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^ CHAPTER BIBLIOGRAPHY

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Introductory text

Qualified as "cardinal" and "intransgressible",^[1] the principle of distinction is the cornerstone of International Humanitarian Law (IHL). One must know who and what may be targeted and who and what may not, and what protection to afford depending on the category which a person belongs to. Indeed, the basic axiom underlying IHL, i.e. that even in an armed conflict the only acceptable action is to weaken the military potential of the enemy, implies that IHL has to define who that potential is deemed to comprise and who, therefore, may be attacked and participate directly in the hostilities, but may not be punished for such participation under ordinary domestic law. Under the principle of distinction, all involved in the armed conflict must distinguish between the persons thus defined (the combatants) and civilians. Combatants must distinguish themselves (i.e., allow their enemies to identify them) from all other persons (civilians), who may not be attacked nor directly participate in the hostilities.

The dividing line between the two categories has developed over time, reflecting the conflicting interests between, on the one hand, powerful, well-equipped States that wanted a strict definition of clearly identified combatants, and, on the other, weaker States that wanted to retain the option to use additional human resources flexibly and thereby continue the hostilities even when their territory was under enemy control, which is practically impossible if combatants have to identify themselves permanently. The IHL of non-international armed conflicts does not even refer explicitly to the concept of combatants, mainly because States do not want to confer on anyone the right to fight government forces. Nevertheless, in such conflicts as well, a distinction must exist if IHL is to be respected: civilians can and will only be respected if government soldiers and rebel fighters can expect those looking like civilians not to attack them.^[2] In this

respect, we are of the view that if IHL applicable in NIACs fails to define 'civilians', the latter should be defined by opposition to individuals who engage in acts of hostility.

Today, the axiom itself is challenged by reality on the ground, in particular by the increasing "civilianization of armed conflicts", a notion that is discussed in more detail below. If everyone who is not a combatant is a civilian, in many asymmetric conflicts the enemy consists exclusively of civilians. Even if, in non-international armed conflicts, members of an armed group with a "continuous combat function", according to the terminology proposed by the ICRC, are not to be considered as civilians,[3] it is in practice very difficult to distinguish them from the civilian population. Furthermore, private military and security companies, whose members are usually not combatants, are increasingly present in conflict areas. On all these issues of "civilianization", the concept of direct participation in hostilities is crucial, because civilians lose their protection against attacks while they so participate and may therefore be treated in this respect like combatants. The ICRC has issued an interpretive guidance to clarify this concept,[4] but some elements in it have sparked controversy.

"Civilianization" is not the only phenomenon challenging the principle of distinction. First, everyone - without any distinction - in the power of a party benefits from fundamental guarantees of human treatment. Second, some States have adopted the concept of 'unlawful combatants', according to which these persons who directly participate in hostilities, when they have no right to do so, are neither civilians, and therefore are not protected by Geneva Convention IV, neither combatants, and therefore not protected by Geneva Convention III (see relevant chapter). Third, there is a tendency in an increasing number of asymmetric IACs, and even more in NIACs, for members of armed groups not to distinguish themselves from the civilian population. This leads some authors to even contend that the principle of distinction cannot realistically be applied in NIACs because in such conflicts non-State armed groups in particular rely on ordinary civilians for certain tasks. Fourth, if the aim of the conflict is "ethnic cleansing", the parties will logically and of necessity attack civilians and not combatants. If some fighters' aim is no longer to achieve victory, but rather to earn a living – by looting or controlling certain economic sectors – they will logically attack defenceless civilians instead of combatants. Finally, if the aim of a party is to change the enemy country's regime without defeating its army or occupying its territory, it may be tempted to pressure the enemy civilian population into overthrowing its own government. If the pressure takes the form of attacks or starvation tactics, it constitutes a violation of IHL. In any event, the effectiveness of such methods is doubtful. Indeed, experience shows that, when confronted with such constraints, the population tends to support its government rather than foment rebellion.

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I. Activities, II. Rights, III. Punishable, IV. Protection

DEFINITION AND CHARACTERISTICS OF CIVILIANS AND COMBATANTS

Civilians	Combatants
= all persons other than combatants	= members of armed forces <i>lato sensu</i> (for a definition, see <i>infra</i> , Combatants and POWs, I. Who is a combatant?)
I. Activities	
Do not take a direct part in hostilities	Take a direct part in hostilities
II. Rights	
Do not have the right to take a direct part in hostilities (but have the right to be respected)	Have the right to take a direct part in hostilities (but have the obligation to observe IHL)
III. Punishable	
May be punished for their mere participation in hostilities	May not be punished for their mere participation in hostilities (See <i>infra</i> Combatants and POWs, III. Treatment of prisoners of war)
IV. Protection (<i>Relativity of the difference: everyone in enemy hands is protected.</i>)	

Are protected because they do not participate:

- as civilians in the hands of the enemy (See infra Civilian Population, II. Protection of civilians against arbitrary treatment and IV. Special rules on occupied territories)
- against attacks and effects of hostilities (See infra, Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities)

Are protected when they no longer participate:

- if they have fallen into the power of the enemy (See infra Combatants and POWs, III. Treatment of prisoners of war)
- if wounded, sick or shipwrecked (See infra Wounded and Sick)
- if parachuting out of an aircraft in distress (See P I, Art. 42)
- are protected against some means and methods of warfare even while fighting (See infra Conduct of Hostilities, III. Means and methods of warfare)

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II. Rights

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- Amnesty International, Breach of the Principle of Distinction
- United States, The Schlesinger Report
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base

III. Punishable

- Convention on the Safety of UN Personnel
- United States, *Ex Parte Quirin et al.*
- Nigeria, Pius Nwaoga v. The State
- South Africa, S. v. Petane
- United States, Military Commissions

IV. Protection

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IV. Protection Suggested reading:

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V. Full complementarity

Is everyone who is not a combatant a civilian (or is there an intermediate category of "unlawful combatant")?

- in the conduct of hostilities?
- in enemy hands?

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VI. The fundamental obligation of combatants to distinguish themselves from the civilian population

P I, Art. 44(3) [CIHL, Rule 106]

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a. In the conduct of hostilities

Can they be attacked until they are "hors de combat" (like combatants) or only while they directly participate in hostilities (like civilians)?

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a. Once in enemy hands

Are they protected civilians or can they be detained like combatants without any individual decision, but not benefit from POW status?

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6. “Civilianization” of armed conflicts

a. growing involvement of private military and security companies

Introductory text

A growing number of States (and sometimes international organizations, NGOs or businesses) use private military and security companies (PMSCs) for a wide variety of tasks traditionally performed by soldiers in the fields of logistics, security, intelligence gathering and protection of persons, objects and transports. In some recent conflicts, some belligerent States have not only hired them for activities concerning the use of force within and between them, but some have even employed more PMSC contractors than members of their regular armed forces.

The international legal obligations of contracting States, territorial States, home States, all other States and PMSCs and their personnel have been restated (together with recommendations of best practices) in a document accepted by most of the States concerned, the Montreux Document.[5] Contracting States remain bound by IHL even if they contract out certain activities to PMSCs. In many cases, the conduct of PMSCs can be attributed to the contracting State by virtue of the general rules on State responsibility, or the State has at least a due diligence obligation in this respect and must ensure that the PMSCs it contracts act in accordance with IHL. Beyond the few cases of activities IHL rules specifically assign to State agents,[6] it may be argued that IHL implicitly prohibits States from outsourcing direct participation in hostilities to persons who are not combatants. Furthermore, since the phenomenon of PMSCs goes beyond the traditional notions of the Westphalian State system, and because many of them do not work for States and armed groups, it is equally important to apply IHL directly to PMSCs. Doing so contributes to the effective implementation and enforcement of IHL and creates a sense of ownership among their staff. If this is uncontroversial when a PMSC constitutes an armed group that is a party to a NIAC, there may be other controversial situations that raise the general problem of what constitutes international legal personality and whether companies possess it. But beyond that, a PMSC may nonetheless become an addressee of IHL rules through self-regulation, either in codes of conduct or by the provisions of its contract with its client (common Article 1 may even oblige a State hiring a PMSC to include in the contract a clause requiring respect for IHL). In respect of self-regulation, it exists an International Code of Conduct for Private Security Providers (ICoC). This code is the only text that specifically enumerates obligations of PMSCs. The ICoC has created an association (the International Code of Conduct Association – ICoCA) which is a multi-stakeholder mechanism that aims at promoting, governing and overseeing the implementation of the ICoC. To go beyond soft law, a process is also ongoing within the UN Human Rights Council which established in 2017 an open-ended intergovernmental working group tasked to elaborate an international regulatory framework - the nature of

which has yet to be defined – “to protect human rights and ensure accountability for violations and abuses relating to the activities of [PMSCs]”.^[7]

PMSC staff normally do not fall under the very restrictive definition of mercenaries in IHL.^[8] Most of them are not *de jure* or *de facto* incorporated into the armed forces of a party and are therefore not combatants but civilians. As such, their conduct linked to an armed conflict is governed at least by the rules of IHL criminalizing certain types of conduct. The main problem is that they often benefit from *de facto* or *de jure* immunity in the country where they work and that criminal jurisdiction over them in third countries is not as clearly regulated as for members of armed forces and often not backed up by an efficient law enforcement system.

As civilians, PMSC staff may not directly participate in hostilities. PMSCs and major contracting States often stress that PMSCs have only defensive functions. The performance of such functions may nevertheless constitute direct participation in hostilities. This is undisputed if they defend combatants or military objectives against the adverse party. On the other extreme, it is uncontroversial that the defence of military targets against common criminals or the defence of civilians and civilian objects against unlawful attacks does not constitute direct participation in hostilities. The most critical, difficult and frequent situation is when PMSC staff guard objects, transports or persons. If those objects, transports or persons are not protected against attacks under IHL, that is if they are combatants, civilians directly participating in hostilities or military objectives, guarding or defending them against attacks constitutes direct participation in hostilities and not an act falling under the legal regime of criminal law defence of others. In our view, in a case like this one, guarding or defending them always amounts to a direct participation in hostilities when the attacker is a person belonging to a party to the conflict, and this even if the attacker does not benefit from (or has lost) combatant status. In other words, the unlawful status of the attacker does not give rise to self-defence. If the person guarded by PMSC staff – and under the domestic legislation of some countries even in the case of an object – is civilian, criminal law self-defence may justify the use of force, even against combatants. The analysis is complicated by the absence of an international law standard of self-defence and defence of others and by doubts whether the criminal law defence of self-defence which avoids conviction may be used *ex ante* as a legal basis for an entire business activity. It must in addition be stressed that self-defence may only be exercised against attacks, not against arrests or the seizure of objects. Indeed the criteria determining when a civilian may be arrested or objects may be requisitioned are too complicated under IHL to enable PMSC staff to determine when they have been met. In our view, self-defence, as an exception to the classification of certain conduct as direct participation in hostilities, must be construed very narrowly. In addition, PMSC staff providing security for an object will often not be able to know whether that object constitutes a military objective (which excludes self-defence, because the attack would be lawful and self-defence is only admissible against unlawful attacks) and whether the attackers do not belong to a party (which would not classify resistance against such attackers as direct participation in hostilities, even when the object attacked is a military objective). At the same time, it is difficult for the enemy to distinguish between combatants, PMSC staff who directly participate in hostilities and PMSC staff who do not directly participate in hostilities.

To maintain a clear distinction between civilians and combatants and to ensure that PMSC staff do not lose their protection as civilians, they should therefore not be put in ambiguous situations. In sum, both self-defence and defence of others are lawful for PMSC staff, and neither makes them legitimate targets of attacks. Direct participation in hostilities, in contrast, makes the staff of PMSCs targetable, and it is also arguably unlawful for States to delegate such participation to PMSCs. Indeed, while IHL does not prohibit civilians from directly participating in hostilities, if a State wants to respect the principle of distinction in good faith, it may not entrust civilians with conduct that constitutes direct participation in hostilities.

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b. the increasing number of civilians (i.e. persons who are not combatants) directly and indirectly participating in hostilities

(See *infra* Conduct of Hostilities II. The protection of the civilian population against the effects of hostilities, 7. Loss of protection: The concept of direct participation in hostilities and its consequences)

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Footnotes

- [1] See ICJ, Nuclear Weapon Advisory Opinion
- [2] See Non-international Armed Conflict
- [3] See *infra*, Conduct of Hostilities II. The protection of the civilian population against the effects of hostilities, 7. Loss of protection: The concept of direct participation in hostilities and its consequences
- [4] See ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities
- [5] Montreux Document on Pertinent International Legal Obligations and Good Practices of States related to Operations of Private Military and Security Companies During Armed Conflict [See Montreux Document on Private Military and Security Companies]
- [6] See e.g. GC III, Art. 39, on who may exercise the power of responsible officer of a POW camp
- [7] See UN, Human Rights Council Resolution on the working group on private military and security companies (2017)
- [8] See P I, Art. 47, and *infra*