sup>1331</sup> The relevant provisions in the law of NIAC uses the words 'active' (in CA 3) and 'direct' (Articles 51(3) AP I; 43(2) AP I; 67(1) AP I and 13(3) AP II). The French texts in all sources refers to "participent directement." Today, there is general agreement that the terms 'active' and 'direct' "refer to the same quality and degree of individual participation in hostilities." ICRC (2009), 43, confirmed in (1998k), *The Prosecutor v. Akayesu, Case No. 96-4-T, Trial Chamber Judgment (2 September 1998)*, § 629; Melzer (2008), 335; Dinstein (2010), 146.

<sup>1332</sup> ICRC (2009), 51 (emphasis added).

<sup>1333</sup> Schmitt (2010a), 726.

<sup>1334</sup> ICRC (2009), 58.

<sup>1335</sup> ICRC (2009), 53.

<sup>1336</sup> ICRC (2009), 54.

be indispensable, but would be taking a direct part in the hostilities. In addition, the ICRC warns that the requirement of direct causation must not be confused with *geographical* or *temporal* proximity. For example, while the use of delayed or remotely controlled means remains direct despite the temporal delay, the deliverance of food to troops engaged in combat does not amount to direct causation.<sup>1337</sup> Nonetheless, some scholars argue that distance does matter (although admitting that it “is not everything”).<sup>1338</sup>

The requirement of “direct” participation at the same time implies that participation in hostilities that can be qualified as “indirect” does not amount to DPH and consequently does not lead to loss of protection. Participation is “indirect” when the individual is engaged in activities that are part of: (1) the *general war effort* or (2) may be characterized as *war-sustaining activities*.<sup>1339</sup> Unlike the conduct of hostilities, which is designed to bring about the materialization of the required harm, the general war effort and war sustaining activities “merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm [...]”.<sup>1340</sup> While both may create a causal link between the act and resulting harm – ultimately even harm reaching the threshold required for DPH – this link is merely indirect. To accept an indirect causation as a standard for DPH “would bring the entire war effort within the concept of direct participation in hostilities and, thus, would deprive large parts of the civilian population of their protection against attack.”<sup>1341</sup> Examples of indirect causation are the imposition of a regime of economic sanctions on a party to an armed conflict, depriving it of financial assets; providing its adversary with supplies and services, such as electricity, fuel, construction material, finances and financial services; scientific research and design, production and transport of weapons and equipment not carried out as an integral part of a specific military operations designed to directly cause the required threshold of harm; the recruitment and training of personnel for other purposes than the execution of a predetermined hostile act.<sup>1342</sup>

The question arises whether measures which form part of chain acts must each be separately examined for their direct cause. An example is the detonation of an IED, which is characterized by the chain of acts to include the finance, purchase and smuggling of components, their assembly and storage, the transportation of the IED to the scene of detonation, its planting and actual detonation.<sup>1343</sup> It is the view of the ICRC that, “where a specific act does

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<sup>1337</sup> ICRC (2009), 55; Dinstein (2010), 149-150.

<sup>1338</sup> Dinstein (2010), 151; Stephens & Lewis (2006), 50; Guillory (2001), 135-136. Dinstein, for example, argues that a civilian driving a military munitions truck in the US while the area of operations is Afghanistan renders him a civilian protected from direct attack, whereas that same civilian would be directly participating in the hostilities if he were to drive the same truck in Afghanistan. In contrast, Rogers argues that the civilian enjoys protection from direct attack at all times. Rogers (2004), 11-12.

<sup>1339</sup> The ICRC defines the general war effort as “to include all activities objectively contributing to the military defeat of the adversary (e.g. design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations). The ICRC defines war-sustaining activities as to “include political, economic or media activities supporting the general war effort (e.g. political propaganda, financial transactions, production of agricultural or non-military industrial goods).” ICRC (2009), 51. See also Sandoz, Swinarski & Zimmerman (1987), §§ 1679 (Article 43 AP I) and 1945; (1999), *Third Report on the Situation of Human Rights in Colombia, LACiHR (26 February 1999)*, § 56.

<sup>1340</sup> ICRC (2009), 52.

<sup>1341</sup> ICRC (2009), 52.

<sup>1342</sup> ICRC (2009), 54.

<sup>1343</sup> Another example concerns the launching of a missile via an unmanned aerial vehicle, involving computer specialists operating the vehicle with remote control; forward air controllers, intelligence personnel, the commander.

not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.”<sup>1344</sup>

While it is generally recognized that the relationship between the act and the harm should be relatively proximate, the “one causal step”-approach of the ICRC has been criticized as interpreting the requirement of directness too restrictively, and should include acts that contribute to the capacity of specific operations.<sup>1345</sup> In view of IED attacks, for example, the ICRC-approach “limits action to deal with such attacks to a reactive posture focused on “acts” rather than on the capacity of an opponent to plan and attack in the future. The initiative is therefore surrendered to the enemy force.”<sup>1346</sup> As argued by Schmitt, the better approach is to view as sufficient that the act should form “an integral part” of the operation causing harm. While the Interpretive Guidance uses this condition, it does so only in connection to coordinated military operations, and not to individual operations. In that way, individuals engaged in acts that by and of itself do not constitute DPH, such as intelligence collection, and that may not be indispensable *per se*, are still part of the entire operation and could be lawfully attacked.<sup>1347</sup> As explained by Schmitt

[t]he benefits of an approach focusing on integrality rather than number of steps should be apparent. After all, it is difficult to conceive of an indirect, yet integral act. And acts many steps removed from an eventual hostile act may nevertheless be integral to an operation. An example is acquiring the materials to build an improvised explosive device or suicide vest to be used in a predetermined attack. Perhaps most importantly, from a practical perspective, those involved in armed conflict are likely to have a much better grasp of which acts are integral to “military” operations than those which meet a juridical test of direct causation.<sup>1348</sup>

Following the ‘integral part’-approach, acts now excluded from DPH following the ‘one causal step’-approach may reasonably result in the loss of immunity from direct attack.

#### 1.1.3.1.1.3. Belligerent Nexus

The third condition of DPH is the requirement of *belligerent nexus*. As explained by the ICRC

[i]n order to meet the requirement of belligerent nexus, 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.<sup>1349</sup>

While an act may directly adversely affect the military operations or military capacity of a party to an armed conflict or directly inflict death, injury, or destruction on persons and objects protected against direct attack, it would not amount to DPH if it is carried out in the absence of a so-called belligerent nexus. Thus, in view of the ICRC, the use of lethal force

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<sup>1344</sup> ICRC (2009), 54-55.

<sup>1345</sup> Schmitt (2010c), 29; Schmitt (2010a), 727.

<sup>1346</sup> Watkin (2010), 658.

<sup>1347</sup> Schmitt (2010a), 729 ff. Particular controversy arose during the ICRC/Asser expert meetings with respect to the issues of IEDs, collective operations, and, most notably, human shields. ICRC (2006), 44; ICRC (2008a), 70. On human shields, see Schmitt (2009b); Lyall (2008). In relation the subject of human shields, the Interpretive Guidance takes the approach that voluntary human shields should not be regarded as civilians directly participating in the hostilities. Opponents of this view argue that “[...] those who argue that voluntary shields should be treated as direct participants embrace the characterization not because they want the shields to be subject to attack, but rather because it will preclude the inclusion of their death or injury in the proportionality calculation and thereby maintain the delicate military necessity-humanitarian considerations balance.”

<sup>1348</sup> Schmitt (2010a), 729.

<sup>1349</sup> ICRC (2009), 58.



by civilians in situations of individual self-defense,<sup>1350</sup> during their exercise of power over persons or territory, or in situations of civil unrest or inter-civilian violence does not, without more, constitute hostilities, for lack of a belligerent nexus.<sup>1351</sup> In all of these situations, the permissibility of the use of force is to be regulated by the normative paradigm of law enforcement. The harm must follow from an act that constitutes *armed* violence, directly following from the means and methods used in the conduct of hostilities and thus constituting acts of direct participation. A belligerent nexus clearly cannot be established if the acts that are designed to inflict harm are acts of indirect participation, as explained above.

The existence of a belligerent nexus must be determined objectively and reasonably in view of the circumstances. Unless it can objectively and reasonably be concluded that an individual is *not aware* of his or her direct participation in the hostilities,<sup>1352</sup> the determination of belligerent nexus must be taken place without further account of the subjective intent or other mental state underlying the individual's participation in the hostilities or his or her hostile intent.<sup>1353</sup> As formulated by the ICRC:

[...] the decisive question is whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party.<sup>1354</sup>

While the least controversial of the three conditions of DPH, some have objected against the limitations underlying the phrase “in support of a party to the conflict and to the detriment of another,” for it implies that a belligerent nexus only arises when specific hostile acts of members of an organized armed group of individual civilians support a party to the conflict, whereas it is conceivable that such specific acts are carried out not in support of a particular party to the conflict, but merely *against* a party to the conflict. Schmitt refers in this context to the Shia militia in Iraq, which staged operations against both the Sunni and the international coalition, but which in his view had no belligerent nexus with one of the parties to the IAC (i.e. the US and coalition States, and Iraq). The, in his eyes, preferred phrase would call “in support of a party to the conflict *or* to the detriment of another.”<sup>1355</sup>

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<sup>1350</sup> As noted by Melzer, the use of force in individual self-defense “presupposes an *unlawful* attack, and can therefore not be exercised against *lawful* military operations of an adverse party to the conflict. The use of armed force in response to lawful military operations of the adversary would amount to direct participation in hostilities. The use of armed force by civilians in self-defence against direct attacks on the civilian population or to prevent marauding soldiers from looting, burning and raping in conquered territory would not, however, deprive civilians of their protection against direct attack.” Melzer (2008), 343; Schmitt (2004), 520; (2000o), *The Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment of 3 March 2000 (Trial Chamber)*, § 407.

<sup>1351</sup> ICRC (2009), 62-63.

<sup>1352</sup> It is argued that these individuals remain protected civilians, and any use of force resulting in their deprivation of life must be based on the proportionality assessment underlying military operations that may result in incidental civilian death or injury.

<sup>1353</sup> The notion of hostile intent is a term not of LOAC, but a technical term related to ROE. It may prohibit the use of lethal force in situations clearly constituting an act of direct participation in hostilities, while at the same time it may provide the basis for the use of lethal force in individual self-defense against conduct not constituting direct participation in hostilities. ICRC (2009), 59 (footnote 151)-60.

<sup>1354</sup> ICRC (2009), 64.

<sup>1355</sup> Schmitt (2010a), 736.

#### 1.1.3.1.2. “Unless and For Such Time”

The concept of DPH contains an important temporal element: the requirement that a civilian enjoys immunity from direct attack “unless and for such time” he or she directly participates in the hostilities. This element has two functions: *firstly*, it is determinative of the substantive scope of the concept of DPH (i.e. the beginning and end of a specific act constituting DPH), and *secondly*, it functions as a modality governing the temporal aspect of the loss of protection against direct attack.

##### 1.1.3.1.2.1. Beginning and End of DPH

With respect to the first function, the element “for such time” is material in the determination of the concept of DPH. More concretely, it triggers the question of what acts may be viewed as the *beginning* and *end* of DPH. In the view of some, the temporal element must be interpreted restrictively, to refer only to the *actual engagement* in hostile acts, such as the firing of weapons.<sup>1356</sup> The ICRC adopts a somewhat more lenient approach, and accepts that the temporal element allows for the inclusion of

[...] measures *preparatory* to the execution of such an act, as well as the *deployment* to and *return* from the location of its execution, where they constitute an integral part of such a specific act or operation.<sup>1357</sup>

Preparatory measures are in essence military operations preparatory to an attack. It is because of the close and direct link to the subsequent execution of a *specific* act (the attack) that they may be viewed as an integral part of that act.<sup>1358</sup> They must be distinguished from preparatory measures that support the general war effort to carry out unspecified acts, which constitute acts of indirect participation in hostilities.<sup>1359</sup> The temporal or geographic proximity of the preparatory act to the specific act is irrelevant. Nevertheless, whether a preparatory measure constitutes an act of DPH is a determination that requires “a careful assessment of the totality of the circumstances prevailing in the concrete context and at the time and place of action.”<sup>1360</sup> According to the ICRC, examples of preparatory measures with a view to the execution of a specific act and amounting to DPH *include, inter alia*, the equipment, instruction, training and transport of personnel, gathering of intelligence; and preparation, transport, and positioning of weapons and equipment. In contrast, the ICRC *excludes* from the scope of preparatory acts amounting to DPH *inter alia* the purchase, production, smuggling and hiding of weapons; general recruitment and training of personnel; and financial, administrative or political support to armed actors.<sup>1361</sup>

As far as the *deployment* and *return* are concerned: the ICRC holds that if acts form an integral part of the specific act, they are to be considered as an integral part of an act of DPH. The

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<sup>1356</sup> Amnesty International (2001), 29; McKeogh (2002), 140.

<sup>1357</sup> ICRC (2009), 65.

<sup>1358</sup> ICRC (2009), 65-66; also Article 44(3) AP I. Conversely, acts preparatory to the general campaign of unspecified acts do form part of an act of direct participation in hostilities.

<sup>1359</sup> Criticizing this approach is Boothby (2010), 746-747, who contends that the ICRC arguably misinterprets the phrase “in a military operation preparatory to an attack,” in Article 44(3) AP I. The ICRC Commentary to Article 44(3) AP I explains that the phrase refers to “*any* action carried out with a view to combat.” Sandoz, Swinarski & Zimmerman (1987), § 1692 (Article 44(3) AP I) (emphasis added). In his view, the better approach is to establish whether the preparatory act itself constitutes an act of DPH, and not whether the act may be preparatory to an act of DPH.

<sup>1360</sup> ICRC (2009), 67.

<sup>1361</sup> ICRC (2009), 66-67.

relevant condition is the *physical displacement* to and from a location, and the *physical separation* from the operation upon return.<sup>1362</sup>

Overall, the ICRC's approach in relation to preparatory acts as well as deployment and return is by many perceived as unnecessarily and unrealistically restricting the notion of DPH. Some experts suggest an alternative approach, which focuses on the chain of causation and implies that the period of direct participation includes all acts, before and after, in causal connection to the hostile act. As explained by Dinstein, "[i]n demarcating the relevant time span in the course of which a civilian is directly taking part in hostilities, it is necessary to go as far as is reasonably required both 'upstream' and 'downstream' from the actual engagement."<sup>1363</sup>

#### 1.1.3.1.2.2. Temporal Scope of the Loss of Protection

The phrase "unless and for such time" also functions as a *modality* governing the temporal aspect of the loss of civilian protection against direct attack. Unlike members of an organized armed group in a CCF, who may be targeted for the duration of their membership and cease to be civilians, in relation to *civilians*, the immunity from direct attack is *suspended* only during the period from the beginning until the end of the DPH<sup>1364</sup> and in relation to an existing and *concrete* threat arising from a specific act of DPH.<sup>1365</sup> In other words, the civilian retains his or her status as a civilian when directly participating in hostilities.<sup>1366</sup> The ICRC has been adamant not to interpret the phrase "unless and for such time" to imply that civilians who participate on a "persistently recurring basis" could be attacked on a continuous basis.<sup>1367</sup> In the view of the ICRC it would be "impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurring basis and whether they have the continued intent to do so again."<sup>1368</sup> Rather, the phrase "unless and for such time" is limited to participation taking place on a merely *spontaneous, unorganized or sporadic* basis.<sup>1369</sup>

As such, the phrase "unless and for such time" in the context of civilians directly participating in hostilities signifies the possibility of a '*revolving door*', implying that the civilian immunity from attack shifts depending on whether the individual is on the protective or unprotected side of the door.<sup>1370</sup> In the view of the ICRC, this '*revolving door*'-function is "an integral part, not a malfunction" of LOAC.<sup>1371</sup>

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<sup>1362</sup> ICRC (2009), 67-68.

<sup>1363</sup> Dinstein (2010), 148. Also Dinstein (2008), 189-190; Watkin (2004), 17; Schmitt (2010c), 36-37; Boothby (2010), 750 ff. For example, while the Interpretive Guidance excludes from the temporal scope of direct participation preparatory measures such as the acquisition of materials to build an IED, such acts are included in the alternative approach.

<sup>1364</sup> ICRC (2009), 71. As noted by Melzer, "[a]s there is temporal identity between the duration of 'direct participation in hostilities' and the duration of the ensuing 'suspension against direct attack', determining the temporal scope of the loss of protection is equivalent to clarifying the beginning and end of direct participation in hostilities itself." Melzer (2008), 347.

<sup>1365</sup> Melzer (2008), 347.

<sup>1366</sup> Dinstein argues that an individual – not member of the armed forces of a party to the conflict – directly participating in the hostilities loses his status of civilian and effectively becomes an unlawful combatant. See Dinstein (2010), 147. Also: Goodman (2009), 51.

<sup>1367</sup> ICRC (2009), 44.

<sup>1368</sup> ICRC (2009), 45.

<sup>1369</sup> ICRC (2009), 71.

<sup>1370</sup> The idea of the '*revolving door*' was mentioned for the first time by Hays Parks in his article *Air War and the Law of War*, explaining that the "initial problem with the establishment of combatant or civilian sta-

It prevents attacks on civilians who do not, at the time, represent a military *threat*. [...] As the concept of direct participation in hostilities refers to specific hostile acts, IHL restores the civilian's protection against direct attack each time his or her engagement in a hostile act ends.<sup>1372</sup>

While those protecting humanitarian interests applaud this mechanism, it has been objected from an operational point of view, for it provides a window of abuse, which may severely hampering military operations.

On a more general note, Schmitt opposes the idea that the civilian poses a *military threat* whilst directly participating in hostilities, and does *not* pose such threat when acting as a civilian. In his view, the loss of protection is not subject to the determination of a threat, but an individual's *decision* to directly participate in the hostilities. In relevant part, he argues:

Indeed, particular acts of direct participation may not pose an immediate threat at all, for even by the restrictive ICRC approach, acts integral to a hostile operation need not be necessary for its execution. Instead, the notion of "threat" is one of self-defense and defense of the unit, which is a different aspect of international law. It is accounted for in operational procedures known as rules of engagement, which are based as much in policy and operational concerns as in legal requirements. To the extent it is based in law, self-defense applies to civilians who are not directly participating in hostilities rather than those who are participating (as they may be attacked without any defensive purpose).<sup>1373</sup>

More specifically, instead of increasing the protection of neutral civilians, the 'revolving door'-approach may have just the opposite effect, particularly in the case of recurring participation. As argued by Watkin,

[i]n adopting the "revolving door" theory as it has, the Interpretive Guidance blurs the line between those civilians who take a direct part in hostilities and members of organized armed groups. Combined with a narrow concept of membership in an organized armed group and a correspondingly broad notion of who is a civilian, the protection normally associated with uninvolved civilians begins to look like a form of immunity for insurgents. It is a protection which is consciously not provided to State security forces. Further, on one level the term "revolving door" evokes the idea of a form of carnival shooting gallery, where soldiers must wait until an opponent pops out from behind a door to be shot at. At some point, the credibility of the law begins to be undermined by suggesting an opponent can repeatedly avail themselves of such protection.<sup>1374</sup>

The 'revolving door' is particularly difficult to reconcile with civilians who do not directly participate in the hostilities on a spontaneous, unorganized or sporadic basis, but who instead participate on a "persistently recurring basis."<sup>1375</sup> As held by several experts, such civilians ought to lose immunity from attack on a *continuous* basis as long as their DPH lasts. Support for this view can be found in ICRC Commentary to Article 13(1) AP II for support. In relevant part, the commentary states that

[i]f a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks *for as long as his participation lasts*. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked.<sup>1376</sup>

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tus lies in the new revolving door provided for by Protocol I for certain 'civilians.'" Hays Parks (1990), 118)

<sup>1371</sup> ICRC (2009), 70.

<sup>1372</sup> ICRC (2009), 70-71.

<sup>1373</sup> Schmitt (2010c), 37. Also: Boothby (2010), 757.

<sup>1374</sup> Watkin (2010), 689. See also Boothby (2010), 757-758.

<sup>1375</sup> ICRC (2009), 44.

<sup>1376</sup> Sandoz, Swinarski & Zimmerman (1987), § 4789 (emphasis added).

Boothby argues that, on closer inspection, the phrase “for as long as his participation lasts” is not supportive of a ‘revolving door’, but instead

[...] suggests, or at least implies, that while the civilian persists in participating in the hostilities he will lose protection. The AP1 [sic] Commentary interpretation makes sense, moreover, because during the period of such persistent participation, that civilian has chosen to become part of the fight.<sup>1377</sup>

As has been noted previously, eligible for continuous civilian DPH are individuals who are to be regarded as civilians, whether in an IAC or NIAC (1) acting independently from any armed forces; (2) who are members of the armed forces of an organized group not belonging to a party to an IAC or NIAC; (3) who cannot be considered members of an organized armed group belonging to a party to a NIAC because they fulfill not CCF. Not only would this imbalance distort the inherent balance between military necessity and considerations of humanity; it also potentially undermines the incentive to pay overall respect for compliance with the law.

The better view, it is proposed, is therefore not to rely on the approach of the ‘revolving door’, but to make a distinction between civilians who directly participate in hostilities on a sporadic, *ad hoc*, basis, and those who, in essence, participate on a persistent and recurring basis, and therefore lose immunity from direct attack for the entire duration of direct participation, to include the intermittent periods in between hostile acts.<sup>1378</sup> This approach appears to find support with the Israel Supreme Court as well:

On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his “home”, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts. *Indeed, regarding such a civilian, the rest between hostilities is nothing more than preparation for the next hostility.*<sup>1379</sup>

As Schmitt continues, in the case of ‘continuous’ direct participation, civilian immunity from direct attack is only re-established once the individual “[...] unambiguously opts out through extended nonparticipation or an affirmative act of withdrawal.”<sup>1380</sup> Clearly, there remains on the attacking side an obligation to carry out the determination of DPH in good faith and reasonableness based on the information available in the circumstances ruling at the time.<sup>1381</sup> This obligation corresponds with the general obligation set out in the requirement of precaution, which will be discussed in more detail below, that the attacking party must take all feasible measures to ensure that the objective is, indeed, a military objective.

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<sup>1377</sup> Boothby (2010), 756 (erroneously referring to AP I).

<sup>1378</sup> Dinstein (2010), 149. See also Boothby (2010), 748 ff, 756-757; Schmitt (2010c), 38.

<sup>1379</sup> (2005d), HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (11 December 2005), § 39 (emphasis added). It is also the United States’ position (see Boothby (2010), 758, and accompanying footnote 55).

<sup>1380</sup> Schmitt (2010c), 38. In his view, it is only the direct participant himself who can remove the presumption of attack by clearly signifying, in whatever way, his return to civilian status. If the attacking party wrongly attacks an individual no longer directly participating in the hostilities, such is to be viewed not as a violation of the presumption of doubt, but as a mistake of fact, which has already been accounted for in LOAC which permits reasonable mistakes in view of the circumstances ruling at the time.

<sup>1381</sup> This appears also to be the view of Canada as expressed in the, as of yet, unpublished Joint Doctrine Manual on the Law of Armed Conflict At the Operational and Tactical Levels, B-GJ-005-104/FP-024. See Boothby (2010), 759, footnote 57.

Schmitt argues that notwithstanding the attacking party's full compliance with the aforesaid obligation, it appears nonetheless no less than reasonable to argue that it remains the burden of the civilian having taken the decision to directly participate in the chain of hostilities – participation in which he was not entitled to in the first place – to remove any misunderstanding that may arise with the attacking party as to his return to civilian status and subsequent entitlement to protection from direct attack by expressing a clear and objectively verifiable overt act of disengagement.<sup>1382</sup> The – in hindsight – erroneous conclusion that the individual was not a civilian does, as is argued by some, not violate the presumption of doubt (as there was no doubt as to the immunity from attack), but rather constitutes a mistake of fact which has already been accounted for in LOAC as it permits reasonable mistakes in view of the circumstances ruling at the time.<sup>1383</sup>

### 1.1.3.2. 'Hors de Combat'

As noted, the concept of *hors de combat* implies the shift from insurgents subject to direct attack to immunity from direct attack. In IAC, the relevant conventional source is Article 41 AP I and customary law.<sup>1384</sup> In NIAC, these sources concern CA 3, Article 5 AP II<sup>1385</sup> and customary law.<sup>1386</sup> Under Article 85(3)(e) AP I, “making a person the object of attack in the knowledge that he is *hors de combat*” is a grave breach of the Protocol. Overall, the prohibition of direct attack against persons *hors de combat* has been adopted in the military manuals of numerous States, and finds additional expression in national law.

In terms of *material* scope an insurgent qualifying as lawful military target is *hors de combat* when:<sup>1387</sup>

- (1) He is in the power of an adverse party to the conflict (generally, persons detained for reasons related to the conflict)<sup>1388</sup> (category 1); or
- (2) He clearly expresses an intention to surrender (category 2); or
- (3) He has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself (category 3).<sup>1389</sup>

The subsequent immunity from attack is conditional, in that the individual may not engage in hostile acts, or attempt to escape.<sup>1390</sup>

In terms of *personal* scope, the material scope of '*hors de combat*' extends to insurgents qualifying as members of the armed forces of an organized armed group party to a NIAC as well as civilians directly participating in the hostilities in IAC and NIAC.

In terms of *temporal* scope, the three aforementioned material grounds of *hors de combat* each trigger questions as to the beginning of the safeguard of *hors de combat*. To be precise, when should it be clear to the armed forces of a party to the conflict that (1) an individual is in its

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<sup>1382</sup> Boothby (2010), 760 and conform the United States' view.

<sup>1383</sup> Schmitt (2010c), 38-39; Boothby (2010), 754.

<sup>1384</sup> Rule 47, ICRC (2005a).

<sup>1385</sup> Article 5 AP II must be read in conjunction with Article 4 AP II, which prohibits violence to life, in particular murder, with regard to persons who are deprived of their liberty for reasons related to the armed conflict. Römer (2009), 73.

<sup>1386</sup> Rule 47, ICRC (2005a).

<sup>1387</sup> Article 41(2) AP I; Rule 47, ICRC (2005a).

<sup>1388</sup> Rule 47, ICRC (2005a); Dinstein (2007), 148; McDonald (2008), 220.

<sup>1389</sup> Article 41(2) AP I; Rule 47, ICRC (2005a). See also Article 23(c), 1907 HIVR.

<sup>1390</sup> Article 41(2) AP I.

“power”?; (2) that an individual expresses “an *intention* to surrender”; and (3) that an individual is “incapable of defending himself”?

A conceptual feature of the notion of *hors de combat* is that it adds to the status-based distinction the element of *threat*: individuals *hors de combat* no longer pose a threat. The absence of a threat, normally inherent in the status of a person directly participating in the hostilities or a member of the armed forces of a party to the conflict bars his killing. As explained by the ICRC Commentary: “[i]t is only the soldier who is himself seeking to kill who may be killed. The abandonment of all aggressiveness should put an end to aggression.”<sup>1391</sup>

#### 1.1.3.2.1.1. “In the Power of an Adverse Party”

The phrase “in the power of an adverse Party” is not defined. It is generally accepted that it refers to situations of actual *physical* custody, i.e. capture and subsequent detention or internment. An insurgent may come in the power of an adverse party because he has been captured without prior surrender or in a state in which he is able to defend himself; following surrender; or following sickness, wounds or their being shipwrecked which has left him in a state of defenselessness.

However, the ICRC Commentary indicates that the condition of “being in the power of an adverse Party” as set out in Article 41 AP I *also* includes situations in which persons otherwise directly participating in the hostilities are rendered *hors de combat* prior to their actual physical custody by enemy forces. An example is given by Römer:

[...], a person who is armed but defenceless because he or she needs medical care falls under the safeguard, while an unarmed, and thus defenceless, soldier (maybe also wounded, but not in need of medical care or assistance) would not be protected. An unconscious soldier (who is severely wounded and has a weapon laying next to him or her) falls under the safeguard, but a sleeping soldier (who might be slightly wounded) without having a weapon next to him or her would not be protected. In order to avoid these undesirable differences, the safeguard should be granted to the first category.<sup>1392</sup>

These words “being in the power of an adverse Party” are deliberately chosen to distinguish Article 41 AP I from Article 4 GC III, relating to POWs, which refers to “falling into the power” of the enemy. As the ICRC Commentary explains:

[a]lthough the distinction may seem subtle, there could be a significant difference between “being” in the power and having “fallen” into the power. Some consider that having fallen into the power means having fallen into enemy hands, i.e., having been apprehended. This is virtually never the case when the attack is conducted by the airforce, which can certainly have enemy troops in its power without being able, or wishing, to take them into custody or accept a surrender (for example, in the case of an attack by helicopters). In other cases land forces might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat. A formal surrender is not always realistically possible, as the rules of some armies purely and simply prohibit any form of surrender, even when all means of defence have been exhausted. A defenceless adversary is ‘hors de combat’ whether or not he has laid down arms. Some delegations considered that this situation was already covered by the Third Geneva Convention. If so, those concerned are protected both as prisoners of war and by the present provision. In this sense there is an overlap. On the other hand, others considered that the Third Convention only

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<sup>1391</sup> Pictet (1952b), 136.

<sup>1392</sup> Römer (2009), 86.

applies from the moment of the actual capture of the [p.485] combatant, and that therefore the present provision constitutes the only safeguard in the interim.<sup>1393</sup>

In the view of Römer, for a person to be recognized by an adverse Party to have come in its power

*any criterion suffices* that allows the operating forces to recognize the attacked individual as discontinuing his or her participation in hostilities and, thus, is no longer defending him/herself, and not resisting further.<sup>1394</sup>

The above would imply that even situations where insurgents are not entirely defenseless, but have been outnumbered and overpowered by counterinsurgent forces so that the insurgents are essentially at the mercy of the counterinsurgent forces, the latter must consider the insurgents to be in their power, even if they have not expressed the intention of surrender. Similarly, following the above, an unarmed civilian ‘spotting’ for the insurgents and transmitting intelligence about the position and activities of counterinsurgent forces to the insurgents and therefore DPH-ing, may not be attacked and must be considered *hors de combat* when he can be easily captured without additional risk to the counterinsurgent forces.<sup>1395</sup>

Others, however, adopts a more restrictive view. To Dinstein, for example, there is only two ways in which fighters can come “in the power of the adverse party”, namely by choice, through surrender, or by force of circumstances, when having become wounded, sick or shipwrecked.<sup>1396</sup> In other words, there is no requirement of recognition that individuals discontinue their DPH in situations where they are not yet physically in the hands of the adversary forces. He thereby refers to the misconception that it is prohibited to attack soldiers “retreating in disarray – as epitomized by the Iraqi land forces during the Gulf War.”<sup>1397</sup> It is submitted that this approach of Dinstein, while restrictive, is in fact the *lex lata*. While the phrase “falling into the power of the adversary party” in Article 41 AP I indeed serves to close a gap of protection, it refers to the gap between the moment in which it becomes manifestly clear that an enemy fighter surrenders, or is injured in such a manner that he or she is rendered defenseless and requires medical attention, and the moment of actual physical control, i.e. of ‘being’ in the power. It does not refer to situations absent surrender of defenselessness following injury, and where a fighter is rendered defenseless on other grounds. A fighter who despite his wounds continues to fight remains subject to lawful direct attack. The same applies to a fighter that sleeps or the unarmed civilian ‘spotter’ in the example above. Such are the risks that come with DPH. If one desires to gain immunity from direct attack, one has to make the choice to surrender. These are the rules of the ‘game’ and any other interpretation would distort its clarity. It is exactly for this reason that it is essential that military leadership, whether of States or organized armed groups, must disseminate this kind of knowledge of the LOAC to their troops (even if national law or internal regulations forbid surrender). Of course, the above does not imply that a commander must kill in the absence of surrender, for that decision remains his prerogative. Another issue is: when is surrender a fact? It is to this question that we will now turn.

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<sup>1393</sup> Sandoz, Swinarski & Zimmerman (1987), § 1612.

<sup>1394</sup> Römer (2009), 81 (emphasis added).

<sup>1395</sup> Römer (2009), 81 (emphasis added).

<sup>1396</sup> Dinstein (2007), 148.

<sup>1397</sup> This is also the view of the US. In its report on the conduct in the Persian Gulf War to Congress, the US Department of Defense took the position that retreating combatants, if they do not communicate an offer of surrender, whether armed or not, are still subject to attack and that there is no obligation to offer an opportunity to surrender before an attack. See United States, § 349.



#### 1.1.3.2.2. “An Intention to Surrender”

A person directly participating in the hostilities is afforded immunity from direct attack once he expresses an *intention* to surrender.<sup>1398</sup> “Surrendering means to cease fighting and give oneself into the power of the adversary, not resisting capture by the enemy.”<sup>1399</sup> An individual acts perfidiously when he feigns the intention to surrender, and in doing so leads the adversary “to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.”<sup>1400</sup> The requirement of expressing the intent to surrender implies that the *initiative* to surrender lies with the person at that time directly participating in the hostilities, at his discretion. It also implies that the burden to communicate that intent in a manner recognizable to the adversary lies with the surrendering individual. After all, it is for the adversary to recognize, or to recognize from the circumstances, that a person is surrendering. In the view of the UK, the initiative to surrender includes the initiative of the party offering surrender to come forward and submit itself to the control of the enemy forces.<sup>1401</sup> According to the US an offer of surrender has to be made at a time when it can be received and properly acted upon.<sup>1402</sup> As explained by the ICRC Commentary:

In land warfare, surrender is not bound by strict formalities. In general, a soldier who wishes to indicate that he is no longer capable of engaging in combat, or that he intends to cease combat, lays down his arms and raises his hands. [p.487] Another way is to cease fire, wave a white flag and emerge from a shelter with hands raised, whether the soldiers concerned are the crew of a tank, the garrison of a fort, or camouflaged combatants in the field. If he is surprised, a combatant can raise his arms to indicate that he is surrendering, even though he may still be carrying weapons.<sup>1403</sup>

Once a person expresses his intention of surrender, the adversary forces have an obligation to accept it.<sup>1404</sup> The denial of quarter is a war crime.<sup>1405</sup> This implies that the individual is *hors de combat* prior to his the actual physical capture by the adversary forces.

#### 1.1.3.2.3. “Incapable of Defending Himself”

A person who is sick or wounded,<sup>1406</sup> unconscious or shipwrecked<sup>1407</sup> is considered “incapable of defending himself” so long as he abstains from any hostile act, and enjoys immunity

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<sup>1398</sup> The killing or wounding of a person who has surrendered at discretion is a war crime. Article 8(2)(b)(vi) Rome Statute.

<sup>1399</sup> Cottier (2008), 344.

<sup>1400</sup> Article 37(1)(a) AP I.

<sup>1401</sup> As mentioned in ICRC (2005a), Rule 47.

<sup>1402</sup> United States, § 349.

<sup>1403</sup> Sandoz, Swinarski & Zimmerman (1987), § 1618 (Article 41 AP I). Rogers (2004), 49. On surrender on the sea and in the air, see also Dinstein (2010), 161.

<sup>1404</sup> Robertson (1995), 547.

<sup>1405</sup> Article 40 AP I; Article 23(d), 1907 HVR; Article 8(2)(e)(x). See also Article 60 of the 1863 Lieber Code: “It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter.” For an example of killings after surrender, see Schork, available at <<http://www.crimesofwar.org/a-z-guide/hors-de-combat/>>.

<sup>1406</sup> Article 8(a) AP I defines sick and wounded persons as those, “whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.”

<sup>1407</sup> Article 8(b) AP I defines shipwrecked persons as those, “whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility.”

from direct attack from the moment it can be reasonably concluded that the person in question is rendered defenseless. In other words, individuals falling in one of these limited categories can no longer participate in the hostilities and no longer form a military threat. It is in the incapability of continued participation in hostilities that forces should recognize the applicability of the safeguard of *'hors de combat'*. Indicative is the (requested) need for medical care or assistance, or the struggle of shipwrecked persons to survive. It should be emphasized that “[t]he mere fact that a soldier is wounded does not necessarily mean that he is incapacitated.”<sup>1408</sup>

In sum, an insurgent, DPH-ing on an *ad hoc* basis, or as a CCF-member of the armed forces of an organized armed group belonging to a insurgent movement party to the conflict may not be attacked due to his being *hors de combat*, from the moment he:

- (1) is physically in the power of the counterinsurgent forces;
- (2) clearly expresses an intention to surrender;
- (3) has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself.

The ‘closing the temporal gap’-incentive of Article 41 AP I is not to imply that an individual falls under the safeguard of *hors de combat* when defenseless, but not injured or sick, and without surrender or actual capture. It should therefore not be misinterpreted in furtherance of the humanization of LOAC.

Finally, a conceptual feature of the notion of *hors de combat* is that it adds to the status-based distinction the element of *threat*: persons *hors de combat* no longer pose a threat, as there is no longer a nexus with the hostilities. Any use of combat power resulting in the deprivation of life is only permissible when carried out as a lawful measure of law enforcement.

#### 1.1.4. Observations

The purpose of this paragraph was to examine whether insurgents fall within the prohibitive scope of direct attack, or in the authoritative scope of direct attack. This determination is an essential step in any targeting process. However, in counterinsurgency practice commanders are faced with *two paradoxes*. The *first* paradox is that, while targeting the ‘right’ people is imperative to protect and secure the civilian population, distinguishing the civilian population from the insurgents is extremely difficult in operational reality. In legal terms, in a single area of operations, counterinsurgent forces may be confronted with a myriad of persons qualifying differently under the law: genuinely peaceful civilians, who want nothing to do with the insurgency; peaceful civilians, who support the insurgency, without *directly* participating in the hostilities; civilians supporting the insurgency such that they directly participate in the hostilities; members of the insurgency movement who do not have a fighting function; and members of the insurgency movement with a fighting function. This conglomeration of individuals is difficult to differentiate outside situations of hostilities, and once hostilities break out, counterinsurgents are prone to make mistakes in discriminating between protected persons and legitimate military objectives. This brings us to the *second* paradox, which is that counterinsurgent forces must comply with the applicable law, to include the rules of distinction under the law of hostilities, but at the same time it remains ambiguous as to what exactly these rules mean.<sup>1409</sup>

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<sup>1408</sup> U.K. Ministry of Defence (2004), 58, § 5.6.1.

<sup>1409</sup> Duchéne & Pouw (2010), 104.

The ICRC's Interpretive Guidance has sought to clarify this notion. In doing so, it has build in several defense mechanisms against the arbitrary or erroneous attack of civilians in order to increase their protection. With respect to organized armed groups, it follows that, while the ICRC recognizes that members of an organized armed groups belonging to a party to the conflict are to be distinguished from civilians and may be targeted on a continuous basis, the built-in conditions of 'belonging to a party to the conflict'; proof of membership; and a limited interpretation of the scope of CCF must prevent that individuals somehow engaged with irregular movements, such as insurgency movements, fall too easily within the authoritative scope of personal attack. Those falling outside the scope of organized armed groups, are all civilians, and thus entitled to protection from direct attack, unless and for such time as they DPH. In respect of civilian DPH, the ICRC has again sought to limit the scope of attackable civilians, by demanding a specific hostile act, by interpreting the requirement of direct causation restrictively, and by endorsing the 'revolving door'-effect of the temporal requirement of "unless and for such time."

While providing useful guidance, many aspects in the Interpretive Guidance remain controversial. From an operational viewpoint, doubts have arisen as to the operational feasibility of fulfilling some of the requirements, such as establishing CCF-membership, as well as the inequality between regular and irregular organized armed groups regarding the scope of persons within such forces that may be attacked.

To date, States have refrained from expressing their views on the notion of DPH. As expressed by the UN High Commissioner on Human Rights, "[t]he failure of States to disclose their criteria for DPH is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing. It also leaves open the likelihood that States will unilaterally expand their concept of direct participation beyond permissible boundaries"<sup>1410</sup> and adopt an "intermediate (ie lower) level of protection"<sup>1411</sup> for individuals not, or indirectly participating in hostilities, but who somehow can be related to that group, due to their presence in an area, their familial ties, or because of their suspected loyalty or cooperation with the insurgency movement.<sup>1412</sup> A noteworthy example in this respect concerns the targeting by States contributing to the NATO mission in Afghanistan (ISAF) of individuals engaged in the Afghan narcotics-industry, in order to cut the ties between that industry and the insurgency in Afghanistan. According to open-source NATO information, such individuals may be attacked when it is determined that they have "*a clearly established link with the insurgency.*"<sup>1413</sup>

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<sup>1410</sup> United Nations General Assembly (2010), 21, § 68

<sup>1411</sup> Melzer (2008), 175.

<sup>1412</sup> (1999), *Third Report on the Situation of Human Rights in Colombia*, LACommHR (26 February 1999), Chapter IV, §§ 202, 293.

<sup>1413</sup> See NATO's Role in Afghanistan, available at the NATO Website, at: <http://www.nato.int/issues/Afghanistan/index.html> (emphasis added). As part of ISAF's new counter-narcotics (CN) approach Commander ISAF (COMISAF) is mandated since February 2009 to order his troops, "upon request of the Afghan Government and with the consent of the national authorities of the forces involved" to provide "[...] enhanced support". This enhanced support includes "the destruction of processing facilities and action against narcotic producers provided there is a *clearly established link* with the insurgency." Arguably, "action against narcotic producers" encompasses targeting operations resulting in their death. Criticizing this approach, see United Nations General Assembly (2010), 21, § 68: "68. Thus, although the US has not made public its definition of DPH, it is clear that it is more expansive than that set out by the ICRC; in Afghanistan, the US has said that drug traffickers on the "battlefield" who have links to the insurgency may be targeted and killed. This is not consistent with the traditionally understood concepts under IHL – drug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does

In view of examples as the above, it is submitted that while in many instances individuals within the insurgency leadership, armed forces, political cadre, auxiliaries, and mass base could be designated by the counterinsurgent State – at the military or political level – as ‘insurgent (or as ‘guerrilla’, ‘terrorist’ or otherwise) for their affiliation with the insurgency, the mere designation of individuals as such is by and in itself meaningless for the purposes of distinction in the law of hostilities. As we have learnt, in a NIAC, not even all insurgents in the armed forces may be attacked, except those with a CCF. Also, it can be no automatism to designate as lawful military targets individuals at level of the insurgency leadership, political cadre, unless it follows that those engaged at those levels either also perform CCFs within the armed forces, or they are caught in the act of DPH. At the level of the mass base, the presumption is that they are civilians from which the insurgents draw support, following which it may be concluded that they enter the armed forces in a CCF function, or perform acts that constitute DPH for such time as they do so. Thus, while perhaps indicative of a link between the individual and the insurgency movement, an individual’s designation as ‘insurgent’ is merely an emblematic designation of particular use in military or political parlance, but one that does not automatically justify his deprivation of life resulting from the use of combat power.

In addition, an insurgent’s designation within the authoritative scope, as difficult as this may be, however, is all that: it merely identifies his eligibility as a lawful military objective under the law of hostilities. It does not imply that the subsequent application of force is otherwise unrestricted and lawful. To the contrary: an insurgent’s designation within the authoritative scope brings into position the principles, prohibitions and restrictions governing the direct attack of lawful military objectives, namely: the principle of proportionality; the requirement to take precautionary measures; and the prohibitions and restrictions on means and methods of warfare. It is to these principles, prohibitions and restrictions that we will now turn.

## 1.2. The Principle of Proportionality

Next to the principle of distinction, the principle of proportionality belongs to the nucleus of LOAC. It must be viewed as a “*restriction* on attacks that is *additional* to the principle limiting them to combatants and military objectives.”<sup>1414</sup> It can be found at various places within conventional LOAC,<sup>1415</sup> and its status as a rule of customary international law is undisputed.<sup>1416</sup> Notwithstanding its firm position within the law of hostilities, its precise meaning and application in practice remain subjects of debate.

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not constitute DPH.” See also Akande (2009); Schmitt (2009c); Gallahue (2010), all arguing that the act of narcotics trafficking does not constitute DPH.

<sup>1414</sup> Schmitt (2005), 457 (emphasis added); Dinstein (2010), 129; Rauch (1982), 67; Sandoz, Swinarski & Zimmerman (1987), § 1979 (Article 51 AP I).

<sup>1415</sup> Without using the term ‘proportionality’ explicitly, the rule can be derived from Articles 15 and 22 of the Lieber Code, as well as Article 24 of the 1923 Hague Air Warfare Rules. Since the adoption of AP I in 1977, its most important codification can be found in the combination of Articles 51(5)(b), 57(2)(a)(iii) en (b) en 85(3)(b) of API.

<sup>1416</sup> See ICRC (2005a), 297 (Rule 14): “Launching 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.” See also Dinstein (2010), 129; (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, Dissenting Opinion Judge Rosalyn Higgins; (2000q), *The Prosecutor v. Kupreskic et al., Case No. IT-95-16-Y, Judgment of 14 January 2000 (Trial Chamber)*, § 524: the norms laid down in Articles 57 and 58 AP I are “part of customary international law, not only because they specify and flesh out general

### 1.2.1. The Basic Rule

The principle of proportionality holds that, after it has been established that a target (whether an individual or an object) is a lawful military objective, it must be ensured that the incidental loss of civilian life, injury to civilians and harm to civilian objects (also referred to as incidental injury and collateral damage)<sup>1417</sup> to be *expected* from an attack is not *excessive* in relation to *anticipated concrete* and *direct* military advantage attained from its destruction, capture or neutralization. In the event of *disproportionality*, while retaining its status as such,<sup>1418</sup> “even a legitimate target may not be attacked.”<sup>1419</sup> With that, the principle of proportionality is, in the words of Rogers, “an *attempt* to balance the conflicting military and humanitarian interests.”<sup>1420</sup> Indeed, its application, no matter how meticulous, is no guarantee that “humanitarian interests” will be left unharmed. It is, without a doubt, one of the most difficult principles of LOAC to apply in practice. At the same time, the principle of proportionality is one of the prime examples demonstrating that the law of hostilities was designed to reflect the reality on the battlefield.<sup>1421</sup> After all, as the history of warfare has demonstrated, “there is no way to avert altogether harmful consequences to civilians flowing from attacks against military objectives.”<sup>1422</sup> It therefore speaks in terms of broad prohibitions.<sup>1423</sup> Proportionality is not a total prohibition.<sup>1424</sup> To the contrary, it offers commanders – and this element is crucial for a proper understanding of the principle – a certain lawful *discretion* to inflict collateral damage.<sup>1425</sup> However, with that authority comes a heavy responsibility, namely that the commander may only proceed with the attack after he has come to a reasonable determination of “the relative importance of the various interests in light of the actual needs in the situation in question.”<sup>1426</sup>

On that note, the principle of proportionality governing the conduct of hostilities discussed here is also referred to as the principle of proportionality *stricto sensu* and is not to be confused with that related to the principle of (military or absolute) necessity, namely that the application of combat power must be objectively limited to that required to attain the legitimate aim of an operation, whether carried out in the domain of law enforcement or hostilities.<sup>1427</sup> Neither should it be confused with the principle of proportionality protecting

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pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol.”

<sup>1417</sup> The term ‘collateral damage’ is used to summarize the phrase “*incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof*”, as mentioned in 51(5)(b).

<sup>1418</sup> Dinstein (2010), 129.

<sup>1419</sup> (1996e), *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 587, Dissenting Opinion Judge Rosalyn Higgins.

<sup>1420</sup> Rogers (2004), 17 (emphasis added).

<sup>1421</sup> Ducheine (2008), 468.

<sup>1422</sup> Dinstein (2004), 119.

<sup>1423</sup> (1996g), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ, Advisory Opinion of 8 July 1996, Dissenting Opinion Judge Higgins*, § 20.

<sup>1424</sup> Solis (2009), 274.

<sup>1425</sup> This room for discretion is, however, subject to the requirement of precaution, see Article 57 AP I. See also § 3 of this Section.

<sup>1426</sup> Cannizzaro (2006), 786.

<sup>1427</sup> This is also referred to as the principle of proportionality *lato sensu*. To recall, in LOAC, the legitimate aim of military operations is to achieve the submission of the enemy with the least expenditure of time, life and physical resources, whereas in IHRL, as noted, the legitimate aim of the use of lethal force is limited to that required to remove a threat posed to human life materializing from unlawful violence, to effect a lawful arrest or to prevent the escape of a person lawfully detained, and to lawfully quell a riot or insurrection.

combatants against means and methods of warfare ‘of a nature to cause superfluous injury or unnecessary suffering’.<sup>1428</sup> The protective scope *ratione personae* of the principle of proportionality, as set out in conventional LOAC, concerns “incidental loss of *civilian* life, injury to civilians, damage to civilian objects.” The principle of proportionality *stricto sensu* does not demand a proportionality examination between the concrete and direct military advantage anticipated from the attack and the expected harm to *lawful military objectives*. In addition, if no civilian damage is to be expected, a proportionality-test is not required in relation to the attack of a lawful military objective, provided the attack conforms with the prohibitions and restrictions with respect to means and methods of warfare. As explained by Corn:

[t]he object of [armed] conflict is to bring about the submission of an enemy as promptly and efficiently as possible. History testifies to the fact that this objective is often implemented by unrelenting and violent application of force in a manner that demonstrates to an enemy the futility of continued resistance. Even fundamental principles of military operations reflect this truism. For example, pursuant to the principle of mass, a military commander is instructed to bring maximum firepower and resources to bear on critical points on the battlefield and enemy vulnerabilities in order to overwhelm the enemy. The notion of striking an enemy with overwhelming force is an axiom of military operations, but it also reflects the [sic] fundamental objectives of armed conflict are inconsistent with making *enemy forces* the beneficiaries of a proportionality rule.<sup>1429</sup>

In other words, the requirement of proportionality in the conduct of hostilities already presumes that harm and injury inflicted upon the opposing party to the conflict is military necessary in order to attain its defeat.<sup>1430</sup>

### 1.2.2. What Determines the Balance of Interests?

The principle of proportionality thus requires (1) an appreciation of (a) the anticipated concrete and direct military advantage; and (b) the expected collateral damage, and (2) the weighing of both interests against each other. The law of hostilities is not particularly helpful in guiding practitioners to conclude on the balance of interests. In addition, there is no universal agreement on how the principle of proportionality is to be understood.<sup>1431</sup> Nonetheless, the assessment of the two elements, and their weighing against each other is necessarily contextual. The law cannot possibly provide a concrete guideline to what proportionality means in any given situation. By means of examining a number of key elements of Article 51(5)(b), the following examination attempts to provide insight in the deliberations a commander and his staff must make with regard to the issue of proportionality.

#### 1.2.2.1. ‘Incidental Loss of Civilian Life, Injury to Civilians, Damage to Civilian Objects, or a Combination Thereof’

Article 51(5)(b) sees to “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, [...]”. The emphasis is on “incidental”. The civilian damage may not be intended. Thus, an attack on a particular military objective may not be carried out as an excuse to hit a civilian who does not qualify as a direct participant in the hos-

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<sup>1428</sup> See Article 35(2) AP I and Article 23(e) HVR. See also Gardam (2004), 49 ff and 59 ff. On means and methods, see also § 4 below.

<sup>1429</sup> Corn (2010), 90. See also Dinstein (2010), 129; Melzer (2008), 359.

<sup>1430</sup> Melzer (2008), 359, footnote 260.

<sup>1431</sup> Schmitt (2006), 293. Hays Parks, however, argues that, for that reason, the proportionality rule cannot be a rule of customary law: *opinio juris* is absent. Hays Parks (1990), 168 ff.

ilities, but whose death is nonetheless a military advantage. Nonetheless, the civilian damage may be inevitable. It is therefore a misinterpretation of the principle of proportionality to argue that civilian damage that could be foreseen bars its characterization as ‘incidental’ and qualifies as a violation of LOAC.<sup>1432</sup> As argued previously, the principle of proportionality allows for a certain margin of collateral damage. That margin does, indeed, not exist once it is foreseeable that the harm to civilians will be *excessive* in relation to the military advantage anticipated (or the attack as a whole). Only in that case, the proponents of the proposition are right: a war crime has been committed, the attack is indiscriminate.<sup>1433</sup>

#### 1.2.2.2. “Concrete and Direct Military Advantage”

The requirement of proportionality demands the determination of the “concrete and direct military advantage anticipated” from the attack on a lawful military objective. This determination alone is not sufficient to conclude on the excessiveness of the attack. It is only one part of that test, for it still needs to be positioned against the expected collateral damage.<sup>1434</sup> That the advantage anticipated must be of a military nature is generally not debated.<sup>1435</sup> From the ICRC Commentary to AP I it can be concluded that the notions “concrete” and “direct” are to be interpreted restrictively: “the advantage concerned should be substantial and relatively close, and [...] advantages which are hardly perceptible and those which would only appear in the long term should be disregarded”<sup>1436</sup> However, as noted by Dinstein, “this paraphrase is questionable: ‘substantial’ is not synonymous with ‘concrete’, and long-term effects may be both direct and concrete.”<sup>1437</sup>

While held by the ICRC as not reflective of the *lex lata*,<sup>1438</sup> doctrine,<sup>1439</sup> State practice<sup>1440</sup> and conventional law<sup>1441</sup> also indicate that “military advantage” concerns the attack as a whole, and not each singular attack incorporated in the ‘*overall*’ operation plan. Schmitt mentions as an example a deceptive air attack in Sector A, meant to lure the enemy to sector B, where the main attack will take place.<sup>1442</sup> On the other hand, while in this example the military advantage anticipated from the attacks in the example may be accumulated and together be balanced against the accumulated collateral damage expected from the operation as a

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<sup>1432</sup> Dinstein (2010), 136.

<sup>1433</sup> Conform artikel 51(5)(b).

<sup>1434</sup> Melzer (2008), 360-361.

<sup>1435</sup> Schmitt (2006), 295.

<sup>1436</sup> Sandoz, Swinarski & Zimmerman (1987), § 2209.

<sup>1437</sup> Dinstein (2010), 134; Melzer (2010c), 293.

<sup>1438</sup> This was the view of the ICRC expressed in its Paper submitted to the Working Group on Elements of Crimes of the Preparatory Commission for the International Criminal Court. See ICRC (2005a), vol. II, 331, § 191.

<sup>1439</sup> Dinstein (2010), 134; Gardam (2004), 99 f.

<sup>1440</sup> The Netherlands has adopted a reservation to AP I that reads: “5. With regard to Article 51, paragraph 5 and Article 57, paragraphs 2 and 3 of Protocol I: It is the understanding of the Government of the Kingdom of the Netherlands that military advantage refers to the advantage anticipated from the attack considered as a whole and not *only* from isolated or particular parts of the attack;” Available at <http://www.icrc.org/ihl.nsf/NORM/E6EF925C67966E90C1256402003FB532?OpenDocument> (emphasis added). See also the similar reservation of the UK, restated in U.K. Ministry of Defence (2004), 56, § 5.4.4

<sup>1441</sup> The condition of ‘overall’ has been incorporated in Article 8(2)(b)(iv).

<sup>1442</sup> Schmitt (2006), 295; Dinstein (2004), 123; Boivin (2006), 44.

whole,<sup>1443</sup> such accumulation cannot extend to the entire military campaign at the strategic level.<sup>1444</sup>

### 1.2.2.3. “Expected Incidental Loss” and “Military Advantage *Anticipated*”

While in hindsight it may be concluded that the appreciation of the expected collateral damage and the military advantage anticipated was inaccurate, a crucial aspect inherent in the design of the principle of proportionality is that the lawfulness of the attack is to be judged from the viewpoint of the commander when taking the decision to proceed with the attack. As noted by Dinstein, “the linchpin is what is mentally visualized before the event.”<sup>1445</sup> Thus, the outcome of the proportionality test is the result of a balance of interests carried out *before* the actual attack. It is not the result of an analysis of the actual incidental loss and the achieved military advantage *post facto*. The latter analysis may be of relevance to verify whether the assessment *ante facto* was in fact accurate, but it is, as such, not relevant to the proportionality rule.<sup>1446</sup> Article 51(5)(b) and Article 57(2)(a)(ii) demonstrate this concept: the proportionality test is complied with if the attacker has taken “all feasible precautions” to determine the “expected” collateral damage in relation to the “anticipated” military advantage.

### 1.2.2.4. Test: “Excessive”

The principle of proportionality demands that the collateral damage expected cannot be “excessive” in relation to the military advantage. In other words, the threshold is not “any”<sup>1447</sup> or “extensive” collateral damage.<sup>1448</sup> In addition, “excessive” does not mean<sup>1449</sup> “clearly excessive.”<sup>1450</sup> The mere fact that collateral damage may be qualified as extensive does not automatically imply that it is excessive.<sup>1451</sup> In fact, the prime conceptual aspect of the principle of proportionality is that the standard of excessiveness is relative, and thus context-specific. As explained in the Manual on International Law Applicable to Air and Missile Warfare, “[i]t is not a matter of counting civilian casualties and comparing them to the number of enemy combatants that have been put out of action. It applies when there is a *significant imbalance* between the military advantage anticipated . . . and the expected collateral damage to civilians and civilian objects.”<sup>1452</sup>

The law of hostilities does not provide detailed directions, laid down in rules or charts, which indicate in quantified measures the relationship between military advantage and collateral damage.<sup>1453</sup> As a result, objective strategies using predetermined calculations are diffi-

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<sup>1443</sup> Boivin (2006), 44.

<sup>1444</sup> Gardam (2004), 101 f.

<sup>1445</sup> Dinstein (2010), 132.

<sup>1446</sup> Schmitt (2006), 294; Dinstein (2010), 132; Kalshoven (2007), 220.

<sup>1447</sup> Rosen (2009), 735.

<sup>1448</sup> Pillaud & al. (1987), 626.

<sup>1449</sup> Dinstein (2010), 131; Greenwood (1997), 461-462; Melzer (2008), 360; Rogers (2004), 18.

<sup>1450</sup> Article 8(2)(b)(iv) Rome Statute.

<sup>1451</sup> Greenwood (1997), 461-462; Rogers (2004), 18. As noted by Melzer “[w]hile extensive collateral damage will always require a very high standard of justification, the excessiveness of collateral damage never depends on the extent of collateral damage alone, but always on whether, in the concrete circumstances, the expected collateral damage is outweighed by the importance of the ‘concrete and direct military advantage anticipated.’” Melzer (2008), 360.

<sup>1452</sup> Program on Humanitarian Policy and Conflict Research (2010), 91-92.

<sup>1453</sup> Schmitt (2006), 293. Also: Cannizzaro (2006), 786; Dinstein (2010), 130; Fenrick (1982), 102; Melzer (2008), 360.



cult if not impossible to apply in a lawful manner.<sup>1454</sup> It is therefore not possible to determine in advance that, regardless of the circumstances at hand, and the information available to the commander, an attack likely to cause incidental injury or collateral damage is *a priori* lawful or unlawful. The principle of proportionality has been designed on the presumption that responsible commanders have a wide margin of discretion to assess in good faith the concrete and direct military advantage anticipated and the possibility of collateral damage in light of the circumstances at hand, making use of information available to him at that time, to include the information he ‘should have known.’<sup>1455</sup> This assessment can be said to form a *subjective* aspect of the proportionality-test, and is followed by an *objective* phase, in which the commander, based on his assessment of the concrete and direct military advantage, as well as the expected collateral damage, must decide on the excessiveness of the latter vis-à-vis the former on the basis of reasonableness, guided by the question of whether other commanders, in comparable conditions and with the same information would have reached the same outcome.<sup>1456</sup> However, while objective in theory, in practice it seems inevitable, as Dinstein argues,<sup>1457</sup> to take into account the influence of the conditions of combat on the analytical capacity of the commander,<sup>1458</sup> conditions to which individuals may respond differently. Conditions of influence include sleep deprivation, hunger, thirst, casualties, combat stress, *et cetera*. Thus, *subjective* elements will in all likelihood be mixed in with the objective analysis carried out in all reasonableness and good faith. On a final note, reference is made here to the argument raised by the ICTY in the *Kupreskic* case, in which it held that in the interpretation and application of the test of excessiveness, recourse may be had to the ‘elementary considerations of humanity’ and more specifically to the Martens clause:

As an example of the way in which the Martens clause may be utilized, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to the demands of humanity.<sup>1459</sup>

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<sup>1454</sup> Melzer (2010c), 294; Dinstein (2010), 132.

<sup>1455</sup> Schmitt, Garraway & Dinstein (2006), 23; Dörmann (2003a), 165; Wright (2010), 9; (2003o), *The Prosecutor v. Galic, Case No. IT-98-29-T, Judgment of 5 December 2003 (Trial Chamber)*, § 58; Office of the Judge Advocate General (1992), 4-5.

<sup>1456</sup> Schmitt (2005), 457; Schmitt, Garraway & Dinstein (2006), 23; Cannizzaro (2006), 787-788; Henderson (2009), 222; Wright (2010), 9.

<sup>1457</sup> Dinstein (2004), 122 (“[t]he whole assessment of what is ‘excessive’ in the circumstances entails a mental process of pondering dissimilar considerations – to wit, civilian losses and military advantage – and is not an exact science. There is no objective possibility of ‘quantifying the factors of the equation’, and the process ‘necessarily contains a large subjective element’. This ‘subjective evaluation’ of proportionality is viewed with a jaundiced eye by certain scholars, but there is no serious alternative. Undeniably, the attacker must act in good faith, and not ‘simply turn a blind eye on the facts of the situation; on the contrary, he is obliged to evaluate all available information”).

<sup>1458</sup> Dinstein (2010), 133, footnote 817; Rogers (2004) 110.

<sup>1459</sup> (2000q), *The Prosecutor v. Kupreskic et al., Case No. IT-95-16-Y, Judgment of 14 January 2000 (Trial Chamber)*, § 526.

### 1.2.3. “Concrete and Direct Military Advantage” in Counterinsurgency Doctrine

It is widely acknowledged in contemporary counterinsurgency-doctrine that any use of force must be *legitimate*, both in a social and a legal sense, and must be applied with *restraint*, i.e. it must be weighed against the effects it may have on providing security to the population.<sup>1460</sup> The misapplication of force at the tactical level – willingly or unwillingly – is almost certain to have detrimental effects at all levels of military operations, as well as the politico-strategic level. The use of force that is perceived by the population as disproportionate, even though it may be lawful, erodes any sense of security and legitimacy the population may have attributed to the counterinsurgency efforts, but it may also negatively affect international public opinion (most notably in light of today’s media coverage and means of communication). The necessity of killing an insurgent, while perfectly lawful under LOAC, appears to be secondary to the ‘necessity’ to win and maintain the support of the civilian population. This imperative also affects the way counterinsurgent forces are to approach the concept of collateral damage. Counterinsurgency doctrine mandates that commanders must demonstrate “genuine compassion and empathy for the populace”<sup>1461</sup> and “serve as a moral compass,”<sup>1462</sup> so that “the populace must feel protected, not threatened, by counterinsurgency forces’ actions and operations.”<sup>1463</sup> Most importantly, “[l]eaders must consider not only the first-order, desired effects of a munition or action but also possible second- and third-order effects – including undesired ones.”<sup>1464</sup> The secondary and tertiary effects of such collateral damage may include the alienation of the population from the counterinsurgent, a propaganda victory for the insurgency and the media coverage negative to the counterinsurgency-strategy.<sup>1465</sup> This was also recognized by the ISAF command in 2009, as expressed in its Tactical Directive:

Like any insurgency, there is a struggle for the support and will of the population. Gaining and maintaining that support must be our overriding operational imperative – and the ultimate objective of every action we take. [...] We must avoid the trap of winning tactical victories – but suffering strategic defeats – by causing civilian casualties or excessive damage and thus alienating the people. [...] [T]he carefully recognized and disciplined employment of force entails risks to our troops – and we must work to mitigate that risk wherever possible. But excessive use of force resulting in an alienated population will produce far greater risks. We must understand this reality at every level of our force. [...] <sup>1466</sup>

In view of the imperative to protect the civilian population, ISAF troops were subjected to a policy-based paradigm of strict guidelines aimed at avoiding and minimizing collateral damage,<sup>1467</sup> even in situations where, from the viewpoint of law, such damage could have been justified. Thus,

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<sup>1460</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 1-27. These imperatives are not new, as demonstrated by the practice of the British in Malaya John A. Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam*, (2005), 87-107 (2002). See also David Galula, *Counterinsurgency Warfare: Theory and Practice*, (1964), 52.

<sup>1461</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 7-8.

<sup>1462</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 7-9.

<sup>1463</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 7-5.

<sup>1464</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 7-36.

<sup>1465</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 7-37: “Fires that cause unnecessary harm or death to noncombatants may create more resistance and increase the insurgency’s appeal – especially if the populace perceives a lack of discrimination in their use.”

<sup>1466</sup> Commander ISAF (2009).

<sup>1467</sup> This policy paradigm includes coalition and national rules of engagement (ROE); no-strike lists (for reasons such as IHL or host-nation sensitivities); restricted target lists (in which attack requires special

[...] leaders at all levels [are] to scrutinize and limit the use of force like close air support (CAS) against residential compounds and other locations likely to produce civilian casualties in accordance with this guidance. Commanders must weigh the gain of using CAS against the cost of civilian casualties, which in the long run make mission success more difficult and turn the Afghan people against us. [...] The use of air-to-ground munitions and indirect fires against residential compounds is only authorized under very limited and prescribed conditions (specific conditions deleted due to operational security). We will not isolate the population from us through our daily conduct or execution of combat operations.<sup>1468</sup>

The question arises as to how the notion of “concrete and direct military advantage” in the LOAC proportionality requirement relates to “military advantage” in the context of counterinsurgency operations. Under the law of hostilities, “[...] a somewhat linear formulation of assessment is undertaken. Hence civilians and civilian objects are accorded a “value” and an exchange is processed along consequentialist lines, whereby an attack may proceed on the basis that “anticipated concrete and direct military advantage” outweighs, by even the smallest of margins, the expected civilian loss.”<sup>1469</sup> To recall, the notion “concrete and direct” implies that the advantage concerned should be substantial and relatively close and is linked to a specific tactical operation.<sup>1470</sup> Thus, “[a] military advantage can only consist in ground gained and in *annihilating or weakening the enemy armed forces*,”<sup>1471</sup>

In deviation from the proportionality-calculus in the normative paradigm of hostilities, military advantage as understood in the counterinsurgency-requirement of proportionality

[...], is best calculated *not in terms of how many* insurgents are killed or detained, but rather *which* enemies are killed or detained. If certain key insurgent leaders are essential to the insurgents’ ability to conduct operations, then military leaders need to consider their relative importance when determining how best to pursue them. In COIN environments, *the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape*. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.<sup>1472</sup>

It is difficult to ignore the underlying sociopolitical objective of winning hearts and minds that appears to form part of the calculus of military advantage in a counterinsurgency-environment. Indeed, in counterinsurgency, the emphasis is not on the status of the insurgent under the law, but on his individual identity, and his ability, potentially, to harm the interests of the counterinsurgent.<sup>1473</sup> This potential threat is to be measured against the potential incidental civilian loss not just in physical terms of death and injury, but, more importantly, also in terms of the sociopolitical damage resulting in the alienation of the civilian population from the counterinsurgent as an effect of disproportionate use of force.<sup>1474</sup> Indeed, in counterinsurgency, the fear for the potential impact of collateral damage on this central strategic aim of the counterinsurgency campaign is so great that collateral

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preapproval, e.g., due to negative cultural implications); individual target folder restrictions (such as a requirement to use a particular munition or strike a particular “desired point of impact”); the implementation of a Joint Targeting Coordination Board; the issuing of directives in SOPs, SOIs and ROEs; the development of target lists; the development of procedures to analyse intelligence; the conclusion of a Weapons Release Matrix; Joint Air Operations Plans, execute orders, fragmentary orders, fire support coordination measures and soldier cards. See Schmitt (2009), 314.

<sup>1468</sup> Commander ISAF (2009).

<sup>1469</sup> Stephens (2010), 304.

<sup>1470</sup> Sandoz, Swinarski & Zimmerman (1987), §§ 2209.

<sup>1471</sup> Sandoz, Swinarski & Zimmerman (1987), §§ 2218 (emphasis added).

<sup>1472</sup> U.S. Department of Army & U.S. Marine Corps (2007), 247-248, § 7-32 (emphasis added).

<sup>1473</sup> Watkin (2007), 280; Watkin (2005c), 153-154.

<sup>1474</sup> Stephens (2010), 305.

damage that is not excessive in relation to the anticipated military advantage in legal terms is generally held to be intolerable in counterinsurgency. Rather, in counterinsurgency, the mere chance of *any* collateral damage precludes the use of lethal force to serve strategic goals.<sup>1475</sup> This has also found its way in ROE and other use of force-guidelines.<sup>1476</sup> Stephens:

Military policy has imposed a high value on civilian loss that effectively weighs the proportionality formula in favor of the humanitarian side, not because it is the “nice” thing to do, but rather as Kilcullen notes, “our approach was based upon a clear-eyed appreciation of certain basic facts” concerning the nature and quality of fighting an insurgency.<sup>1477</sup>

However, one has to be cautious in classifying the counterinsurgency-imperatives of protecting and securing the civilian population as to be driven by purely humanitarian considerations, because, in essence, they are not. While such considerations may play a role to some degree, it is submitted that these imperatives serve a necessity, which is that in acting in compliance with them, the insurgency may be defeated and the *status quo* in public security, law, and order returns, and moreover, that the government resumes total control over the monopoly on the use of force. In other words, fighting ‘humanely’ or ‘ethically’ sound serves, first and foremost, *strategic purposes*. As such, counterinsurgency-doctrine requires military commanders to take account of “advantages which are hardly perceptible and those which would only appear in the long term.”

Here, the counterinsurgency-based calculus of proportionality deviates from the LOAC-based calculus of proportionality. A traditional explanation of the latter implies that vague and indirect strategic advantages “should be disregarded” when assessing military advantage in LOAC-proportionality.<sup>1478</sup> During the drafting stage of Articles 51 and 57 AP I, the calculus of military advantage of strategic objectives was rejected by the fear that such objectives would be used as a legal basis to eventually outweigh the counterweight of collateral damage. In counterinsurgency, however, the effect of these strategic objectives is the opposite: it functions as an argument to *limit* or *outlaw* any collateral damage. LOAC-proportionality, however, does not require or even mandate this. As remarked by Schmitt, concrete and direct military advantage

does not extend to winning hearts and minds, a point illustrated by agreement that destroying enemy civilian morale does not qualify as advantage vis-à-vis the definition of military objective. [...] Political, economic or social advantage does not suffice. This being so, any assertion that collateral damage should diminish military advantage would have to be supported by a direct nexus to military factors. While true that collateral damage motivates civilian sympathy for the enemy, such general effects are too attenuated. As a general rule, then, collateral damage plays no part in proportionality calculations beyond being measured against the yardstick of excessiveness.<sup>1479</sup>

In sum, the proportionality-calculus in counterinsurgency is strictly policy-based and powered by strategic imperatives, and results in restrictions on causing collateral damage not required by the LOAC-based principle of proportionality.

#### 1.2.4. Observations

In sum, the requirement of proportionality demonstrates that while military commanders are afforded a wide margin of discretion in determining the excessiveness of the concrete

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<sup>1475</sup> Beran (2010), 9.

<sup>1476</sup> Schmitt (2009), 321.

<sup>1477</sup> Stephens (2010), 306.

<sup>1478</sup> Sandoz, Swinarski & Zimmerman (1987), §§ 2209.

<sup>1479</sup> Schmitt (2009), 323. See also Stephens (2010), 305.

and direct military advantage anticipated from an attack vis-à-vis the incidental damage expected to ensue from that attack, at the same time it imposes on the commander the heavy burden of carrying out such assessment in all reasonableness and in good faith on a case-by-case basis, in light of the circumstances at hand and the information available. In any case, the principle of proportionality thereby precludes that attacks can be generally carried out on standardized basis, implying that lawfully targetable insurgents with military advantage of an absolute weight X under any circumstances permit the incidental harm to a pre-fixed number of civilians. To the contrary, while in some instances such number of civilian casualties could be lawful to attain the military advantage following from the attack on insurgent A, an attack on insurgent B could be unlawful, as the military advantage anticipated does not outweigh the civilian harm to the same number of civilians.

### 1.3. The Requirement of Precautionary Measures

The law of hostilities imposes upon military commanders the duty to take precautionary measures in attack. This obligation has been codified in Article 57(1) API, which stipulates that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”<sup>1480</sup> This requirement of precaution is a rule of customary law in both IAC and NIAC.<sup>1481</sup> In situations of *pre-planned* targeting, the requirement to take all feasible precautions “merits particularly strict and literal interpretation.”<sup>1482</sup> It is complementary, on the one hand, to the requirement of distinction, as it aims to ensure that an individual subject to attack falls is a lawful military objective. On the other hand, it is complementary to the requirement of proportionality in attack, in that it aims to avoid, or minimize to the maximum extent feasible, incidental harm to the civilian population expected.<sup>1483</sup> Therefore, the duty to take precautionary measures should not be seen as a follow-up test, to take place *after* the requirements of distinction and proportionality, but as a continuous requirement that underlies the law of hostilities in attack, and, as a consequence permeates through the targeting cycle as set out in military doctrine.

#### 1.3.1. Specific Obligations

The general requirement of precaution consists of specific obligations related to (1) the ascertainment that the objective to be attacked is lawful under the law of hostilities; and (2) to avoid, or at least, to minimize incidental harm to civilians.

##### 1.3.1.1. Ascertainment of Lawful Military Objective

The law of hostilities imposes upon military personnel the obligation to ensure, as far as this is *feasible*, that the objectives to be attacked are, at the relevant time, in fact lawful military objectives under the law of hostilities, i.e. fall within the authoritative personal scope of direct attack.<sup>1484</sup> Unless the commander has personally been able to determine the status of

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<sup>1480</sup> Article 57(1) AP I. Military operations means more than attacks, and also concerns maneuvers, patrols and transfers. Rogers (2004)96;

<sup>1481</sup> ICRC (2005a), Rules 15-21; (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* § 111-112; (2006e), *Partial Award (Central Front), Eritrea's Claims 1,3,5,9-13, 14, 21,25 and 26 (2005)*, 417, 425.

<sup>1482</sup> Melzer (2010c), 292.

<sup>1483</sup> Article 57 AP I is to be viewed as complementary to Articles 48, 51, 52 en 54 API. Sandoz, Swinarski & Zimmerman (1987), § 2189.

<sup>1484</sup> Article 57(2)(a)(i) API; ICRC (2005a), Rule 16.

the object, this duty to act does not imply that there has to be an *absolute* certainty that the object is a military objective: “mistakes based on faulty intelligence can be made.”<sup>1485</sup> Nevertheless, there is a duty to constantly review target lists that may provide the basis for targeting, for objectives may cease to be military objectives.<sup>1486</sup> This implies that the commander or his staff, besides his (possible) personal knowledge of the potential target, may also have to rely on other information, for example intelligence or on reports of subordinate commanders in the field. Even when there is little or no doubt, there is a duty to obtain subsequent information, for example by carrying out additional reconnaissance operations. This is not merely a legal obligation, it also serves a military interest: “[...] no responsible military commander would wish to attack objectives which were of no military interest. In this respect humanitarian interests and military interests coincide.”<sup>1487</sup> The UK Manual of the Law of Armed Conflict mentions of a number of factors a commander has to pay regard to before deciding upon the attack. These include:

- a. whether he can personally verify the target;
- b. instructions from higher authority about objects which are not to be targeted;
- c. intelligence reports, aerial or satellite reconnaissance pictures, and any other information in his possession about the nature of the proposed target;
- d. any rules of engagement imposed by higher authority under which he is required to operate
- e. the risks to his own forces necessitated by target verification.<sup>1488</sup>

As stipulated by Article 57(b) AP I, once an attack is underway, it shall be cancelled or suspended “if it becomes apparent that the objective is not a military one [...]” This may be the case when it becomes clear that a person was erroneously identified as a legitimate military target, when the target is a civilian that ceases to directly participate in hostilities, or when the target surrenders or falls *hors de combat*.

### 1.3.1.2. Avoidance or Minimization of Incidental Harm to the Civilian Population

The law of hostilities also imposes upon military personnel the obligation to take, as far as 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.”<sup>1489</sup> This provision includes a double objective.<sup>1490</sup> The *first* objective is an ultimate, and preferred, aspiration: to avoid, in total, the occurrence of collateral damage. Realizing that this is not always possible, a *second* objective has been built in: irrespective of whether collateral damage can be avoided, in any event the focus shall be on minimizing, as much as feasible, collateral damage. How is this obligation to be applied in relation to the proportionality-test? Article 57(2)(a)(ii) allows for multiple interpretations. One can argue, for example, that the provision is an autonomous instrument, to be applied *after* a commander, *in abstracto*, has carried out the proportionality test. This approach is, however, an artificial one, for the commander is only able to reach a sound judgment if he knows, as part of the weaponizing-phase during the targeting process, with which means and methods he can carry out the attack, both operationally and lawfully.

<sup>1485</sup> Rogers (2004), 96-96, referring to Obradovic, who requires absolute certainty (Obradovic (1979)).

<sup>1486</sup> U.K. Ministry of Defence (2004), 83, § 5.32.2.

<sup>1487</sup> Sandoz, Swinarski & Zimmerman (1987), § 2195.

<sup>1488</sup> U.K. Ministry of Defence (2004), 83, § 5.32.2.

<sup>1489</sup> Article 57(2)(a)(ii) AP I; ICRC (2005a), Rule 17.

<sup>1490</sup> The ICRC Commentary does not address this.

The preferable approach, therefore, is to firstly gain insight in which means and methods limit the expected collateral damage beforehand.<sup>1491</sup> Factors of influence in the choice in means and methods are the importance of the object; the time-constraints; the availability and accuracy of intelligence on the object; the available weapon(s) and weapon systems; the availability of various types of ammunition; the effect, range and accuracy of the ammunition and the weapon systems; the circumstances in which the attack takes place (time of day, terrain, weather conditions); the presence of civilians or protected objects; and risks for friendly troops.<sup>1492</sup> In light of the circumstances at the time, and the information available to him, the commander can determine, in second instance, whether the collateral damage that may still be expected is disproportionate in relation to the military advantage anticipated. In that event, the decision to launch an attack shall be refrained from, as mandated by Article 57(b) AP I.<sup>1493</sup> This duty is, as Article 51(5)(b) AP I, a codification of the proportionality principle. While the latter provision contains a qualification (a disproportionate attack is indiscriminate and therefore prohibited), the former contains an unequivocal *instruction* to the commander: the attack must be cancelled if disproportionate.

When civilians are expected to be harmed, Article 57(c) AP I stipulates that they shall be warned *effectively* in advance of the attack, “unless circumstances do not permit.”<sup>1494</sup> The purpose of warnings is to provide civilians the opportunity to leave the area of operations or to enable them to seek shelter from coming attacks, and to enable the civil defense authorities to take appropriate measures. A warning is not required “if military operations are being conducted in an area where there is no civilian population or if the attack is not going to affect the civilian population at all.”<sup>1495</sup> In all other cases, a warning must be “effective” unless “circumstances do not permit” or require a warning.<sup>1496</sup>

To be sufficiently effective “the warning must be in time and sufficiently specific and comprehensible” to enable civilians to leave the area or to seek shelter.”<sup>1497</sup> In some circumstances a general warning may suffice.<sup>1498</sup> The warning may be given by using radio, leaflets, phone calls, SMS-messages, via the internet, or, if necessary by mouth.<sup>1499</sup> Recent events, such as the Israeli military campaign in Gaza from 27 December 2008 – 18 January 2009 have led to new interpretations of the requirement of warning. For example, the Goldstone Report, a report following the investigation by the HRC of the aforesaid Israeli campaign, holds that a warning

[...] must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible

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<sup>1491</sup> Oeter (2008), 210-211.

<sup>1492</sup> U.K. Ministry of Defence (2004), 83-84, § 5.32.4 and 5.32.5 for examples on the accuracy of weapon-systems and ordinance and factors to be taken into account.

<sup>1493</sup> Article 57(2)(a)(iii) AP I; ICRC (2005a), Rule 18.

<sup>1494</sup> Article 57(2)(c) AP I; ICRC (2005a), Rule 20.

<sup>1495</sup> U.K. Ministry of Defence (2004), 83, § 5.32.8.

<sup>1496</sup> NATO's AJP-3.9 does not make reference to this requirement. Annex E (Legal Considerations to Joint Targeting) does, see United States Department of Defense (2007), E-4, (§ 5(b)(2)(b)).

<sup>1497</sup> U.K. Ministry of Defence (2004), 83, § 5.32.8. For a detailed analysis of the requirement of warnings in theory and practice, see Baruch & Neuman (2011).

<sup>1498</sup> This is also acknowledged by the Goldstone Report. Human Rights Council (2009), § 37. This is also the view of the United States. See ICRC (2005a), State Practice, §§ 483-485. See also The State of Israel (2009), § 137.

<sup>1499</sup> U.K. Ministry of Defence (2004), 83, § 5.32.8.

warning means that civilians should be in no doubt that it is intended to be acted upon, as a false alarm of hoax may undermine future warnings, putting civilians at risk.<sup>1500</sup>

It may be doubted whether the level of specificity suggested by the Goldstone Report is indeed required by law and will be ‘feasible’ in most, or at least many circumstances. In addition, the Goldstone Report’s understanding of what constitutes an “effective” warning imposes upon the attacking party obligations that are strange to the law of hostilities and disregard the balance between military necessity and humanity implied in the relevant rules. For example, it wrongly asserts that

[t]he question is whether the injury or damage done to civilians or civilian objects by not giving a warning is *excessive* in relation to the advantage to be gained by the element of surprise for the particular operation.<sup>1501</sup>

As rebutted by Schmitt

No basis exists in IHL for applying this proportionality standard to the warnings requirement; they are separate and distinct norms. Conflating the two upsets the agreed-upon balance resident in them. What the authors of the report have neglected is that an attacker is already required to assess the proportionality of a mission as planned; the issuance of warnings would be a factor in that analysis, as would other factors such as timing of the attack, weapons used, tactics, life patterns of the civilian population, reliability of intelligence, and weather. A subsequent proportionality analysis would consequently be superfluous. Additionally, the warning requirement applies whenever the attack “may affect the civilian population.” Warnings must be issued even if the collateral damage expected in the absence of a warning would not be excessive relative to the anticipated military advantage and even if they are unlikely to minimize harm to civilians and civilian objects (as in the case of regularly unheeded warnings). Thus, the position proffered in the report paradoxically sets a lower humanity threshold than required by IHL.<sup>1502</sup>

The circumstances meant here concern mostly the question whether a warning would have detrimental effects on the element of surprise of the attack. Nevertheless, the drafters have opted not to incorporate an additional clause that limits the discretionary room to only that situation (such as: ‘except in the case of an attack’).<sup>1503</sup> It provides a commander a basis to refrain from issuing a warning because of other operational considerations. One can think of time-sensitive situations, such as ‘ticking time-bomb’-scenarios like the targeting of suspect suicide bombers, or the unexpected appearance of a High Value Target, requiring dynamic targeting.

A final requirement flowing from the general obligation to avoid or minimize incidental harm to civilians is 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.”<sup>1504</sup>

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<sup>1500</sup> Human Rights Council (2009), § 528. The government of Israel has released its own report: The State of Israel (2009), available at <<http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf>>.

<sup>1501</sup> Human Rights Council (2009), § 527.

<sup>1502</sup> Schmitt (2010b), 827-828. Another example is the requirement that the warning “[...] must clearly explain what [civilians] should do to avoid harm”, which in fact is an obligation to be complied with by the attacked party (Article 58 AP I; ICRC (2005a), Rule 22: “The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects *under their control* against the effects of attacks”). Also, the Goldstone Report wrongly suggests that the warning must include information on the timings of the attack.

<sup>1503</sup> Rogers (2004), 100.

<sup>1504</sup> Article 57(3) AP I; ICRC (2005a), Rule 21.



Notwithstanding these obligations, the law of hostilities limits their compliance to situations where precautionary measures are not ‘feasible’. It is to the notion of ‘feasibility’ that we will now turn.

### 1.3.2. “Feasible”

The requirement to take precautionary measures is not absolute. As instructed by Article 57(a)(1) AP I, the attacking party is under an obligation to “do everything feasible” to ascertain that the potential target is a military objective.<sup>1505</sup> In addition, Article 57(2)(a)(ii) requires the attacking party to “take all feasible precautions” in the choice of means and methods of attack in order to avoid or limit collateral damage. “Feasible” has been defined in conventional law as:

[...] those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.<sup>1506</sup>

As such, the law of hostilities offers a certain degree of discretion to military commanders to determine which of the selected means of combat power – envisioned to attain the desired effects – shall be used and how they shall be used.<sup>1507</sup> The requirement of precautionary measures, via the notion of ‘feasibility’, therefore permits the reliance on considerations of military necessity.<sup>1508</sup> However,

[t]he feasibility test is a fine balance because the commander will not wish to take precautions to such an extent as to reduce his chances of military success. On the other hand, military considerations cannot be overriding so as to render the protection for civilian useless.<sup>1509</sup>

Factors which may determine whether precautionary measures are ‘feasible’ are, *inter alia*, the location of the military objects, the possible change of protective status of objectives, weather conditions, the presence of civilians, the configuration of the surrounding area, the accuracy of the weapons(-systems) available, the physical and mental condition of the soldiers, the availability of intelligence on the military objectives and the area of operations in general, the degree of control exercised over the AO by the armed forces, and the urgency of the attack.<sup>1510</sup> The requirement to take feasible precautions lasts until the very moment of the strike or impact. For example, if during the flight-time of a laser-guided rocket heading towards the place of impact it becomes clear to the military personnel operating the rocket that a lawful military objective has gained protection, or that civilians have emerged which render the attack disproportionate, an obligation arises to avert the rocket to another place of impact, or to otherwise limit to a maximum extent the consequences of the impact, in so far this is feasible.

### 1.3.3. Scope *Ratione Personae* of the Requirement of Precautionary Measures

The scope *ratione personae* of the requirement of precautionary measures consists, on the one hand, of those upon whom the obligations are imposed (*active scope*), and on the other hand, those who are to benefit from the protections resulting from compliance with the obligations (*passive scope*).

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<sup>1505</sup> Article 57(2)(a)(i) API.

<sup>1506</sup> Article 3(4) Protocol II, 1980 CWC.

<sup>1507</sup> United Nations (2000b), § 29.

<sup>1508</sup> Greenwood (2008a),

<sup>1509</sup> Rogers (2004), 98.

<sup>1510</sup> Melzer (2008), 366.

As regards the active scope, the requirement of precaution is a requirement of the attacking party to the conflict, be it for offensive or defensive purposes.<sup>1511</sup> Article 57 AP I places the responsibility to take precautionary measures with “those who plan or decide upon an attack [...]” These are, firstly, commanders, planners and other (staff) officers responsible for a specific operation.<sup>1512</sup> However, these could also be individual soldiers.<sup>1513</sup> One can think of the Joint Tactical Air Controller (JTAC-er) or a fighter or bomber pilot. The same counts for a team of Special Forces, mostly operating autonomously, who, when arriving at the target, are confronted with a civil population suddenly present.

Some States oppose a shift of the duty to take precautionary measures to a lower level (read: platoon and lower).<sup>1514</sup> The majority of States does not share this view. More so, in a contemporary conflict it is unavoidable. The complexity of military operations demands that commanders at a lower tactical level are increasingly responsible for independent tasks related to strategic targets.<sup>1515</sup> During hostilities the commander must be able to independently make an analysis of the situation on the battlefield. Therefore, it is almost unavoidable that he can be held responsible for taking precautionary measures when applying force. This aspect stresses the necessity (apart from the obligation thereto) for thorough education and training of armed forces at all levels in the law of hostilities.<sup>1516</sup>

The individual responsible for taking precautionary measures is also the one who, in light of the information available at that time, determines whether the measures are feasible.<sup>1517</sup> At first sight, this appears to be a subjective determination, with respect to which LOAC trusts, in good faith, the considerations of reasonable commanders.<sup>1518</sup> Nonetheless, a certain degree of objectivity is required.<sup>1519</sup> The Commentary to Article 57(2)(a)(1), for example, states:

[t]he interpretation will be a matter of common sense and good faith. What is required of the person launching an offensive is to take the necessary identification measures in good time in order to spare the population as far as possible. It is not clear how the success of military operations could be jeopardized by this.<sup>1520</sup>

When following Schmitt, however, that requirement is limited:

In the end, feasibility means that those who plan, approve, or execute an attack must take those measures that a reasonable warfighter in same or similar circumstances would take to limit harm to civilians – *nothing more*.<sup>1521</sup>

As regards the passive scope, the prime beneficiaries of the requirement of precaution are civilians and other persons who do not or no longer directly participate in the hostilities. In other words, once it has been determined that a target is a lawful military objective, and

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<sup>1511</sup> Sandoz, Swinarski & Zimmerman (1987), § 2188. In that respect, Article 57 API differs from Article 58 API, which imposes obligations on the attacked party, not the attacking party to the conflict to take measures protection the civilian population from the effects of attacks.

<sup>1512</sup> Rogers (2004), 96.

<sup>1513</sup> Oeter (1995), § 457.2.

<sup>1514</sup> An example is Switzerland, which has made a reservation to Article 57(2) stating that the obligations arising from the requirement of precaution do not impose obligations to military personnel below the level of batallion. Sandoz, Swinarski & Zimmerman (1987), 689, footnote 5.

<sup>1515</sup> Krulak (1999).

<sup>1516</sup> Sandoz, Swinarski & Zimmerman (1987), § 2197.

<sup>1517</sup> (1948b), *United States v. Wilhelm List, et al. (Hostages Case)*, UNWCC (8 July 1947-19 February 1948), 69.

<sup>1518</sup> Oeter (1995), § 457.4

<sup>1519</sup> Sandoz, Swinarski & Zimmerman (1987), § 2208.

<sup>1520</sup> Sandoz, Swinarski & Zimmerman (1987), § 2198; Bothe (2001), 45.

<sup>1521</sup> Schmitt (2006), 303.

there is not incidental harm of civilians and civilian objects expected, there is no requirement to take precautionary measures vis-à-vis the target.

#### 1.3.4. Information

A determinative factor in the analysis of taking feasible precautions is the availability of information *at the moment of planning, deciding upon or executing attacks*, and not that which was available in hindsight.<sup>1522</sup> As held by Watkin

[t]he reality of combat must also be taken into consideration when assessing precautionary measures. As a result, the written word of the Protocols must be interpreted in the practical context within which the rules were designed to be applied. Those assessing the actions of those participating in targeting decisions must remember that “[d]etached reflection cannot be demanded in the presence of an upturned knife.”<sup>1523</sup>

For example, in 2009, the German command of the ISAF mission in the province of Kunduz, Afghanistan ordered the aerial bombardment of two stranded fuel trucks, close to its headquarters. The order to launch the attack against the trucks was ordered on the basis of intelligence available to the German ISAF command that the trucks were plundered by 60-70 Taliban fighters. The Battle Damage Assessment carried out after the attack made clear that many of the ‘fighters’ killed in the bombardment were in fact civilians. The German commander was acquitted from further criminal persecution in Germany because the prosecutor concluded that the commander had acted in good faith, on the basis of the information available to him at that time – which indicated that all those present near the trucks were lawful military objectives, and that his decision to proceed with the attack was justified in light of the circumstances at hand.<sup>1524</sup>

The availability of information has intensified due to the availability of new technologies. While these technologies undoubtedly contribute to a more accurate assessment of the situation on the ground, they are no absolute guarantee that mistakes will no longer be made. In fact, the intelligence produced by these systems requires its processing, and may lead to an overload of information that is difficult to digest, particularly when a decision is to be made quickly.

#### 1.3.5. Observations

The law of hostilities imposes upon military personnel the continuous obligation to assess and reassess the lawfulness of an attack, up and until the moment of the actual strike, to the extent feasible. While leaving a certain degree of discretion to the commander, at the same time this latitude involves a responsibility to examine to the utmost degree reasonably possible the circumstances under which the attack takes place, notwithstanding the difficulties under which the commander operates at that time. The ‘fog of war’ itself cannot be used as an excuse to avail oneself of this responsibility, yet it is an aspect to be taken into account when assessing – *post facto* – whether it had been reasonable to take precautionary measures.

### 1.4. Prohibited and Restricted Means and Methods

Besides the requirements of proportionality and precaution, LOAC also contains prohibitions and restrictions on the *means and methods* of warfare applied in the conduct of hostilities

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<sup>1522</sup> Hays Parks (1997), 802 (emphasis added).

<sup>1523</sup> Watkin (2005a), 25.

<sup>1524</sup> Ducheine & Baron (2010).

against lawful military objectives. These specific prohibitions and restrictions follow from the general rules embodied in Article 22 and 23(e), 1907 HVR and Article 35 AP I,<sup>1525</sup> reflecting the idea that the enemy fighter must be given a chance to return to normal civil life after the end of the conflict and that therefore the means and methods which parties to an armed conflict may adopt are not unrestricted, and that means and methods that cause superfluous injury or unnecessary suffering are prohibited. These concepts permeate the entire body of the law of hostilities and are reflected in numerous specific prohibitions regulating the means methods of warfare.

In so far it concerns *means of warfare* LOAC generally prohibits the employment of indiscriminate weapons<sup>1526</sup> as well as weapons that are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment.<sup>1527</sup> More specifically, it contains prohibitions on the following weapons: bacteriological or biological weapons;<sup>1528</sup> chemical weapons;<sup>1529</sup> dum-dum bullets;<sup>1530</sup> explosive<sup>1531</sup> and fragmentation weapons;<sup>1532</sup> anti-personnel landmines;<sup>1533</sup> ‘other devices’;<sup>1534</sup> nuclear weapons;<sup>1535</sup> and the employment of poison or poisoned weapons;<sup>1536</sup>

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<sup>1525</sup> Article 22, 1907 HVR states that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.” Article 23(e), 1907 HVR adds: “In addition to the prohibitions provided by special Conventions, it is especially forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering.” While the former provision is limited to “means” only, Article 35(2) AP I extends the limitation to “methods” as well: “In any armed conflict, the right of the Parties to the conflict to choose the methods and means of warfare are not unlimited. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”

<sup>1526</sup> Article 51(4) AP I;

<sup>1527</sup> Article 35(3) AP I;

<sup>1528</sup> 1925 Geneva Gas Protocol; 1972 BWC. While Article 1 BWC does not explicitly prohibit the use of these types of weapons, at the Fourth Review Conference in 1996 States agreed that Article 1 nonetheless has a prohibitive effect.

<sup>1529</sup> Article I(1) of the CWC prohibits States party to undertake never under any circumstances the development, production, otherwise acquirement, stockpiling or retainment of chemical weapons, or their transportation, directly or indirectly, to anyone; the use of chemical weapons; their engagement in any military operations; and to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party to the CWC. For a definition of chemical weapons, see Article II CWC.

<sup>1530</sup> 1899 Hague Declaration 3 Concerning Expanding Bullets; ICRC (2005a), Rule 77. Dum-dum bullets “expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.”

<sup>1531</sup> Concerning exploding bullets: ICRC (2005a), Rule 78; 1868 St. Petersburg Declaration. Concerning incendiary bullets: ICRC (2005a), Rule 85

<sup>1532</sup> Protocol I on Non-Detectable Fragments to the CCW prohibits “any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays”. Generally, under the rule embodied in Article 35(2) AP I, the use of weapons or projectiles that discharge broken glass, nails, and so forth is prohibited. See also Oppenheim (1952c), 340; U.K. Ministry of Defence (2004), 110, § 6.11.1.

<sup>1533</sup> Article 1, 1997 Ottawa Convention prohibits the possession or use of anti-personnel mines as well as assistance, encouragement, or inducement to any other person to possess or use these mines. The prohibition is limited to the States party to the Ottawa Convention. States, not party to the Ottawa Convention are, in the view of the ICRC, bound by the customary rule that “When landmines are used, particular care must be taken to minimize their indiscriminate effects.” ICRC (2005a), Rule 81.

<sup>1534</sup> ‘Other devices’ refers to “manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.” Article 2(5) Amended Mines Protocol.

<sup>1535</sup> There is no specific rule prohibiting the use of nuclear weapons in neither conventional nor customary international law. Nonetheless, according to the ICJ, the threat or use of nuclear weapons would generally be unlawful in view of the rules of the *jus ad bellum*, as well as in view of the law of hostilities, except

In addition to strictly prohibited weapons, the following weapons are in principle lawful, but may be used only restrictively: bayonets and swords;<sup>1537</sup> booby-traps;<sup>1538</sup> incendiary weapons;<sup>1539</sup> anti-vehicle landmines;<sup>1540</sup> laser weapons;<sup>1541</sup> and riot control agents.<sup>1542</sup>

In the context of counterinsurgency operations, the use of booby-traps, dum-dum bullets (or bullets with a ‘stopping’ effect in general), as well as riot control agents may at times, at least from an operational point of view, be quite useful if not an outright necessity. For example, the use of tear gas or ammunition that does not leave the human body is particularly useful in close-quarter battles where there is a likelihood of incidental injury or collateral damage to civilians, as well as to own troops. However, the prohibitions on the use of these weapons are limited to its use as a means of warfare. This implies that even during an armed conflict, dum-dum bullets and riot control agents may be used in the context of activities that may qualify as law enforcement (even though the insurgents may also qualify as lawful military objectives under the law of hostilities). Examples of such law enforcement situations in armed conflict are riots or hostage situations.<sup>1543</sup>

Prohibited and restricted *methods of warfare* include perfidy,<sup>1544</sup> the prohibition of denial of quarter,<sup>1545</sup> the prohibition of terror attacks,<sup>1546</sup> the prohibition of using civilians or pro-

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perhaps in an extreme circumstance of self-defense in which the survival of the State is at stake. (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, 165-166.

<sup>1536</sup> Article 23(a), 1907 HIVR;

<sup>1537</sup> Generally, stabbing or cutting weapons, such as bayonets, swords, and knives are lawful, unless they are of a nature to cause superfluous injury and unnecessary suffering, for example due to serrated edges. U.K. Ministry of Defence (2004), 105, § 6.6.

<sup>1538</sup> Generally, booby-traps are permitted, provided they are (1) not specifically directed against civilians; (2) indiscriminate in nature; and (3) feasible precautions are taken to protect civilians from their effects. See Article 3(10) CCW. A booby-trap is “any device or material which is designed, constructed, or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.” (Article 2(4) Amended Mines Protocol). Other prohibitions are laid down in Article 3(3), (5) and 7(1), (2) and (3) Amended Mines Protocol.

<sup>1539</sup> An incendiary weapon is “any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target,” such as “flamethrowers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.” Article 2(2) to the Incendiaries Protocol (Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons) to the CCW prohibits “in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.” It follows that the use of incendiary weapons against military objectives is lawful provided the military necessity to do so outweighs the humanitarian harm inflicted by its use. Article 1(1) to the Incendiaries Protocol contains a list of weapons not considered incendiary.

<sup>1540</sup> See Amended Mines Protocol (Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices 1996).

<sup>1541</sup> See Lasers Protocol (Protocol IV on Blinding Laser Weapons to the CCW). It prohibits the employment of laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision.

<sup>1542</sup> Article 1(5) CWC.

<sup>1543</sup> Melzer (2008), 367 ff; de Cock (2010), 123 ff

<sup>1544</sup> Article 23, 1907 HIVR; Article 37(1) AP I; Rule 65, ICRC (2005a). A perfidious act invites the confidence of the adversary to lead him to believe that he is entitled to or is obliged to afford protection under LOAC, with intent to betray that confidence. Examples are the feigning of an incapacitation by wounds or sickness; the feigning of being a civilian or combatant; the feigning of an intent to negotiate under a flag of truce or to surrender; and the feigning of protective status by the use of signs, emblems or uniforms of the United Nations or of neutral States or other States not parties to the conflict. It must

tected persons or objects as shields,<sup>1547</sup> the prohibition of indiscriminate attacks,<sup>1548</sup> the prohibition of attack on civilian objects,<sup>1549</sup> cultural objects and places of worship,<sup>1550</sup> the prohibition of starvation of the civilian population,<sup>1551</sup> the prohibition from attack on objects indispensable to survival,<sup>1552</sup> prohibition of environmental manipulation;<sup>1553</sup> the prohibition from employing methods and means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment,<sup>1554</sup> works and installations containing dangerous forces;<sup>1555</sup> locations and zones under special protection.<sup>1556</sup>

### 1.5. Additional Restrictions Imposed by Military Necessity (and Humanity)?

As follows from the analysis thus far, an attack is lawful under the law of hostilities, *firstly*, when it has been established – in compliance with the requirements of distinction, proportionality and precautionary measures – that the target is a lawful military objective, and that the incidental harm to civilians and civilian objects does not outweigh the military advantage anticipated from the attack, and, *secondly*, in so far the means and methods of warfare applied in that attack are lawful, i.e. are not restricted or prohibited.

Recent views express the idea that the lawfulness of an attack under the law of hostilities is subject to an *additional restriction*, namely that the kind and degree of force that may be applied against a legitimate military target may not exceed that which is necessary to attain the lawful objective of warfare. This requirement is said to follow from restrictions on the kind and degree of force flowing from the notions of military necessity and humanity. *Materially*, these interpretations of military necessity and humanity result in the introduction of requirements imposing a duty to be carried out by individual soldiers to (re)assess the necessity to apply lethal force against lawful military objectives in the concrete circumstances of each military operation or part thereof with the aim to avoid, or in any event *to minimize the loss of life or injury of lawful military objectives*. In sum, it introduces a ‘least harmful means’-approach of lethal force vis-à-vis lawful military objectives. While some, such as Blum, acknowledge that such restrictions are mere suggestions of the direction in which the law of

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be distinguished from ruses of war, which are lawful and aim to mislead an adversary or to induce him to act recklessly, provided they do not infringe upon a rule of LOAC. Rule 57, ICRC (2005a).

<sup>1545</sup> Article 23, 1907 HIVR; Article 37(1) AP I; Rule 48, ICRC (2005a). In view of the generic obligation to limit warfare to the defeat of the enemy, it is prohibited to order that there shall be no survivors, or to conduct hostilities on that basis, to refuse to accept a surrender or to kill those who are *hors de combat*.

<sup>1546</sup> Article 51(2) AP I;

<sup>1547</sup> Article 51(7) AP I;

<sup>1548</sup> Article 51(4) AP I;

<sup>1549</sup> Article 52(1) AP I;

<sup>1550</sup> Article 53 AP I;

<sup>1551</sup> Article 54(1) AP I;

<sup>1552</sup> Article 54(2) AP I;

<sup>1553</sup> Article I ENMOD

<sup>1554</sup> Article 35(3) AP I;

<sup>1555</sup> Article 56(1) AP I;

<sup>1556</sup> These include undefended towns, villages, dwellings, or buildings (Article 25, 1907 HIVR); hospital zones and localities for the protection of the wounded and sick of the armed forces and medical personnel (Article 23 GC I); safety zones for wounded and sick civilians, old people, expectant mothers, and mothers of small children (Article 14 GC IV); neutralized zones for protection of the wounded and sick, both combatants and civilians, and also civilians who are taking no part in hostilities (Article 15 GC IV); non-defended localities (Article 59 AP I); demilitarized zones (Article 60 AP I).

hostilities should develop, others, and most notably the ICRC and Dr. Nils Melzer,<sup>1557</sup> submit an interpretation of the position, function and interpretation of the notions of military necessity and humanity which in their view reflects the *lex lata*. In recent times particularly the ideas of the ICRC and Melzer have been strongly opposed, most notably because the ‘least harmful means’-approach was adopted in Section IX of the heavily scrutinized Interpretive Guidance, and merits discussion.

This paragraph addresses the question whether and, if so, how the notions of military necessity and humanity may limit the commander’s discretion to determine the *kind and degree* of force of his choosing against the lawful military objective. It will first set out the traditional view on the role and function of military necessity and humanity regarding the killing of lawful military objectives, which, it is submitted, reflects the *lex lata*, followed by an overview of the principal aspects of this ‘least harmful means’-approach as understood by the ICRC and Melzer. It concludes that currently there is no legal basis for an approach as proposed by the ICRC and Melzer.

### 1.5.1. Traditional View Reflecting the *Lex Lata*

To recall what has been previously noted when setting out the legal context of counterinsurgency operations (in Part A), the conceptual construct inherent in the grammar of the law of hostilities is that it allows *any* conduct in hostilities in order to attain the legitimate purpose of warfare, *unless* it is specifically prohibited or restricted by rules and principles of positive international law. Possibly the supreme reflection of this construct is the authority to render *hors de combat* enemy personnel by death, injury or capture, once it has been determined that this complies with the requirements of distinction, proportionality and precaution, and is not otherwise prohibited or restricted by specific rules of the law of hostilities (e.g. those on the means and methods of warfare). The law of hostilities simply *presumes* that, besides capture, the injuring and killing of individuals taking a direct part in the hostilities is inherently *necessary* to achieve the legitimate aim of warfare, which is “to weaken the military forces of the enemy.”<sup>1558</sup> This is a presumption at the strategic or, at the most, operational level of military operations. Beyond the requirements, prohibitions and restrictions discussed previously, the law of hostilities, by design, dictates that military necessity prevails over humanitarian considerations,<sup>1559</sup> and thus remains otherwise silent on the kind and degree of force permissible against lawful military objectives at the tactical level of military operations, i.e. it is legally irrelevant whether there is a specific necessity to do so via the capture, injury or killing of military objectives in each individual operation.<sup>1560</sup> This is also how the phrase “degree and kind of force” in the definition of military necessity in the UK Manual of the Law of Armed Conflict must be read. It permits

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<sup>1557</sup> The principal source of the ICRC is the Interpretive Guidance, where the approach is adopted in Section IX, titled ‘Restraints on the Use of Force in Direct Attack’. The principal source of Dr. Melzer is his book ‘Targeted Killing in International Law’. As Dr. Melzer functioned as the main author of the Interpretive Guidance, there is considerable overlap in the arguments as set out in both sources. Support can also be found with Alston (2010), §§ 75-77; Römer (2009), 70-72; Droegge (2008a), 534.

<sup>1558</sup> As stipulated in the 1868 St. Petersburg Declaration.

<sup>1559</sup> Schmitt (2009a), 817.

<sup>1560</sup> See also Corn (2010), 75 (emphasis added): “deliberate targeting of enemy personnel is permitted by the law of armed conflict based not on a manifestation of actual threat, but instead on a presumption of necessity derived from the determination of status as “enemy.” Once that status is determined, the law *permits* the government agent to use of the *most efficient means to subdue the enemy personnel*, which in warfare is synonymous with the use of deadly force as a measure of first resort.”

[...] a State engaged in an armed conflict to use that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.<sup>1561</sup>

In the absence of a prohibition or guiding rule in positive international law to that effect, it is submitted, therefore, that, *firstly*, as a matter of law, there is no legal basis authorizing a distinct *appeal* on military necessity for the use of lethal force against a lawful military objective, nor a legal basis for a requirement to *demonstrate* the continuing existence of the presumed military necessity to apply lethal force in relation to each lawful military objective. *Secondly*, there is not, as a matter of law, a legal basis within the *principle of humanity* authorizing an *appeal* on, or imposing a *requirement* to demonstrate that humanitarian interests override military necessity in each concrete application of lethal force.

### 1.5.2. The ‘Least Harmful’-Approach

As noted, recent interpretations of the notions of military necessity and humanity challenge the traditional outlook on the kind and degree of force permissible against lawful military objectives at the tactical level of military operations. The most authoritative source in encapsulating these recent interpretations – Section IX of the Interpretive Guidance, titled ‘Restrains on the Use of Force in Direct Attack’ – formulates the following rule:

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.<sup>1562</sup>

At the heart of this restriction is the assertion that the traditional outlook explained above is flawed. Notwithstanding that fact that there is a strong presumption that in armed conflict it will be necessary to kill, injure or capture enemy personnel to win the war, the fact that the law of hostilities does not provide a distinct rule regulating the kind and degree of force that may be applied against a lawful military objective does not imply that his killing is permissible when there is *manifestly* no necessity to do so.<sup>1563</sup> An example is the situation where a lawful military objective, not *hors de combat*, is nonetheless in a defenseless position, and could easily be apprehended.

While it is not the aim of the Interpretive Guidance to “replace the judgment of the military commander by inflexible or unrealistic standards” but rather “to avoid error, arbitrariness, and abuse” it nonetheless seeks to provide “*guiding principles* for the choice of means and methods of warfare based on [the commander’s] assessment of the situation.”<sup>1564</sup> The prin-

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<sup>1561</sup> U.K. Ministry of Defence (2004), Section 2.2 (emphasis added). Until August 2010, the UK manual used to state “[...] to use *only* that degree and kind of force.” The word “only” has been deleted in an amendment of September 2010. See United Kingdom Ministry of Defence (2010), available at <<http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/LegalPublications/LawOfArmedConflict/>>. For an overview of other definitions appearing in military manuals, see Melzer (2008), 283-285.

<sup>1562</sup> ICRC (2009), 77.

<sup>1563</sup> Melzer (2008), 288 (emphasis added). This argument not only finds support among lawyers, but is also found among philosophers. See May (2007), 115 ff; Kasher (2009);

<sup>1564</sup> ICRC (2009), 80.



cial vehicle it uses for these guiding principles is the Martens clause.<sup>1565</sup> While referring to it in a footnote, the Interpretive Guidance explains as follows:

It has long been recognized that matters not expressly regulated in treaty IHL should not, “for want of a written provision, be left to the arbitrary judgment of the military commanders” (Preamble H II ; Preamble H IV) but that, in the words of the famous Martens Clause, “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” (Art. 1 [2] AP I). First adopted in the Preamble of Hague Convention II (1899) and reaffirmed in subsequent treaties and jurisprudence for more than a century, the Martens Clause continues to serve as a constant reminder that, in situations of armed conflict, a particular conduct is not necessarily lawful simply because it is not expressly prohibited or otherwise regulated in treaty law.<sup>1566</sup>

In view of the Martens clause, it has been argued that notwithstanding the absence of specific rules to that effect, the law of hostilities nonetheless imposes a restriction on the kind and degree of lethal force against lawful military objectives that finds its *legal basis* principally in the complementary function of military necessity and humanity, which function as “guiding *principles* for the interpretation of the rights and duties of belligerents.”<sup>1567</sup> As such, elementary considerations of humanity have a complementary role, forming an integral part of – what is referred to as<sup>1568</sup> – the *restrictive* function of the principle of military necessity:<sup>1569</sup>

The restrictive function of the principle of military necessity is sometimes expressed in the maxim ‘necessity is the limit of legality’. In this dimension, the principle is by no means contrary to humanitarian, cultural, religious, environmental and other protective values but, on the contrary, is the very expression of their priority over the political liberty of states. Far more restrictive than any of those values by themselves, the principle of military necessity reduces the sum total of lawful military action from that which positive IHL does not prohibit *in abstracto* to that which is actually required *in concreto*. Put more plainly, in its *restrictive* function, the principle of military necessity prohibits the employment of any kind or degree of force which is not indispensable for the achievement of ‘the ends of the war’, *even if such force would not otherwise be prohibited by IHL*.<sup>1570</sup>

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<sup>1565</sup> As sources are cited: Article 1(2) AP I. See also the Preamble of the 1899 HC II; Preamble, 1907 HIVR; Article 63 GC I; Article 63 GC II, Article 142 GC III; Article 158 GC IV; Preamble AP II; (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, 257. As acknowledged by the ICTY, “this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates.” (2000q), *The Prosecutor v. Kupreskic et al., Case No. IT-95-16-Y, Judgment of 14 January 2000 (Trial Chamber)*, § 525. Also: Lauterpacht (1952), 379 (“the law on these subjects must be shaped- so far as it can be shaped at all – by reference not to existing law but to more compelling considerations of humanity, of the survival of civilization, and of the sanctity of the individual human being.”) During the ICRC/Asser-Interpretive Guidance expert meetings, a group of experts proposed that “instead of referring directly to the principles of military necessity and humanity and incorporating a vague “without prejudice”-clause, Section IX should be based on the famous Martens Clause.” ICRC (2008a), 22.

<sup>1566</sup> ICRC (2009), 80, footnote 219.

<sup>1567</sup> ICRC (2009), 78-79 (emphasis added).

<sup>1568</sup> The term is not mentioned in the Interpretive Guidance.

<sup>1569</sup> Melzer also identifies a *permissive* function. This function “relates exclusively to conduct that would be prohibited under international law in situations other than armed conflict” (Melzer (2008), 286), and “is that aspect of the principle which must be *balanced* against other interests, such as humanitarian, cultural, religious, political, environmental, or economic values in order to determine the lawfulness of conduct in situations of armed conflict.” Melzer (2008), 291.

<sup>1570</sup> Melzer (2008), 287 and accompanying footnote 243 (emphasis added). The 1868 St. Petersburg Declaration is submitted as evidence for support of this argument. While it is accepted that its permission to

As argued by Melzer, the restrictive function of military necessity is “the inevitable result of logical reasoning”; the *manifest* absence of a necessity, otherwise presumed to exist, to attack and kill a lawful military objective renders such use of force, nonetheless employed, unlawful.<sup>1571</sup>

To operationalize the determination of ‘necessity’ in the specific circumstances of a case, Melzer identifies three “objective standards” that are not “new aspects to the concept of military necessity:”<sup>1572</sup> *qualitative*, *quantitative* and *temporal* military necessity.

*Qualitative* necessity refers to the condition that “the achievement of the desired concrete and direct military advantage<sup>1573</sup> *must* require a direct attack against the individual in question.”<sup>1574</sup> This implies, *firstly*, that a commander is under an obligation to question in *each specific engagement* the necessity for the use of lethal force against a military objective.<sup>1575</sup> *Secondly*, he must refrain from the use of lethal force when it is manifestly clear that the necessity to do so is absent because the desired military advantage can be attained by feasible alternatives, such as capture.<sup>1576</sup> The purpose here is to exclude from ‘necessity’ – and thus to qualify as ‘unnecessary’ (and hence as unlawful) – the use of lethal force that is merely convenient;<sup>1577</sup> that amounts to ‘potential’ military advantage;<sup>1578</sup> or that which is “hardly perceptible [or] would only appear in the long term.”<sup>1579</sup>

*Quantitative* necessity relates to the *kind and degree of force required* to achieve the desired military advantage and embodies the very essence of the ‘least-harmful’-approach. This aspect of necessity introduces a *proportionality*-test grounded not in LOAC (with the aim of *minimizing incidental* harm to protected persons and property), but in general international law (*proportionality lato sensu*), and is aimed at *limiting* the kind and degree of *intended* force applied *against lawful military objectives*.<sup>1580</sup> In more concrete terms, the aspect of quantitative necessity

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“weaken the military forces of the enemy” presumes a military necessity to kill, at the same time it limits such killing to that which is “*sufficient* to disable the greatest possible number of men.” As Melzer argues, “the word ‘sufficient’ would have no meaning without a corresponding requirement or [sic] necessity” (Melzer (2008), 288).

<sup>1571</sup> Melzer (2008), 288; ILC (1980a), 46 (“a circumstance precluding the lawfulness of conduct which that rule normally allows”).

<sup>1572</sup> Melzer (2008), 296.

<sup>1573</sup> Melzer (2008), 292 ff. The condition of ‘direct and concrete military advantage’ follows from an inductive examination of Article 52(2) AP I, defining military objects, and which uses the term ‘definite military advantage’, and Articles 51(5)(b) and 57(2)(a)(iii) AP I, on proportionality, which contain the phrase “concrete and direct military advantage anticipated.” Objecting this approach: Hays Parks (2010b), 796-797 ff.

<sup>1574</sup> Melzer (2008), 398 (emphasis added).

<sup>1575</sup> For support of this idea, see United Nations General Assembly (2010), 16, § 47.

<sup>1576</sup> See also Blum (2009), 42.

<sup>1577</sup> Melzer (2008), 292; Draper (1973), 135; (1949d), *UK v. von Lewinski (called von Manstein)*, 522.

<sup>1578</sup> Melzer (2008), 293.

<sup>1579</sup> Sandoz, Swinarski & Zimmerman (1987), § 2209.

<sup>1580</sup> This element of proportionality was relied upon by the Israel High Court in (2004c), *Beit Sourik Village Council v. The Government of Israel et al.*, HCJ 2056/04, *Israel Supreme Court (sitting as the High Court of Justice), Judgment of 30 June 2004*, § 37: “Proportionality is recognized today as a general principle of international law. [...] From the foregoing principle springs the Principle of Humanitarian Law (or that of the law of war): Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare which is to destroy or weaken the strength of the enemy.” See also, (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 40: “[...] a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those

imposes upon a party to the conflict not only a moral or ethical obligation, but foremost a *legal obligation* in two respects. *Firstly*, of the range of reasonable *measures* available and feasible to attain the military advantage, a party to the conflict must apply only that measure which is the *least harmful* to the military objective.<sup>1581</sup> Thus, if a lawful military objective can be captured, he should not be attacked. *Secondly*, the measure that is qualitatively necessary and is least harmful must be applied in the least harmful *manner* that is proportionate to attain the desired military advantage. In the context of direct attacks against lawful military objectives, this implies that, if the military advantage can be attained by wounding, his killing would be quantitatively unnecessary, and thus unlawful. The legal basis for this rule is said to follow from Article 35(2) AP I, which prohibits the employment of means and methods of warfare that cause superfluous injury and unnecessary suffering,<sup>1582</sup> as well as the so-called Pictet's use-of-force continuum, which rules that "humanity demands capture rather than wounds, and wounds rather than death; that non-combatants shall be spared as much as possible; that wounds shall be inflicted as lightly as circumstances permit, in order that the wounded may be healed as painlessly as possible; and that captivity shall be made as bearable as possible."<sup>1583</sup>

Finally, *temporal* necessity limits, and qualifies as unnecessary, force that is not yet, or no longer qualitatively or quantitatively necessary at the moment of its application. An example is the situation "where a group of defenceless soldiers has not had the occasion to surrender, but could clearly be *captured without additional risk to the operating forces*."<sup>1584</sup>

In essence, these aspects of military necessity require the identification and appraisal of the *actual threat* posed by individuals to own troops or innocent bystanders, notwithstanding and additional to their status as a lawful military objective under the law of hostilities.<sup>1585</sup> Melzer

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are the means which should be employed [...]. Trial is preferable to use of force. A rule-of-law State employs, to the extent possible, procedures of law and not procedures of force." However, it is important to stress here that the High Court appears to view this obligation as one that follows from domestic law, not international law.

<sup>1581</sup> Melzer (2008), 289.

<sup>1582</sup> Article 35(2) AP I is not mentioned in the Interpretive Guidance. It has, however, emerged as a subject during the ICRC/Asser-expert meetings (see ICRC (2006), 75; ICRC (2008b), 39; ICRC (2008a), 19) and in Melzer's response to Hays Parks critique in Melzer (2010b), 905-906.

<sup>1583</sup> Pictet (1975), 32. See also : ICRC (1973), 13 (if [a combatant] can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed, and if he can be put out of action, grave injury should be avoided"); ICRC (1975), § 25 ("if two or more weapons would be available which would offer equal capacity to overcome (rather than 'disable') and adversary, the weapon which could be expected to employ the least injury ought to be employed"); also Pictet (1985), 75 f. Pictet's use-of-force continuum is explicitly mentioned in the Interpretive Guidance and Melzer's book (ICRC (2009), 82 and Melzer (2008), 289.

<sup>1584</sup> Melzer (2008), 288.

<sup>1585</sup> While acknowledging the *lege ferenda*-nature of her suggestion, Blum proposes "the relaxation of the status-based determination by supplementing it with an obligation to assess the individual threat emanating from many particular human target. This would require an amendment to the principle of distinction, from one separating combatants from civilians to one distinguishing threatening combatants from unthreatening ones. This amendment would essentially operate as the mirror-image of the doctrine of civilian immunity: civilians are presumed innocent and immune unless and for such time as they take direct part in hostilities (art. 51(3) of API). The proposed change would make combatants presumptively dangerous, unless they pose no or marginal threat. Once there is reason to believe that the level of threat is low, even if the enemy soldier is not *hors de combat*, the targeting forces would have to refrain from direct fire. [...] Naturally, nonthreatening combatants could still be killed where distinguishing them from others is impossible or where they are affected as collateral damage. The point I wish to emphasize here is that they should not be targeted intentionally, and that reasonable efforts to spare them should be made." Blum (2009), 35.

and the ICRC acknowledge that, ultimately, great latitude may have to be given to the commander, as it is he who has to make the assessment of necessity in the concrete circumstances prevailing at the time. However, in their view the restrictions imposed by the principles of military necessity and humanity should be flexible enough to take into account the nature and reality of armed conflict.<sup>1586</sup> In acknowledgement of the fact that in practice the determination of the kind and degree of lethal force in terms of necessity “involves a complex assessment based on a wide variety of operational and contextual circumstances.”<sup>1587</sup> Melzer and the ICRC propose a “flexible scale” between reasonable and absolute necessity, which also takes account of the risk to the lives of the security forces and the civilian population.<sup>1588</sup> As explained by the ICRC:

In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.<sup>1589</sup>

An important source for this approach is the Israel High Court of Justice (hereinafter: Israel HCJ) decision in the *Targeted Killings Case*, which holds that

a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest [...]. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated and tried, those are the means which should be employed [...]. [T]rial is preferable to the use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force [...]. Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required [...]. It might actually be particularly practical under the conditions of belligerent occupation, in which the army *controls the area in which the operation takes place*, and in which arrest, investigation, and trial are at times realizable possibilities [...]. Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby

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<sup>1586</sup> Melzer (2008), 295; ICRC (2009), 80.

<sup>1587</sup> ICRC (2009), 80.

<sup>1588</sup> This view finds support among other scholars. Sassòli and Olson point at combat and ‘peace’ as being two ends of a spectrum and submit that the extent to which the armed forces are able to “effect an arrest (of individuals or groups) without being overly concerned about interference by other rebels in that operation [...]” functions as a rule of thumb to identify control (Sassòli & Olson (2008), 614). Droege mentions other parameters, such as the outcome of an assessment of the likelihood of a successful arrest, the degree of threat to own forces and innocent bystanders when doing so, and the danger the enemy poses, based on the number of forces, the weapons and methods used, the frequency, duration and intensity of likely hostilities and other indications (Droege (2008a), 536).

<sup>1589</sup> ICRC (2009), 80-81. Note that the ICRC, appears to suggest that even “in classic battlefield situations involving large scale confrontations” resort to law enforcement measures is required, as it argues that “[...] armed forces operating in situations of armed conflict, even if equipped with sophisticated weaponry and means of observation, may not *always* have the means or opportunity to capture rather than kill.” For similar wording, see Melzer (2008), 295. See, however, Blum (2009), 42, arguing that “[...] while feasibility may depend on tactical capabilities in a particular time and place, it is unclear why it should be ruled out altogether from “classic battlefield situations involving large scale confrontations.”

innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used.<sup>1590</sup>

In sum, the ‘least harmful means’-approach implies that while the necessity to attack and kill military objectives is presumed *to generally exist*, the restrictive function of military necessity implies a requirement to determine in *light of the prevailing circumstances at the time of employment of force* that a *necessity* to attack and kill still exists, based on the actual *threat* posed by the legitimate military objective at the very moment of attack, “and not only where positive IHL so demands.”<sup>1591</sup> This obligation would not only exist for governments and senior military commanders, but also for individual soldiers.<sup>1592</sup>

### 1.5.3. Observations on the Idea of a ‘Least Harmful Means’-Obligation under the Law of Hostilities

There is no doubt that one’s designation as DPH-civilian or member of an organized armed group has significant, and potentially lethal consequences, as it entails a shift from protective to unprotected status under the law of hostilities, which in the case of membership even results in the continuous loss of immunity from direct attack. As it is not conceivable that civilians will be erroneously or arbitrarily identified as DPH-civilians or as members of organized armed groups (in a CCF), the restriction in Section IX of the Interpretive Guidance seeks to add a level of protection in order to save the lives of civilians.<sup>1593</sup> While laudable from a humanitarian point of view, it is submitted that there is no legal basis in positive international law, State practice or *opinio juris* that substantiates the claim that the qualitative, quantitative and temporal aspects of military necessity are to be part of every government’s, commander’s and soldier’s assessment of the use of force against lawful

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<sup>1590</sup> (2005d), HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (11 December 2005), § 40 (emphasis added). An example of State practice, arguably adopting the ‘flexible approach’ and the interpretation of the principles of military necessity and humanity as expressed in the Interpretive Guidance, is the “Manual de Derecho Operacional” of 7 December 2009 by the General Command of the Colombian Armed Forces. The Manual, in relevant part, states as follows: “Principle of necessity: Generally speaking, the principle of necessity implies that all combat activity must be justified by military purposes, wherefore activities that are not military necessary are prohibited. Inherent in the concept of military necessity is an important element of restriction: only that force will be used, which is necessary to achieve the military purposes; any use of force exceeding this purpose contravenes military necessity. [...] The fact that officers, non-commissioned officers and soldiers are required to adapt the principle of military necessity while planning and executing an operation does not mean that it is possible to adapt military necessity in all scenarios of hostilities. There are many combat situations where this is not possible without exposing one’s own men to unacceptable risks and without losing operational effectiveness.” Colombia (2009), 88, 92 (emphasis in original; translation Nils Melzer, in Melzer (2010b), 910).

<sup>1591</sup> It is argued, in more detail, that “[...] the various provisions of IHL which permit a particular conduct in armed conflict constitute the result of ‘equations’ which already include the ‘necessity-factor’. Since it is precisely this necessity-factor which makes that conduct lawful despite its deviation from the more restrictive rules applicable in peace-time, the loss or absence of this factor necessarily changes the equation to the effect that the said conduct becomes unlawful.” Melzer (2008), 287. And: “as much as the positive rules of IHL may *presume* the existence of military necessity, they also *presuppose* such necessity as an *inherent condition for the lawfulness of military operations*.” Melzer (2008), 289 (emphasis original and added).

<sup>1592</sup> Melzer (2010b), 908-909.

<sup>1593</sup> It is particularly problematic that the ICRC appears to extend the ‘least harmful means’-requirement to all individuals not protected from direct attack, to include members of the regular armed forces, in which cases errors or arbitrariness in the identification as lawful military objectives are less likely to occur, but which nonetheless demands from military personnel to resort to the least harmful means of combat power.

military objectives *as a matter of legal obligation*, and that arguments in support of such a claim are generally to be regarded as flawed.<sup>1594</sup>

To recall, the Martens clause has been relied upon as a main vehicle to fill the gap in regulation of the kind and degree of force permissible against lawful military objectives. A problematic aspect of the Martens clause remains not only that its scope of applicability remains subject of dispute,<sup>1595</sup> but also that there is no agreed interpretation by States or case-law that supports the argument that the principles of humanity and the dictates of conscience implied in the Martens clause constitute *positive rules* restricting conduct not further expressly prohibited by positive LOAC. At the most, it is argued, the “principles of humanity” and “dictates of public conscience” “may be driving forces for the development of the law.”<sup>1596</sup> In addition, serious objections have been raised against the view that military necessity and humanity are “*guiding principles* for the choice of means and methods of warfare based on [the commander’s] assessment of the situation.”<sup>1597</sup> The principal point of criticism expressed by experts is that, as “*guiding principles*”, *considerations* of military necessity and humanity would in effect function and be elevated, via the Martens clause, to “independent normative standards that possess legal force in and of themselves,” which they are pertinently not.<sup>1598</sup> As further explained by Kleffner,

[...] if the law is silent on a given issue, neither humanity nor military necessity can directly and on its own force alone, provide an answer to the underlying question. If the law is permitting a given action, such as the use of force against a combatant or a fighter, considerations of humanity do not provide for further *legal* restraints on the use of that force, nor does the restrictive dimension of military necessity.<sup>1599</sup>

In the quantitative aspect of military necessity, which inhibits the ‘least harmful means’-requirement, support was found in, arguably, Article 35(2) AP I and the Pictet’s use-of-force continuum. Both bases are flawed. As for Article 35(2) AP I, as contended by Kleffner, there is no State practice or sufficiently established jurisprudence to date from which it follows that the prohibition of *methods* of warfare of a nature to cause superfluous injury and unnecessary suffering functions as a basis for a ‘least harmful means’-requirement, implying that this requirement is violated if the use of lethal force as a method of warfare to cause superfluous injury or unnecessary suffering is avoidable.<sup>1600</sup> In addition, as argued by Hays Parks, Pictet’s argument arguably was not taken seriously by governmental delegations during conferences preparatory to, for example, the Conventional Weapons Convention and therefore has no standing as a source of international law.<sup>1601</sup>

A final source for the ‘least harmful means’-approach is the Israel HCJ’s reasoning in the *Targeted Killings*-case. However, this reasoning has been termed as “misrepresentative of existing law”<sup>1602</sup> and “at best, unsubstantiated and probably also inaccurate.”<sup>1603</sup> As argued by, for example, Cohen and Shany, the ‘least harmful means’-approach relied upon by the HCJ belongs to the normative paradigm of law enforcement and cannot be readily applied

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<sup>1594</sup> For an extensive analysis, see Kleffner (2011); Hays Parks (2010b), 796-797 ff; Hayashi (2012), 60-61.

<sup>1595</sup> Meron (2000b); Cassese (2000); Ticehurst (1997).

<sup>1596</sup> Kleffner (2011), 7-8.

<sup>1597</sup> ICRC (2009), 80.

<sup>1598</sup> Kleffner (2011), 10.

<sup>1599</sup> Kleffner (2011), 10.

<sup>1600</sup> Kleffner (2011), 14.

<sup>1601</sup> Hays Parks (2010b), 796-797 ff. For additional opposition against Pictet’s argument, see ICRC (1975), § 27; Kalshoven (1984), 380.

<sup>1602</sup> Hays Parks (2010b), 792-793.

<sup>1603</sup> Cohen & Shany (2007), 314.

in the context of armed conflict. The law of hostilities does not require such an approach and its application in the context of hostilities against individuals DPH-ing would offer them more protection than afforded to members of the regular armed forces.<sup>1604</sup> In addition, its importance for the interpretation of the law of hostilities must be viewed in the proper context.<sup>1605</sup> It is one of very few cases available that adopts this approach. More importantly, it constitutes a case ruled in the specific context of Israel, terrorism and belligerent occupation, in which the Israel HCJ applies domestic law, and gives instructions to military commanders and the Israeli government.<sup>1606</sup> It can therefore not be stretched to apply across the entire spectrum of conflict, nor be interpreted as a reflection of international law imposing obligations on individual soldiers.<sup>1607</sup>

In sum, the legal basis for a ‘least harmful means’-approach in the law of hostilities appears to be absent, or very thin, at the most. In fact, to argue that such restrictions in the kind and degree of force against lawful military objectives are part of the *lex lata* triggers the question whether States have not violated the law of hostilities all along. After all, for decades, its troops have engaged enemy fighters without second doubts as to whether killing them was lawful or not, whether they were asleep and armed, or unarmed but not *hors de combat*. This is not because the notion of military necessity has been neglected or misunderstood in legal doctrine, as suggested by Melzer,<sup>1608</sup> but simply because States have always had a clear view as to whether the killing of lawful military objectives was lawful or not: such killing serves, in view of the 1868 St. Petersburg Declaration, always a military necessity in the grand scheme of the war. In the absence of a clear legal basis for further restrictions, despite suggestions *de lege ferenda* or *de lex lata* to the contrary, it follows that the killing of a lawful military objective even in the *manifest absence of necessity in specific circumstances at hand* remains a lawful act under the law of hostilities.<sup>1609</sup>

It is, however, emphasized that the mere *permissibility* to employ lethal force is not to be equated, nor confused with an *obligation* to employ lethal means of combat power.<sup>1610</sup> Nei-

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<sup>1604</sup> Cohen & Shany (2007), 315. At § 31 of the Targeted Killings Case, Israel High Court President Barak argued that “[t]hat aspect of proportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might – like a combatant – be the objective of a fatal attack.” (2005d), HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (11 December 2005), § 31.

<sup>1605</sup> ICRC (2008a), 15.

<sup>1606</sup> Hays Parks (2010b), 796-797 ff.

<sup>1607</sup> Hays Parks (2010b), 792-793; Cohen & Shany (2007), 315.

<sup>1608</sup> Melzer (2008), 279.

<sup>1609</sup> The Interpretive Guidance notes that *no claims* were made by the experts that “a person could be lawfully killed in a situation where there is manifestly no military necessity to do so.” See ICRC (2009), 78, footnote 212. However, it is submitted the absence of claims to that effect does not in itself imply that all experts objected to the idea of rendering lawful military objectives *hors de combat* despite the manifest absence of military necessity. Neither does it imply that the experts unequivocally embrace a ‘least harmful means’-approach.

<sup>1610</sup> Corn (2010), 78: “law of armed conflict establishes the outer limits of permissible conduct; it has never established a mandate that combatants employ the full scope of authority granted by the law to subdue an enemy. Put more simply, authority is not synonymous with obligation. As a result, how commanders choose to exercise the authority they are granted by the law of armed conflict is, and has always been a choice dictated by operational considerations. Thus, it is certainly true that there have been and will undoubtedly continue to be many instances where a commander who could employ deadly force against an enemy chooses not to do so, but to instead employ a lesser degree of force to bring the enemy into submission. However, by characterizing the exercise of such operational restraint as a legal obligation, the

ther does it pave the way for arbitrariness or abuse the use of lethal means of combat power to satisfy military convenience. Rather, it is reflective of an *authority* left to the commander to decide on the kind and degree of force he desires to apply on the basis of reasonableness and good faith. As observed by Dinstein, “[m]ilitary commanders are often the first to understand that their duties can be discharged without causing pointless torment.”<sup>1611</sup> In fact, there may be very valid personal or moral reasons to resort to non-lethal alternatives. In addition, the century-old concept of *chivalry* – a concept that not only permeates throughout the law of hostilities, but that is also firmly established within military doctrine, philosophy and ethics – may lead a commander to decide to offer surrender, to resort to alternative, non-lethal means of combat power, or to abort, to postpone, or to cancel an operation.<sup>1612</sup> Not seldom, it is doctrinal, strategic, operational or tactical imperatives that determine the kind and degree of force to be applied by forces. This is particularly so in the context of *counterinsurgency*, which reflects a ‘least harmful means’ approach to killing insurgents.

In view of the difficulty to determine who may be lawfully attacked and who not – and the risk of using indiscriminate and disproportionate force (i.e. the kind and degree of force not in balance with the threat-level) the practice of recent counterinsurgency indeed shows that forces are sometimes required to determine the actual (rather than inherent) *threat* posed by individuals in a specific situation, and to *only use minimum force*. This threat-based targeting has been applied by Canadian Special Forces operating in Afghanistan.

Based on a police model, (JTF2 replaced the RCMP’s SERT task force in 1993) Canada’s super-secret soldiers emphasize the minimization of the use of force, especially deadly force. Don’t kill unless you absolutely have to. [...] To minimize the need for training, and prevent potentially deadly confusion, Canadian special operators adhere to a single standard overseas and at home. In Afghanistan, a JTF2 [Joint Task Force Two] operator will apply the same standards he would in Toronto for a domestic event. This means that CANSOFCOM operators meet, and frequently exceed, the standards for laws of armed conflict, Day explains. Every target is assessed on a “threat” or “no-threat” basis. Simply because an insurgent is a target does not make them an immediate threat or give the justification for killing them. It is illegal for a JTF2 commando to kill an unarmed person, no matter who they are. I don’t just mean civilians or an insurgent who has been previously forcibly disarmed. A JTF2 operator who has spotted a wanted terrorist must first determine whether they are a threat, (read: Armed) rather than simply calling in an air or artillery strike on the location the way some allies do. Then they will attempt to devise a way to take the target into custody without harming them. The insurgent is then turned over to Afghan authorities using the same rules that govern every other Canadian soldier in Afghanistan.<sup>1613</sup>

However, the use of minimum force in targeting transcends mere practical considerations. As has been previously noted in the introduction to this study, neo-classical counterinsurgency doctrine is founded in a number of key principles. Of particular relevance in the context of this study are the principles of legitimacy, security and the notion that political factors are prime. The importance of these principles finds reflection in the ideas on the use of force in counterinsurgency operations. Unlike traditional wars of attrition, where the

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ICRC is transforming a policy based upon operational judgment into a legal obligation that is unsupported by either treaty law or custom.”

<sup>1611</sup> Dinstein (2004), 17.

<sup>1612</sup> Corn (2010), 82.

<sup>1613</sup>

Stephenson

(2010),

[http://www.winnipegsun.com/comment/columnists/mercedes\\_stephenson/2010/12/10/16509861.html](http://www.winnipegsun.com/comment/columnists/mercedes_stephenson/2010/12/10/16509861.html).



*physical destruction* of enemy forces is viewed as “the overriding principle of war,”<sup>1614</sup> it is not an “overriding principle” of counterinsurgency.

Clearly, in counterinsurgency, the physical destruction of enemy forces forms an integral part of offensive and stability operations. However, even when the legal principle of distinction allows for the targeting of insurgents, counterinsurgency doctrine calls upon counterinsurgents to clearly examine the *necessity* to kill in each specific situation. As argued by Stephens,

The strategies and tactics for COIN/stability operations are profoundly more nuanced than what the law provides. The COIN doctrine counsels greater restraint when confronting and targeting individuals who come squarely within the criteria of DPH targeting. It has become clear that functional categorization of individuals and the validity of the norm are not the complete answer for lawful targeting – just as it has become clear that a state cannot kill its way out of an insurgency.<sup>1615</sup>

Counterinsurgency expert David Kilcullen, in his article “*Twenty-Eight Articles: Fundamentals of Company-Level Counterinsurgency*,” writes that (particularly) in (the late stages of) counterinsurgency, forces should

[t]ry not to be distracted, or forced into a series of reactive moves, by a desire to kill or capture the insurgents. Your aim should be to implement your own solution - the “game plan” you developed early in the campaign, and then refined through interaction with local partners. Your approach must be environment-centric (based on dominating the whole district and implementing a solution to its systemic problems) rather than enemy-centric. This means, particularly late in the campaign, you may need to learn to negotiate with the enemy. [...] *At this stage, a defection is better than a surrender, a surrender is better than a capture, and a capture is better than a kill.*<sup>1616</sup>

Those supporting further humanization of armed conflict will be triggered by the last sentence, as it closely resembles Pictet’s use-of-force continuum, discussed earlier (and to humanizers encapsulating a restraint in the kind and degree of force permissible as a matter of law. Indeed, ROE applied in recent SUPPCOIN (Afghanistan) and OCCUPCOIN (Iraq) operations generally require counterinsurgent forces to resort to the use of minimum force only, i.e. “the minimum degree of authorized force which is necessary and reasonable in the circumstances, limited to the degree, intensity, and duration necessary to achieve the objective,” and which may include deadly force.<sup>1617</sup> However, whether the counterinsurgency use of force-continuum is grounded in humanitarian considerations as much as Pictet’s may be doubted, even though it is difficult to ignore the second or third degree humanitarian benefits that may ensue from it. Rather, in counterinsurgency, the necessity for targeting should include

greater consideration of individual identity and broader sociopolitical considerations relating to the individual and the sectarian/tribal/regional connections he/she may be entwined within.<sup>1618</sup>

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<sup>1614</sup> See Von Clausewitz, who argued that the destruction of enemy forces “[...] is the overriding principle of war, and, so far as positive action is concerned, the principal way to achieve our object.” Clausewitz (1989), 258. See also Jomini: “strategy is the key to warfare; that all strategy is controlled by invariable scientific principles, and that these principles prescribe offensive action to mass forces against weaker enemy forces at some decisive point if strategy is to lead to victory.” Jomini (1811), 312.

<sup>1615</sup> Stephens (2010), 301.

<sup>1616</sup> Kilcullen (2006b), 26 (emphasis added).

<sup>1617</sup> Cathcart (2010), 208.

<sup>1618</sup> Stephens (2010), 302.

This way, it becomes possible to identify and distinguish between those who show willingness for reconciliation and those who persist in the fight. For example, in Iraq, policy guidance was distributed stipulating that

[w]e cannot kill our way out of this endeavour. We and our Iraqi partners must identify and separate the “reconcilables” from the “irreconcilables” through engagement, population control measures, information operations, kinetic operations, and political activities. We must strive to make reconcilables a part of the solution, even as we identify, pursue, and kill, capture, or drive out the irreconcilables.<sup>1619</sup>

This not only requires of the counterinsurgent soldier to be sensitive to the legality of the targeting operation, but also to develop

[...] a mental framework to understand how violence works in small wars and how it affects all aspects of the conflict. Each leader needs to have these mental paradigms and a working knowledge of these effects if he is able to be expected to adapt to the realities on the ground in a small war.<sup>1620</sup>

To facilitate this mental shift, the FM 3-24 stresses that “[k]indness and compassion can often be as important as killing and capturing insurgents.”<sup>1621</sup> Elsewhere, it calls upon counterinsurgent forces to reconsider the necessity for resort to lethal means, for “[c]ounterinsurgents often achieve the most meaningful success in garnering public support and legitimacy for the [host nation] government with activities that do not involve killing insurgents (although, again, killing clearly will often be necessary).”<sup>1622</sup>

These ideas have also found their way in State practice. A noteworthy example is the approach adopted by the Colombian government in its counterinsurgency campaign against the FARC and other non-State organized armed groups. More specifically, one of the ROE applicable in operations during hostile scenarios requires forces to capture, not kill legitimate military objectives when feasible. As has been noted previously, the underlying motive for this approach is to reconsider what military necessity means in the process of extending and consolidating the rule of law, “and to modulate that principle with the human rights principle of capturing or demobilizing first and using lethal force as a last resort.”<sup>1623</sup> As explained by Von der Groeben,

[...], all efforts, even military, must be subordinate to this policy aim of enforcing the rule of law. This conflict is in essence one between legality versus illegality, but instead of invoking just war theories aiming to justify an even larger amount of violence, the Government re-

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<sup>1619</sup> MNF-1 Commander (2008).

<sup>1620</sup> Harris (2010), 14. Harris proposes a “framework for understanding the effects of violence” which can “begin with how it affects the objectives of an operation, and then proceed to how violence affects the insurgents, and finally the population as a whole. From this framework, the local commanders can begin to think about how they need to approach the goal of securing the population, how to integrate development with security, and what security means for the population.”

<sup>1621</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 5-38.

<sup>1622</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 1-153.

<sup>1623</sup> As stated by the Colombian Vice-Minister of Defense, the Honourable Sergio Jaramillo Caro, in Pfanner, Melzer & Gibson (2008), 828 (emphasis EP). The phrase “to rethink what military necessity means in these contexts and to modulate that principle with the human rights principle of capturing or demobilizing first and using lethal force as a last resort” may be taken to imply that military necessity needs to be reinterpreted as to contain a ‘least harmful means’-obligation derived from IHRL. This study interprets the phrase to mean that in situations as in Colombia the function of military necessity fundamentally differs from its traditional, leading *function* (i.e. where it serves as the primary objective to do all that is required and permissible by LOAC to render the enemy *hors de combat*, in order to defeat him). Rather, military necessity, while still existing, plays a subordinate role in situations where the objective of reestablishing the Rule of Law can be attained by measures short of lethal force.

strains itself by following a law enforcement pattern. In other words, the aim of the Colombian fight against their opponents is not only primarily to annihilate them but also to bring them to justice.<sup>1624</sup>

In a way, therefore, counterinsurgency doctrine, policy and practice demonstrate a certain degree of convergence between “descriptive humanity and material military necessity in counterinsurgency warfare:”<sup>1625</sup> it is militarily expedient to apply force in a humane as possible manner, even more so than is warranted by the law of hostilities. However, the convergence reaches its limits – in the sense that military necessity and humanity diverge in favor of the former – when the tactical situation changes such that it is no longer expedient to be humane, and that a shift is made to pure military necessity to render insurgent forces *hors de combat* by the application of sheer military force.<sup>1626</sup>

Clearly, such directives on the kind and degree are imposed as policy, and not intended to reflect a legal position towards the notion of military necessity. Yet, it risks to be misinterpreted by supporters of humanization as just that – the expression of State practice that is gradually turned into a reflection of *opinio juris*. It is submitted that States are to be cognizant of such developments in order to maintain control as the principal ‘legislators’ of international law.

In view of the above, the ‘least harmful-approach’ is a clear example of *innovative humanization*: an attempt to humanize LOAC as a legal regime, and armed conflict as a sociological phenomenon through methods bypassing States. However, it not only lacks a basis in international law, but its forced application on the battlefield – as an obligation under international law – is most likely going to be perceived by commanders as to greatly disable their “tangible operational latitude”<sup>1627</sup> implicitly present in military necessity to independently decide on the kind and degree of force he desires to apply. The very danger inherent in accepting the restrictive notion of military necessity as part of the *lex lata* is its neutralizing effect on this authority. As noted earlier, the ICRC stresses that

the aim [of restrictive military necessity] cannot be to replace the judgment of the military commander by inflexible or unrealistic standard; rather it is to avoid error, arbitrariness, and abuse [...]<sup>1628</sup>

In spite of this aim, it is to be expected that Section IX might be perceived exactly so: as an inflexible and unrealistic standard.<sup>1629</sup> A commander’s decision to fully apply the room for maneuver to use lethal force against a legitimate military objective as an outcome of the balancing of multiple considerations now risks to be replaced by a single, overriding parameter, namely the ‘obligation’ to resort to non-lethal alternatives when practically feasible. It is more likely to strengthen the military commanders resolve to “preserve their discretion as to how exactly LOAC should be applied and translated into rules of engagement (ROE) [...]”<sup>1630</sup> Apart from the operational consequences of such obligation, the commander would be forced to possibly upset the long-established and delicate balance underlying LOAC. In as much as an individual rebalancing of humanitarian considerations could further restrict permissive conduct, some fear this may also be viewed as an incentive to interp-

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<sup>1624</sup> Von der Groeben (2011), 162.

<sup>1625</sup> Hayashi (2012), 74.

<sup>1626</sup> Hayashi (2010c), personal e-mail to the author.

<sup>1627</sup> Dinstein (2004), 16.

<sup>1628</sup> Melzer (2009), 80.

<sup>1629</sup> Corn (2010), 41.

<sup>1630</sup> ICRC (2008a), 9.

ret the *permissive* side of military necessity as a basis to overrule established prohibitions. Such interpretations “would be tantamount to re-introducing the universally condemned doctrine of “*Kriegsraison geht vor Kriegsmanier*”.”<sup>1631</sup>

In view of the above, it is therefore submitted that, while laudable from a humanitarian perspective, a ‘least harmful means’-approach to regulate the conduct of hostilities against lawful military objectives “represents a dangerous confusion between law and policy,”<sup>1632</sup> lacks a sound legal basis, challenges the historical balance between military necessity and humanity with a potential to undermine further compliance with the law of hostilities and must be therefore be rejected.

## 1.6. Observations

As this paragraph has demonstrated, the substantive content of the standards governing targeting under the law of hostilities reflects the awareness with its designers that, in order to ensure observance with its principle users – soldiers – it had to comport with the reality of warfare. Hence, in so far it concerns the use of lethal means and methods of combat power against insurgents who not or no longer enjoy immunity from direct attack, humanitarian considerations give way to considerations of military necessity to the extent that such means and methods are not “of a nature to cause superfluous injury or unnecessary suffering.” Beyond this restriction, the law of hostilities imposes no other restrictions or prohibitions that would limit the kind and degree of force against lawful military objectives. Thus, contrary to IHRL, in respect of insurgents qualifying as lawful military objectives, counterinsurgent forces are not under an obligation to resort to lethal force only when a direct and concrete threat has emerged and when no non-lethal alternatives are feasible, notwithstanding attempts to incorporate such limitations. While laudable from a humanitarian perspective, attempts to introduce such ‘least harmful means’-based limitations are to be viewed as products of innovative humanization that are not likely to generate *opinio juris* among States. To the contrary, under the law of hostilities, upon someone’s qualification as lawful military objective, the use of lethal force is permissible at any time during which he is not immune from direct attack. Admittedly, in the case of insurgents, this authority is considerably limited by the strict temporal requirement underlying the notion of DPH (“unless and for such time”), which in practice implies that the targeting of insurgents who qualify as lawful military objectives on that basis may only occur once, and as long as a hostile act takes place. This considerably limits the targeting of insurgents in situational contexts of counterinsurgency to which the law of IAC applies (OCCUPCOIN and non-consensual TRANSCOIN). One solution for this restriction on targeting is to adopt the CCF-membership approach recently recognized by the ICRC in its Interpretive Guidance in relation to NIACs, and on which basis insurgents qualifying as such are targetable at all times during their membership. Of course, the problem here is the limited scope of CCF and the practical difficulty of establishing membership.

Obligations to avoid or minimize harm, however, are imposed on counterinsurgent forces in respect of innocent civilians who may be affected by the hostilities, as set forth in the requirements of proportionality and precautionary measures. These echo the principle that persons having no belligerent nexus with the hostilities are to be spared as much as feasible, and in any event in those cases where the concrete and direct military advantage anticipated

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<sup>1631</sup> ICRC (2008a), 7; Kleffner (2011), 8-9.

<sup>1632</sup> Corn (2010), 78.

from an operation does not outweigh the harm to civilians and civilian objects. Here, military necessity yields to humanitarian considerations. The final call of this determination, however, lies with the commander. While thereby providing the commander considerable latitude, at the same time it places him under much responsibility, which requires that he takes the decision to go forward with an operation notwithstanding the possible civilian harm on the basis of good faith and reasonableness. Nonetheless, at all times, he must take precautionary measures in order to avoid or minimize collateral damage.

Overall, the law of hostilities offers a flexible scope for targeting insurgents who qualify as lawful military objectives in the difficult and complex situation of hostilities, where generally the effective control over territory or the situation at hand is absent. In that respect, the law of hostilities under LOAC serves as a natural alternative to the far more inflexible regime under IHRL.

This paragraph has also demonstrated that the permissible scope for targeting is so wide that it may not always be expedient to make use of the full scope of maneuver, in order to serve strategic counterinsurgency imperatives. In the areas of distinction, proportionality and military necessity, counterinsurgents may be restricted, based on policy guidelines, in the use of force, even to the extent that it resembles requirements imposed under IHRL. Nonetheless, the position taken in this study is that the legal framework of the law of hostilities remains unaffected by the counterinsurgency-based policy paradigm. It is stressed that such policy-based restrictions may be (ab)used by those who seek to advance the humanization of armed conflict as evidence of emerging *opinio juris* supported by State practice. As such, when left unacknowledged by States, counterinsurgency policy may unintendedly contribute to a change in perception among those involved in armed conflicts on the traditional balance between military necessity and humanity.

## **2. Normative Substance of the Valid Normative Framework Relative to Targeting in the Context of Law Enforcement**

As has become clear in the previous paragraph, the law of hostilities offers a detailed and dense regulatory framework permitting the deprivation of life of insurgents who qualify as lawful military objectives. We concluded that the direct attack of lawful military objectives is intrinsically linked to the concept of hostilities. In view of the notion of DPH, we have also been able to conclude that not all those who can be labeled as insurgent qualify as lawful military objective, and thus must be regarded person protected under the law of hostilities. To recall, this concerns civilians, medical and religious personnel, as well as fighters who have fallen *hors de combat*. As such, any direct attack upon these insurgents is prohibited. They do not, or no longer have a belligerent nexus with the hostilities, and any measures imposed upon them, including those resulting in the deprivation of life, can be lawful *as measures of law enforcement only*. The question before us in this section is therefore whether the laws of IAC and NIAC themselves offer valid law enforcement-based norms regulating the deprivation of life of persons protected under the law of hostilities.

### **2.1. The Law of IAC**

This paragraph aims to examine the substantive content of valid norms of LOAC pertaining to the deprivation of life in law enforcement situations. As noted, parties to the conflict are under an obligation to respect and protect the lives of protected persons falling within the authority, or exposed to the conduct of a party to the conflict and provide a general prohibition against the *willful killing* of protected persons in situations of IAC, including belligerent

occupation. In so far the law of IAC applies, this prohibition is of relevance to counterinsurgent forces in OCCUPCOIN and non-consensual TRANSCOIN. ‘Willful killing’ concerns cases of death resulting from an omission or willful act with the intent to kill, to include reprisals.<sup>1633</sup> The willful killing of protected persons is a grave breach of LOAC and constitutes a war crime.<sup>1634</sup> It follows that, outside cases of willful killing, any deprivation of life of individuals resulting from the conduct of a counterinsurgent party to the conflict can only be lawful when complying with the standards of law enforcement, as set out in the normative framework governing the deprivation of life under IHRL.

A more detailed set of norms governing the deprivation of life outside the context of hostilities of particular relevance in the context of OCCUPCOIN is found in the law of belligerent occupation, as found in HIVR, GC IV and AP I. A general purpose of the law of belligerent occupation is to ensure that the civilian population is protected against the *arbitrary exercise* of power by the Occupying Power, and can lead as normal a life as possible<sup>1635</sup> – a purpose the fulfillment of which is subject to the security interests of the Occupying Power.<sup>1636</sup>

The relevant sources of the law of belligerent occupation provide guidance on the protective scope *ratione personae* of the law of belligerent occupation. Articles 44-45 HIVR refer to the “inhabitants” of the occupied territory. GC IV, according to its title, applies to “civilian persons”. While suggesting a wide scope of applicability covering all civilians, Article 4 GC IV sets out the scope *ratione personae* of persons protected by GC IV. Article 4(1) GC IV limits its protective scope to persons:

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<sup>1633</sup> Pictet (1952b), 371 f (Article 50 GC I); Pictet (1960), 626 (Article 130 GC III); Pictet (1958a), 597 (Article 147). See also (2000c), *The Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment of 3 March 2000 (Trial Chamber)*, § 153; (2001c), *The Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment of 26 February 2001 (Trial Chamber)*, § 229.

<sup>1634</sup> Article 8(2)(a)(i) ICC Statute (stipulating that the willful killing of protected persons under the Geneva Conventions constitutes a war crime); Article 2(1) and 5(2) ICTY Statute (stipulating that the willful killing of protected persons under the Geneva Conventions constitutes a serious violation of international humanitarian law). See also Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, as well as Article 85 AP I, the willful killing of protected persons constitutes a grave breach. In addition, LOAC imposes upon States the obligation to carry out investigations in relation to the deprivation of life. These obligations do not, as in IHRL, see to the investigation of every deprivation of life, including those of lawful military objectives, but are limited to alleged grave breaches of the obligations set forth in the GCs and AP I. See Articles 49 GC I; 50 GC II; 129 GC III; 146 GC IV. While not explicitly stipulating the obligation to carry out investigations, this obligation is implicit in the obligation to “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts.” See also Article 85 AP I. For specific investigatory obligations, see e.g. Article 121 GC III, in relation to deaths or POWs, and Article 131 GC IV, in relation to deaths of civilian internees.

<sup>1635</sup> Kolb & Hyde (2008), 231 (emphasis added); Melzer (2008), 158; Dinstein (2009c), 92. This also follows from Article 64 GC IV, which stipulates: “the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.” See also Gasser: “[a]lthough Article 64 mentions only criminal law which remains in force, the entire legal system of the occupied territories is actually meant by this rule.” Gasser (2008), 286, § 544, referring to Pictet (1958a), 335.

<sup>1636</sup> Melzer (2008), 158.

[...] who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power *of which they are not nationals* [emphasis added].

By implication, Article 4(1) GC IV suggests the exclusion from the protective scope of GC IV of persons *not* in the hands of an Occupying Power. However, according to the ICRC Commentary, the phrase “in the hands of [...]” “need not necessarily be understood in the *physical* sense; it simply means that the person is in territory which is under the control of the Power in question.”<sup>1637</sup> Thus, in the context of occupied territory, the phrase “in the hands of [...]” must be understood to mean that the whole population of the occupied territory comes within the power of the Occupying Power. However, in geographical terms, the applicability of GC IV is limited to all persons within the occupied territory, not all person in the territory of the occupied State.

Also by implication of Article 4(1) GC IV, the rights and protections of GC IV do not apply to:

- nationals of that Occupying Power.<sup>1638</sup>
- nationals of a State which is not bound by the Convention;<sup>1639</sup>
- nationals of a neutral State who find themselves *in the territory of a belligerent State*,<sup>1640</sup> and nationals of a co-belligerent State, while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are;<sup>1641</sup>
- individuals protected by GC I, II and III.<sup>1642</sup>

In addition, States, party to both GC IV and AP I must consider as protected persons under GC IV and extend the applicability of its Parts I and III, “in all circumstances and without any adverse distinction,” to “[p]ersons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence.” This extension follows not from GC IV, but from Article 73 AP I.

In the view of the ICTY, the nationality-element in Article 4 GC IV must not be interpreted to stringent. Instead, the determination of a person’s status as protected person under Article 4 GC IV may depend solely on his allegiance to the party to the conflict “in the hands” of which they reside (i.e. the Occupying Power in the context of this study).<sup>1643</sup>

A question of particular relevance here is whether the personal scope of GC IV accommodates as protected person the insurgent taking a direct part in the hostilities. This question is of importance, for if the answer is in the affirmative, insurgents fall within the scope *ratione personae* of both the law of hostilities, as well as the law enforcement-based normative

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<sup>1637</sup> Pictet (1958a), 47.

<sup>1638</sup> Article 4(1) GC IV. This exception is included because, as a principle, international law does not interfere in a State’s relations with its own nationals, with the exception of Article 70(2) GC IV. Pictet (1958a), 46.

<sup>1639</sup> Article 4(2) GC IV. This provision has become obsolete, given today’s universal ratification of GC IV.

<sup>1640</sup> Arai-Takahashi argues that Article 4(2) GC IV does not exclude nationals of a neutral State who are present in the occupied territory. See also Von Glahn, Glahn (1957), 91-92. However, the phrase “in the territory of a belligerent State” refers to occupied territory, which still belongs to the occupied belligerent State.

<sup>1641</sup> Article 4(2) GC IV. Citizens of neutral States or co-belligerent States in normal diplomatic relationships with the detaining Power were deliberately left out because in 1949, during the negotiations leading to the Geneva Conventions it was assumed that sovereign States would protect their own citizens.

<sup>1642</sup> Article 4(4) GC IV.

<sup>1643</sup> (1999m), *The Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*, §§ 165-168. See also (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landžo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber)*, §§ 51-106.

framework. This in turn, triggers the question which framework is to be applied for example when a key military leader of an insurgency is found present in occupied territory; an issue that we will turn to in Chapter VIII.

As to the position of the civilian taking a direct part in the hostilities, several views appear to persist within doctrine.

Dinstein and Baxter conclude that unprivileged belligerents captured whilst taking a direct part in the hostilities in combat are excluded from the protection of GC IV. Protection to them is offered by the Martens clause, CA 3 and Article 75 AP I, as well as customary law.<sup>1644</sup>

The present study, however, adopts the view that GC IV also applies to civilians taking a direct part in the hostilities.<sup>1645</sup> Besides doctrinal support,<sup>1646</sup> support for this conclusion can be found with the ICRC Commentary to Article 5 GC IV<sup>1647</sup> and the Israeli HCJs decision in the *Targeted Killings*-case.<sup>1648</sup> Additional support is found in Article 5 GC IV and the accompanying ICRC Commentary, which states that

[i]t may, nevertheless, seem rather surprising that a humanitarian Convention should tend to protect spies, saboteurs or irregular combatants. Those who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare. Surely they know the dangers to which they are exposing themselves. It might therefore have been simpler *to exclude them from the benefits of the Convention*, if such a course had been possible, but the terms espionage, sabotage, terrorism, banditry and intelligence with the enemy, have so often been used lightly, and applied to such trivial offences, that it was not advisable to leave the accused at the mercy of those detaining them.<sup>1649</sup>

In sum, insurgents may qualify for protection as a civilian/protected person under GC IV provided they fall under the protective scope of Article 4 GC IV. Such qualification is, however, by and of itself not sufficient to deprive him from his liberty, for this may occur

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<sup>1644</sup> Dinstein (2009c); Baxter (1951).

<sup>1645</sup> See Articles 43 AP II ff.

<sup>1646</sup> Melzer (2008), 160; Dörmann (2003b), 50; Arai-Takahashi (2010), 307; University Centre for International Humanitarian Law (2005), 21-22, footnote 33. Admittedly, Arai-Takahashi here refers to “hostile activities” and not to “direct participation in hostilities.” It is submitted that, while the latter always is a hostile activity, not every hostile activity amounts to direct participation in hostilities. Noteworthy is Dinstein’s view to the applicability of GC IV, who, as it appears, distinguishes between occupied territory and “areas where fighting is in progress.” It appears that Dinstein limits the non-applicability of Article 5, and GC IV as a whole to “unlawful combatants *captured on the battlefield in enemy territory (prior to the onset of belligerent occupation)*” and thus accepts the applicability of GC IV to unprivileged belligerents present in *occupied territory*. Dinstein (2009c).

<sup>1647</sup> See Pictet (1958a), 53 (emphasis added), which states that “[i]t may, nevertheless, seem rather surprising that a humanitarian Convention should tend to protect *spies, saboteurs or irregular combatants*. Those who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare. Surely they know the dangers to which they are exposing themselves. It might therefore have been simpler *to exclude them from the benefits of the Convention*, if such a course had been possible, but the terms espionage, sabotage, terrorism, banditry and intelligence with the enemy, have so often been used lightly, and applied to such trivial offences, that it was not advisable to leave the accused at the mercy of those detaining them.” See also Pictet (1958a), 47; Sandoz, Swinarski & Zimmerman (1987), § 2912. See also Melzer (2008), 160; Dörmann (2003b), 50.

<sup>1648</sup> (2005d), HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (11 December 2005), §§ 28, 40.

<sup>1649</sup> Pictet (1958a), 53 (emphasis added). See also Pictet (1958a), 47; Melzer (2008), 160; Dörmann (2003b), 50; Sandoz, Swinarski & Zimmerman (1987), § 2912



only when taking place as a measure of (1) law enforcement or (2) internment necessary for imperative reasons of security.<sup>1650</sup> Deprivation of liberty outside these two bases is unlawful.

Commensurate to the purpose of the law of belligerent occupation, the Occupying Power is under an obligation, stipulated in Article 43 HIVR, to take “all the measures in his power to restore, and ensure, as far as possible, public order and safety” while complying with the negative obligation to respect, “unless absolutely prevented, the laws in force in the country.”<sup>1651</sup> This obligation arises once a State exercises effective control over the territory of another State – in accordance with Article 42 HIVR – and becomes bound by the law of belligerent occupation. Thus, commensurate to this purpose, and in the fulfillment of the obligation under Article 43 HIVR, troops of the Occupying Power must try, to the maximum extent possible, to calm down situations of upheaval, rather than to benefit from the situation and to support “alternatively one side or the other according to their political and financial interest.”<sup>1652</sup> As such, it may not stand by idle when killings take place, but must take positive action. The obligation arising from Article 43 HIVR implies that “public order is generally restored through police, not military, operations.”<sup>1653</sup> However, the use of military forces in executing such operations cannot be excluded, particularly not in situations where the local police are not present or functioning and the troops of the Occupying Power are the only forces available to carry out police tasks.<sup>1654</sup>

The obligation under Article 43 HIVR to restore and ensure public order and safety as far as possible “goes far beyond the issue of a crime wave in an occupied territory.”<sup>1655</sup> It continues in times of major disturbances and upheaval. An example in case is riots,<sup>1656</sup> such as those experienced by US forces in Fallujah, Iraq.<sup>1657</sup> Police operations may even extend to “countering small insurgent bands supported by the local population.”<sup>1658</sup> The Israel Supreme Court, in the case of *Taha*, concluded that Israel had a duty to fulfill its obligations under Article 43 HIVR during the first *intifada*, which was marked by hostilities.<sup>1659</sup> The

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<sup>1650</sup> A third basis for deprivation of liberty is mentioned in Article 49(5) GC IV, which permits deprivation of liberty of individuals pursuant their presence in an area exposed to the dangers of war, and when the security of the population or imperative military reasons demands their detention. This basis will not be further examined for lack of relevance for the present study.

<sup>1651</sup> Article 43, 1907 HIVR (emphasis added). This commonly used English text is a translation from the official French text, and is, as such, formally non-binding. The French text states: l'autorité de pouvoir légal ayant de passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.” Dinstein points out that the two texts show discrepancies, as result of mistranslation, the most significant of which is the use of the word ‘safety’ in the English text, a word that is not mentioned in the French text at all. See Dinstein (2009c), 89, with reference to the *travaux préparatoires* on 90.

The words ‘l'ordre et la vie [publics]’ have separate meanings, the former referring to ‘security and general safety’, the latter denotes ‘social functions [and] ordinary transactions which constitute daily life’. Schwenk (1944-5), 398.

<sup>1652</sup> (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment of 19 December 2005, § 209.

<sup>1653</sup> Droege (2008a), 538; Sassòli (2005), 665.

<sup>1654</sup> Watkin (2008), 179.

<sup>1655</sup> Dinstein (2009c), 92.

<sup>1656</sup> Dinstein (2009c), 98. See also University Centre for International Humanitarian Law (2005), 26.

<sup>1657</sup> Human Rights Watch (2003b), available at <http://www.hrw.org/reports/2003/iraqfalluja/>.

<sup>1658</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 6-91.

<sup>1659</sup> (1988d), *Taha (minor) et al. v. Minister of Defence et al., Israel Supreme Court*, 300. See also Judge Shamgar, in the case of (1983a), *Abu Aita et al. v. Commander of the Judea and Samaria Region et al.*, 356-357, holding that

mere occurrences of hostilities does not automatically, nor necessarily, terminate the effective control over occupied territory. As follows from the US Military Tribunal in Nuremberg's judgment in the *List* Case, the temporary control of insurgents over occupied territory does not terminate the occupation as long as the Occupying Power has the capacity to "assume physical control of any part of the country."<sup>1660</sup> It must, however, be borne in mind that this ruling was based on the factual superiority of the German army in relation to the Yugoslav and Greek partisans. Because it actually could go anywhere it wanted and assert effective control at will, it was determined that the occupation was intact. However, this is not necessarily the case in every situation whereby an occupation is contested. So while it seems reasonable to argue that there is a *rebuttable presumption* of effective control, and that the obligation under Article 43 HVR continues to apply and protection under GC IV continues, eventually the existence of effective control must depend on the factual situation in question.

Underlying the obligation in Article 43 HVR to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety" entails a positive duty is the presumption that the Occupying Power has an authority to take affirmative measures to fulfill this obligation. With respect to the question whether these affirmative measures may include deprivations of life, two provisions are of particular interest: Article 27(4) and Article 64(3) GC IV.

Article 27(4) permits a counterinsurgent State, party to an IAC "to take such measures of control and security in regard to protected persons *as may be necessary as a result of the war.*" While the text suggests to provide a basis for the *intentional* deprivation of life on the basis of exceptional military necessity,<sup>1661</sup> it follows from the ICRC Commentary that, "[w]hile a great deal is thus left to the discretion of the Parties to the conflict as regards the choice of means, [...] the measures of constraint they adopt *should not affect the fundamental rights of the persons concerned,*" but "these rights must be respected even when measures of constraint are justified."<sup>1662</sup> Similar language follows from the Final Record of the Diplomatic Conference, which states that while "[i]t seemed fair, in view of the individual rights ensured, to take into account the vital requirements of the State, [...] this reservation does not re-establish arbitrary governmental power," Rather, "it deals only with such persons as really constitute a danger for the security of the State and *it leaves intact the general prohibitions imposed by the humanitarian principles of the Convention.*"<sup>1663</sup> Following this conceptual construct, LOAC only permits derogations from the prohibitions and restrictions established in its norms when explicitly foreseen, and there is not authority for a party to the conflict to set aside the prohibition on willful killing. In fact, LOAC places strict limitations on the permissible measures. Article 5 GC IV permits derogation only from the rights of communication of persons detained by an Occupying Power for reasons related to hostile activities and thus does not permit derogation from the right to life. Article 41 GC IV stipulates that the most severe measures that may be imposed are internment and assigned residence, thus implying that

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the obligation to restore public life and security is an "immediate and primary duty," and that the duty to ensure public order and safety is a "subsequent and continuous duty".

<sup>1660</sup> (1948b), *United States v. Wilhelm List, et al. (Hostages Case)*, UNWCC (8 July 1947-19 February 1948), 56.

<sup>1661</sup> To recall, exceptional military necessity refers to those instances where an appeal on military necessity is specifically provided in norms of LOAC.

<sup>1662</sup> Pictet (1958a), 207 (emphasis added).

<sup>1663</sup> United Nations (1949), 821 (emphasis added).

the intentional deprivation of life of a protected person, being a measure more severe than internment and assigned residence, is prohibited.<sup>1664</sup> In sum, while Article 27(4) GC IV permits the Occupying Power to take “all the measures in his power to restore, and ensure, as far as possible, public order and safety,” required by military necessity, this does not include the intentional deprivation of life. Rather, any measures resulting in the deprivation of life cannot be grounded in military necessity, but are only lawful when adhering to the standards of absolute necessity, underpinning the normative framework governing the deprivation of life under IHRL. This outcome is fully in line with Article 27(1) GC IV, which stipulates that “protected persons are entitled, in all circumstances, to respect for their persons, [...], and shall be protected especially against all acts of violence or threats thereof [...].”<sup>1665</sup>

A *second* implied basis relevant to deprivations of life of protected persons resulting from measures taken to restore and ensure public order and safety is found in Article 64(3) GC IV, which stipulates that the Occupying Power may subject the population

to provisions which are essential to enable the Occupying Power [1] to fulfil its obligations under the present Convention, [2] to maintain the orderly government of the territory, and [3] to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.<sup>1666</sup>

This provision recognizes the right of the Occupying Power to guarantee its own security “as a fundamental prerequisite to the [Occupying Power’s] own ability to maintain law and order.”<sup>1667</sup> The legislation enacted for one or more of the above purposes may offer a basis for a wide range of measures, such as a ban on the possession of firearms, restrictions concerning border security, demonstrations, weapons control, the prohibition of irregular armed forces and militias not under a unified command, seizure of means of communication and for transmission,<sup>1668</sup> as well as those measures permissible in the context of Article 27 GC IV. However, such new legislation may not contravene obligations under international law.<sup>1669</sup> It follows that the Occupying Power may not issue legislation that overrides the prohibition of willful killing under LOAC, or that is more permissive than the standards provided for under the normative framework governing the deprivation of life under IHRL.

In sum, it may be concluded that the law of belligerent occupation, while acknowledging the performance of law enforcement-based tasks for the Occupying Power, does not provide precise, explicit norms that regulate the deprivation of life of individuals in occupied territo-

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<sup>1664</sup> See Article 41 GC IV; Pictet (1958a), 207. For an examination of internment, see Part C.

<sup>1665</sup> Pictet (1958a), 207: “[...] the measures of constraint [adopted by the Occupying Power] should not affect the *fundamental rights* of the persons concerned. As has been seen, those rights must be respected even when measures of constraint are justified.”

<sup>1666</sup> Article 64(3) GC IV corresponds to the second part of Article 43, 1907 HIVR, which contains a negative obligation to respect, “*unless absolutely prevented*, the laws in force in the country.” On the three exceptions in Article 64(3) GC IV in general: Dinstein (2009c), 112 ff; Arai-Takahashi (2010), 123 ff.

<sup>1667</sup> McCormack & Oswald (2010), 457.

<sup>1668</sup> These were measures taken in Iraq by the CPA. See CPA Orders 3 (Weapons Control, CPA/ORD/31 December 2003/3; 14 (Prohibited Media Activity, CPA/ORD/10 June 2003/14); 16 (Temporary Control of Iraqi Borders, Ports and Airports, CPA/ORD/04 June 2004/16; 19 (Freedom of Assembly, CPA/ORD/09 July 2003/19, Section 6; Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 27(B).

<sup>1669</sup> Dinstein (2009c), 113.

ry outside the context of hostilities. It may however be concluded that the Occupying Power, while given the authority “to restore, and ensure, as far as possible, public order and safety,” must properly balance this authority “against the rights, needs and interests of the local population.”<sup>1670</sup> In respect of the lawfulness of deprivations of life of protected persons resulting from measures taken by the Occupying Power to “restore, and ensure, as far as possible, public order and safety,” this implies that such deprivations of life may not amount to willful killings, but must be the result of measures of law enforcement measures lawful under the normative framework governing the deprivation of life under IHRL. As such, it may also be concluded that LOAC is not more permissive than the normative framework governing the deprivation of life under IHRL.

## 2.2. The Law of NIAC

The law of NIAC only provides very scarce guidance as to the permissibility of deprivations of life of protected persons. As a general rule of international law, States on whose territory a NIAC takes place are equally entitled to, as well as responsible for taking appropriate measures for maintaining or restoring law and order, and to defend their national unity and territorial integrity. This rule implicitly underlies CA 3 and Article 3(1) AP II. As the commentary to the latter provision states, AP II “does not affect the right of States to take appropriate measures for maintaining or restoring law and order, defending their national unity and territorial integrity. This is the responsibility of governments and is expressly recognized here.”<sup>1671</sup>

More precise guidance is found in reference to the prohibition of ‘murder’ of protected persons in situations of NIAC, to be found in both conventional<sup>1672</sup> and non-conventional LOAC.<sup>1673</sup> The scope of persons protected by CA 3 and AP II extends to “persons taking

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<sup>1670</sup> (2004c), *Beit Sourik Village Council v. The Government of Israel et al.*, HCJ 2056/04, Israel Supreme Court (sitting as the High Court of Justice), Judgment of 30 June 2004, § 34.

<sup>1671</sup> Sandoz, Swinarski & Zimmerman (1987), § 4500 (commentary to Article 3(1) AP II): AP II “does not affect the right of States to take appropriate measures for maintaining or restoring law and order, defending their national unity and territorial integrity. This is the responsibility of governments and is expressly recognized here.”

<sup>1672</sup> CA 3 prohibits “at any time and in any place whatsoever [...] (a) violence to life and person, in particular murder of all kinds [and] (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” with respect to “persons taking no active part in 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.”

Article 4(2)(a) AP II prohibits “at any time and in any place whatsoever [...] violence to the life [...], in particular murder [...]” of “[a]ll persons who do not take a direct part or who have ceased to take a part in hostilities.” In addition, Article 6(2) AP II, while not explicitly prohibiting the death penalty for offences related to the armed conflict, requires that “no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.” Nor shall the death penalty “be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children” (Article 6(4) AP II).

<sup>1673</sup> Rule 89 (murder) and Rule 100 (extrajudicial execution), ICRC (2005a), 311 ff. and 352 ff; IACommHR (2002), § 76; (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), § 218 (referring to CA 3 as “elementary considerations of humanity”; (1995i), *The Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (2 October 1995), § 98; (1997n), *Tadić*, § 615; (2000o), *The Prosecutor v. Blaskić*, Case No. IT-95-14-T, Judgment of 3 March 2000 (Trial Chamber), § 166; (2002m), *The Prosecutor v. Kunarac and Others*, Case Nos. IT-96-23 & IT-96-23/1, Appeals Chamber (June 12, 2002), § 68; (1998k), *The Pros-*

no active part in the hostilities” as phrased in CA 3, or to “[a]ll persons who do not take a direct part or who have ceased to take a direct part in hostilities” as set forth in Article 4 AP II. Such persons concern the wounded, sick, and shipwrecked members of the armed forces, as well as those captured, and civilians not or no longer directly participating in hostilities.<sup>1674</sup> As stated by the ICTY in the *Delalic*-case, “[...] the nature and purpose of the prohibition contained in the Geneva Conventions [...] is clearly to proscribe the deliberate taking of the lives of those defenceless and vulnerable persons who are the objects of the Conventions’ protections.”<sup>1675</sup> The ‘murder’ of protected persons is a ‘grave breach’ of LOAC and constitutes a war crime.<sup>1676</sup>

Beyond these sources, the law of NIAC does not provide any guidance. Generally, domestic law fills this ‘gap’, and it is therefore that law which provides the basis for the use of force. Today, as many States have committed themselves to obligations – conventionally or customary – under IHRL, their domestic laws must be in conformity with IHRL, and it is in that way that the deprivation of life of protected persons in a NIAC is regulated at the level of international law.

### 2.3. Observations

This paragraph has examined a second string of norms under LOAC relating to the deprivation of life, i.e. that in respect of protected persons, and following from conduct that has no nexus with the hostilities, but that is connected to law enforcement. This string of norms – where it relates to the deprivation of life of protected persons – is not military necessity-based at all, but reflects the view of its designers that humanitarian considerations are to prevail at all times, and that infringements on the right to life are permissible only when absolutely necessary. This is reflected, *firstly*, in the fact that both the law of IAC and NIAC contain a general prohibition on the willful killing or murder of protected persons. While the law of NIAC remains silent as to deprivation of life of protected persons not constituting murder, the law of IAC is more elaborate. Of particular relevance to the present study is the law of belligerent occupation, which in object and purpose is law enforcement-oriented, at least in so far it concerns the use of force. In order for the Occupying Power to comply with its obligation to restore, and ensure public order and security in the occupied territory, it is permitted to take measures required by military necessity. However, in relation to the measures resulting in the deprivation of life, an appeal on military necessity to derogate from the prohibition on willful killing and the general obligation to respect the right to life as set forth in Article 27 GC IV is not permitted, thereby implying that the only basis on which a person may be deprived of his life is when such is absolutely necessary, as understood in the normative framework governing the deprivation of life under IHRL. How such interplay (and that of the right to life with the law of hostilities) is to be appreciated will be examined in the next chapter.

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*ecutor v. Akayesu*, Case No. 96-4-T, Trial Chamber Judgment (2 September 1998), §§ 608 ff; United Nations (2000a), § 14.

<sup>1674</sup> See also (1997n), *Tadić*, § 615.

<sup>1675</sup> (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case)*, Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber), § 431.

<sup>1676</sup> Article 3, Statute of the ICTY (“violations of the laws or customs of war”); (1995i), *The Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (2 October 1995), § 89; Article 1 jo. Article 4, Statute of the ICTR (“serious violations of humanitarian law”); Article 1(1) jo. Article 3, Statute of the SCSL (“serious violations of humanitarian law”); Article 8(2)(c), ICC Statute (“war crimes”).