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^ CHAPTER BIBLIOGRAPHY

- MELZER Nils, "The Principle of distinction between civilians and combatants", in CLAPHAM Andrew & GAETA Paola (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, OUP, 2014, pp. 296-332.
- M.KINSELLA Helen, *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian*, London, Cornell University Press, 2011, 272 pp.

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.

▲ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- MELZER Nils, "The principle of distinction under international humanitarian law", in MELZER Nils, *Targeted killing in international law*, Oxford, OUP, pp. 360-367.

Further reading:

- MELZER Nils, *Targeted Killing in International Law*, Oxford, OUP, 2008, 468 pp.
- STERN Orly, *Gender, Conflict and International Humanitarian Law: A critique of the 'principle of distinction'*, New York, Routledge, 2018, 252 pp.
- WARD Christopher, "Distinction: The Application of the Additional Protocols in the Theatre of War", in *Asia-Pacific Yearbook of International Humanitarian Law*, Vol. 2 (2006), 2007, pp. 36-45.

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	
(Relativity of the difference: everyone in enemy hands is protected.)	

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)

^ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- WATKIN Kenneth, “The Notion of Combatant, Armed Group, Civilians and Civilian Population in International Armed Conflicts”, in BERUTO Gian Luca (ed.), *The Conduct of Hostilities: Revisiting the Law of Armed Conflict: 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols: Current Problems of International Humanitarian Law*, Sanremo, 6-8 September 2007: Proceedings, Milano, Nagard, 2008, pp. 59-69.

Further reading:

- SIDDIQUI Muhammad Ali, “Persons Controlling and Operating Drone Aircrafts and Computer Network Attacks: Combatants or Civilians?”, in *AALCO Journal of International Law*, Vol. 3, No. 2, 2014, pp. 37–57.

^ CASES AND DOCUMENTS

I. Activities

- Outer Space/Applicability of IHL in Space

II. Rights

- United States, *Ex Parte Quirin et al.*
- 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

- United States, *United States v. William L. Calley, Jr.*
- Colombia, Special Jurisdiction for Peace, Extrajudicial Executions in Casanare

^ SPECIFIC BIBLIOGRAPHY

I. Activities

Suggested reading:

- BOOTHBY Bill, "And for such time as: the time dimension to direct participation in hostilities", in *New York University Journal of International Law and Politics*, Vol. 42, 2009, pp. 741-768.

II. Rights

Suggested reading:

- ROGERS A.P.V, "Direct Participation in Hostilities: Some Personal Reflections", in *military law and the law of war review*, Vol. 48, 2009, pp. 143-163.

IV. Protection

Suggested reading:

- PRIMORATZ Igor, *Civilian Immunity in War*, Oxford, OUP, 2007, 263 pp.

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?

^ CASES AND DOCUMENTS

- ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
- ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities
- ECHR, Korbely v. Hungary
- Israel, The Targeted Killings Case
- Israel, Detention of Unlawful Combatants [Part A., paras 11-17; Part B.]
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- United States, The Obama Administration's Internment Standards

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

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

^ CASES AND DOCUMENTS

- France, Accession to Protocol I [Part B., para. 8]
- Malaysia, Osman v. Prosecutor
- Nigeria, Pius Nwaoga v. The State
- ICRC Appeals on the Near East [Part B.]
- Amnesty International, Breach of the Principle of Distinction
- United States, The Schlesinger Report
- Afghanistan, Code of Conduct for the Mujahideen [Art. 63]
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- ECHR, Khatsiyeva v. Russia [Paras 132-138]
- Syria, Syrian rebels treat captured Filipino soldiers as 'guests'

^ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- PFANNER Toni, "Military Uniforms and the Law of War", in *IRRC*, No. 853, March 2004, pp. 93-130.

Further reading:

- FERRELL William H., "No Shirt, No Shoes, No Status: Uniforms, Distinction and Special Operations

in International Armed Conflict”, in *Military Law Review*, Vol. 178, Winter 2003, pp. 94-140.

- GILADI Rotem, ““Undercover” Operations and IHL Advocacy in the Occupied Palestinian Territories”, in *Journal of Conflict and Security Law*, Vol. 14, No. 3, 2009, pp. 393-439.
- WEST Allen B. “The Future of Warfare against Islamic Jihadism: Engaging and Defeating Nonstate, Nonuniformed, Unlawful Enemy Combatants”, in *Military Review*, 2016, Vol. 96, No. 1, pp. 39-44.

VII. Relativity of the distinction in modern conflicts

^ CASES AND DOCUMENTS

- ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
- ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities
- ECHR, Korbely v. Hungary
- Amnesty International, Breach of the Principle of Distinction

^ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- DINSTEIN Yoram, “Distinction and Loss of Civilian Protection in International Armed Conflicts”, *IYHR*, Vol. 38, 2008, pp. 1-16.
- GROSS Michael L., “Asymmetric War, Symmetrical Intentions: Killing Civilians in Modern Armed Conflict”, in *Global Crime*, Vol. 10, No. 4, November 2009, pp. 320-336.
- PLAW Avery, “Upholding the Principle of Distinction in Counter-Terrorist Operations: a Dialogue”, in *Journal of Military Ethics*, Vol. 9, No. 1, 2010, pp. 3-22.
- SCHMITT Michael N., “Targeting in Operational Law”, in GILL Terry D. and FLECK Dieter (ed.), *Handbook of the International Law of Military operations*, 2nd Edition, 2015, Oxford university Press, pp.269-306.
- WATKIN Kenneth, “Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict”, in WIPPMAN David & EVANGELISTA Matthew (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, pp. 137-179.

Further reading:

- BELT Stuart Walters, “Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas”, in *Naval Law Review*, Vol. 47, 2000, pp. 115-175.
- BLANK Laurie & GUIORA Amos, “Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare”, in *Harvard National Security Journal*, Vol. 1, 2010, 44 pp.
- BLUM Gabriella, *The Dispensable Lives of Soldiers* (arguing for a reinterpretation of the principle of

distinction to add a notion of threat, and a least-harmful means approach), *Journal of Legal Analysis*, vol.2 issue 1, Spring 2010, pp.115-170.

- CRAWFORD Emily, "The principle of distinction and remote warfare", in JENS David Ohlin (ed.), *Research Handbook on Remote Warfare*, Edward Elgar Publishing; 2017, pp.50-78.
- DAVID Eric, "Respect for the Principle of Distinction in the Kosovo War", in *YIHL*, Vol. 3, 2000, pp. 81-107.
- KLEFFNER Jann K., "From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities: on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", in *Netherlands International Law Review*, Vol. 54, No. 2, 2007, pp. 315-336.
- RUYS, Tom, "License to Kill? State-Sponsored Assassination under International Law", *Military Law and Law of War Review*, Vol. 44 (2005): 13-49.
- SASSÒLI Marco, "When do Medical and Religious Personnel Lose what Protection", in Collegium 44 (Autumn 2014), *Proceedings of the Bruges Colloquium, Vulnerabilities in Armed Conflicts: Selected Issues, 17-18 October 2013*, pp.50-57.
- SCHMITT Michael N., "The Impact of High and Low-Tech Warfare on the Principle of Distinction", in ARNOLD Roberta & HILDBRAND Pierre-Antoine (eds), *International Humanitarian Law and the 21st Century's Conflicts*, Lausanne, Edis, 2005, pp. 169-189.

1. Guerrilla warfare

▸ CASES AND DOCUMENTS

- United States, President Rejects Protocol I
- Case Study, Armed Conflicts in the former Yugoslavia [Para. 35]
- Sri Lanka, Naval War against Tamil Tigers

▸ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- VEUTHEY Michel, *Guérilla et droit humanitaire*, Geneva, ICRC, 1983, 451 pp.

2. Wars of extermination

▸ CASES AND DOCUMENTS

- UN, Resolutions and Conference on Respect for the Fourth Convention [Part G.II.2]
- Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
- Case Study, Armed Conflicts in the Great Lakes Region [Parts I. A. and III.C.]

^ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- LAMP Nicolas, "Conceptions of War and Paradigms of Compliance: The 'New War' Challenge to International Humanitarian Law", in *Journal of Conflict & Security Law*, Vol. 16, No. 2, 2011 pp. 225-262.

3. Situations where structures of authority have disintegrated

^ CASES AND DOCUMENTS

- Colombia, Response of armed groups to COVID-19
- ICRC, Disintegration of State Structures
- First Periodical Meeting, Chairman's Report [Part II.2]
- Case Study, Armed Conflicts in the Great Lakes Region [Part III.A. and III.C.]
- Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Parts 1 and 2]
- Mali, Conduct of Hostilities
- Somalia, the fate of Children in the conflict

^ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- THUERER Daniel, "The 'Failed State' and International Law", in *IRRC*, No. 836, December 1999, pp. 731-761.
- THUERER Daniel, "Der Wegfall effektiver Staatsgewalt: Der 'failed State'", *Berichte der Deutschen Gesellschaft für Völkerrecht*, Vol. 34, 1995, pp. 9-47.

Further reading:

- CAIN Kenneth L., "The Rape of Dinah: Human Rights, Civil War in Liberia, and Evil Triumphant", in *Human Rights Quarterly*, Vol. 21, No. 2, 1999, pp. 265-307.
- KONO Keiko, "The Legal Status of Taliban Detainees as Unlawful Combatants: International Armed Conflict with a "Failed State"", in *NIDS Security Report*, 2008, pp. 35-44.

4. Conflicts aimed at overthrowing a regime or a government

5. Terrorism, the "war on terror", and in particular the status of "unlawful combatants"

i.e. persons who belong to an armed group, but do not fulfil the (collective or individual) requirements for combatant status

[See also Fundamentals of IHL, III. 1. C. e) The global war on terror?]

^ CASES AND DOCUMENTS

- ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
- Israel, The Targeted Killings Case [Paras 24-40]
- Israel, Detention of Unlawful Combatants
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- United States, Military Commissions
- United States, Use of Armed Drones for Extraterritorial Targeted Killings
- General Assembly, The use of drones in counter-terrorism operations
- U.S., Lethal Operations against Al-Qa'ida Leaders
- United States of America, The Death of Osama bin Laden
- USA, Guantánamo, End of "Active Hostilities" in Afghanistan
- Somalia, The Death of Bilal Al-Sudani

^ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BORELLI Silvia, "Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the 'War on Terror'", in *IRRC*, No. 857, March 2005, pp. 39-68.
- BORELLI Silvia, "The Treatment of Terrorist Suspects Captured Abroad: Human Rights and Humanitarian Law", in BIANCHI Andrea (ed.), *Enforcing International Law Norms against Terrorism*, Oxford, Hart, 2004, pp. 39-61.
- BYERS Michael, "Terrorism, the Use of Force and International Law after 11 September", in *ICLQ*, Vol. 51/2, 2002, pp. 401-414.
- CASSESE Antonio, "Terrorism is also Disrupting Crucial Legal Categories of International Law", in *EJIL*, Vol. 12-5, 2001, pp. 993-1001.
- CRAWFORD Emily, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford, OUP, 2010, 213 pp.
- DINSTEIN Yoram, "Unlawful Combatancy", in *IYHR*, Vol. 32, 2002, pp. 247-270.
- DÖRMANN Knut, "The Legal Situation of 'Unlawful/Unprivileged Combatants'", in *IRRC*, No. 849, March 2003, pp. 45-74.
- FERNANDO-SANCHEZ Pablo Antonio (ed.), *International Legal Dimension of Terrorism* (See in particular Part IV, 'Terrorism and Armed Conflicts'), Leiden, M. Nijhoff, 2009, 512 pp.
- FINAUD Marc, "L'abus de la notion de "combattant illégal" : une atteinte au droit international

humanitaire”, in *RGDIP*, Tome 110, No. 4, 2006, pp. 861-890.

- GABOR Rona, “Does IHL Protect “Unlawful Combatants”?”, in *Collegium*, No. 43, 2013, pp. 63-67.
- GASSER Hans-Peter, “International Humanitarian Law, the Prohibition of Terrorist Acts and the Fight against Terrorism”, in *YIHL*, Vol. 4, 2004, pp. 329-347.
- GREENWOOD Christopher, “International Law and the ‘War against Terrorism’”, in *International Affairs*, Vol. 78/2, 2002, pp. 301-317.
- KESEME Philip Odudu & EBITARI Joshua Allison, “International humanitarian law: the status of unlawful combatants”, in *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol 8, No 2, 2017, pp. 38-47.
- KING Faiza Patel & SWAAK-GOLDMAN Olivia, “The Applicability of International Humanitarian Law to the ‘War on Terrorism’”, in *Hague Yearbook of International Law*, 2003, Vol. 15, 2002, pp. 39-49.
- LIETZAU William, “Combating Terrorism: The Consequences of Moving from Law Enforcement to War”, in WIPPMAN David & EVANGELISTA Matthew (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, pp. 31-51.
- NEUMAN Gerald L., “Humanitarian Law and Counterterrorist Force”, in *EJIL*, Vol. 14/2, April 2003, pp. 283-298.
- PAUST Jordan J., “War and Enemy Status After 9/11: Attacks on the Laws of War”, in *The Yale Journal of International Law*, Vol. 28, 2003, pp. 325-335.
- PEJIC Jelena, ““Unlawful/Enemy Combatants:” Interpretations and Consequences”, in SCHMITT Michael & PEJIC Jelena (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, M. Nijhoff, Leiden/Boston, 2007, pp. 335-357.
- PLAW Avery, *Targeting Terrorists: A License to Kill?*, Aldershot, Ashgate, 2008, 294 pp.
- RATNER Steven R., “Predator and Prey: Seizing and Killing Suspected Terrorists Abroad”, in *Journal of Political Philosophy*, September 2007, Vol. 15, Issue 3, pp. 251-275.
- ROBERTS Adam, “The Laws of War in the War on Terror”, in *IYHR*, Vol. 32, 2002, pp. 193-245.
- SASSÒLI Marco, “La définition du terrorisme et le droit international humanitaire”, in *Revue québécoise de droit international*, Vol. 19, hors-série, 2007, pp. 29-48.
- SASSÒLI Marco, “La ‘guerre contre le terrorisme’, le droit international humanitaire et le statut de prisonnier de guerre”, in *CYIL*, Vol. 39, 2001, pp. 211-252.
- SASSÒLI Marco, “Terrorism and War”, in *Journal of International Criminal Justice*, Vol. 4, Issue 5, 2006, pp. 969-981.
- SASSÒLI Marco, “Query: Is There a Status of “Unlawful Combatant”?”, in JACQUES Richard B. (ed.), “Issues in International Law and Military Operations”, in *International Law Studies*, Vol. 80, 2006, pp. 57-69.
- SCHEIPERS Sibylle, *Unlawful Combatants: A Genealogy of the Irregular Fighter*, Oxford, Oxford University Press, 2015, 288 pp.
- SPEROTTO Federico, “Targeted Killings in response to Security Threats: Warfare and Humanitarian Issues”, in *Global Jurist*, Vol. 8, Issue 3, 2008, pp. 1-32.
- TOMAN Jiri, “The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions”, in *IYHR*, Vol. 32, 2002, pp. 271-304.
- VEUTHEY Michel, “Le droit international humanitaire face à la guerre contre le terrorisme”, in

DOUCET Ghislaine (ed.), *Terrorisme, victimes et responsabilité pénale internationale*, Paris, Calmann-Lévy, 2003, pp. 516-529.

- WIPPMAN David & EVANGELISTA Matthew (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, pp. 137-179.
- XIAO Mao, "Are Unlawful Combatants Protected under International Humanitarian Law", in *Amsterdam Law Forum*, Vol. 10, No. 2, 2018, pp. 62-71.
- YOO John C. & HO James C., "The Status of Terrorists", in *Virginia Journal of International Law*, Vol. 44, Fall 2003, pp. 207-228.

Further reading:

- BELLAMY Alex J., "No Pain, No Gain? Torture and Ethics in the War on Terror", in *International Affairs*, Vol. 82, No. 1, January 2006, pp. 121-146.
- CONDORELLI Luigi & NAQVI Yasmin, "The War against Terrorism and Jus in Bello: Are the Geneva Conventions Out of Date?", in BIANCHI Andrea (ed.), *Enforcing International Law Norms against Terrorism*, Oxford, Hart, 2004, pp. 25-37.
- DINSTEIN Yoram, "The Distinction between Unlawful Combatants and War Criminals", in DINSTEIN Yoram (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht, Boston, London, Martinus Nijhoff, 1989, pp. 103-117.
- DUFFY Helen, "Human Rights Litigation and the 'War on Terror'", in *IRRC*, Vol. 90, No. 871, September 2008, pp. 573-597.
- HOFFMANN Michael H., "State Practice, the Customary Law of War and Terrorism: Adapting Old Rules to Meet New Threats", in *IYHR*, Vol. 34, 2004, pp. 231-249.
- JACKSON Jami Melissa, "The Legality of Assassination of Independent Terrorist Leaders: an Examination of National and International Implications", in *North Carolina Journal of International Law and Commercial Regulation*, Vol. 24/3, 1999, pp. 669-697.
- LINNAN David K., *Enemy Combatants, Terrorism and Armed Conflict Law: a Guide to the Issues*, Westport, London, Praeger Security International, 2008, 400 pp.
- MCDONALD Neil & SULLIVAN Scott, "Rational Interpretation in Irrational Times: The Third Geneva Convention and War on Terror", in *Harvard International Law Journal*, Vol. 44, No. 1, 2003, pp. 301-316.
- O'CONNELL Mary Ellen, "Combatants and the Combat Zone", in *University of Richmond Law Review*, Vol. 43, Issue 3, March 2009, pp. 845-863.
- PARKER Tom, "The Proportionality Principle in the War on Terror", in *Hague Yearbook of International Law*, Vol. 15, 2002, pp. 3-15.
- PFANNER Toni, "Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action", in *IRRC*, No. 857, March 2005, pp. 149-174.
- REEVES Shane, WALALACE David.A, "The Combatant Status of the 'Little Green Men' and Other Participants in the Ukraine Conflict" in *International Law Studies*, Vol. 91, p. 361, 2015
- ROBERTS Adam, "Counter-terrorism, Armed Force and the Laws of War", in *Survival*, Vol. 44/1, 2002, pp. 7-32.

- RUBIN Alfred P., "Applying the Geneva Conventions: Military Commissions, Armed Conflict, and Al-Qaeda", in *The Fletcher Forum of World Affairs*, Vol. 26/1, 2002, pp. 79-81.
- SCHMITT Michael N., "Asymmetrical Warfare and International Humanitarian Law", *The Air Force Law Review*, Vol. 62, 2008, pp. 1-42.
- SZPAK Agnieszka, "The Legal Status of the Guantanamo Bay Detainees - Ten Years Later", in *Birkbeck Law Review*, Vol. 1, No.2, 2013, pp. 375-420.
- TIGROUDJA Hélène, "Quel(s) droit(s) applicable(s) à la 'guerre au terrorisme' ?", in *AFDI*, Vol. 48, 2002, pp. 81-102.
- VAN SCHAAK Beth, "The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory", *Legal Studies Research Papers Series*, no.02-12, January 2012, 68 pp.
- VIERUCCI Luisa, "Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees are Entitled", in *Journal of International Criminal Justice*, Vol. 1, 2003, pp. 284-314.
- WEDGWOOD Ruth, "Responding to Terrorism: the Strikes against Bin Laden", in *The Yale Journal of International Law*, Vol. 24/2, 1999, pp. 559-576.

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)?

^ CASES AND DOCUMENTS

- Australia/Afghanistan, Inquiry into the Conduct of Australian Defence Forces
- ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities
- Iraq/Syria/UK, Drone Operations against ISIS

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?

^ CASES AND DOCUMENTS

- Israel, Detention of Unlawful Combatants
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- United States, Military Commission
- United States, Habeas Corpus for Guantanamo Detainees
- United States, The Obama Administration's Internment Standards
- United States, Closure of Guantanamo Detention Facilities

^ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BOGAR Thomas, "Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror", in *Florida Journal of International Law*, Vol. 21, No. 1, April 2009, pp. 29-91.
- BORELLI Silvia, "Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the 'War on Terror'", in *IRRC*, No. 857, March 2005, pp. 39-68.
- BORELLI Silvia, "The Treatment of Terrorist Suspects Captured Abroad: Human Rights and Humanitarian Law", in BIANCHI Andrea (ed.), *Enforcing International Law Norms against Terrorism*, Oxford, Hart, 2004, pp. 39-61.
- FORSYTHE David P., "United States Policy Toward Enemy Detainees in the 'War on Terrorism'", in *Human Rights Quarterly*, Vol. 28, No. 2, May 2006, pp. 465-491.
- GOODMAN Ryan, "The Detention of Civilians in Armed Conflicts", in *AJIL*, Vol. 103, No. 1, January 2009, pp. 48-74.
- MURPHY Sean D., "Evolving Geneva Convention Paradigms in the 'War on Terrorism': Applying the Core Rules to the Release of Persons Deemed 'Unprivileged Combatants'", in *The George Washington Law Review*, Vol. 75, No. 5/6, August 2007, pp. 1105-1164.
- NAERT Frederik, "Detention in Peace Operations: the Legal Framework and Main Categories of Detainees", in *Revue de droit militaire et de droit de la guerre*, Vol. 1-2, No. 45, 2006, pp. 51-78.
- RONA Gabor, "An Appraisal of US Practice Relating to 'Enemy Combatants'", in *YIHL*, Vol. 10 (2007), 2009, pp. 232-250.
- TURNS David, "The Treatment of Detainees and the 'Global War on Terror': Selected Legal Issues", in *IYHR*, Vol. 38, 2008, pp. 145-167.
- WAXMAN Matthew C., "Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists", in *Columbia Law Review*, 2008, Vol. 108, pp. 1365-1430.

Further reading:

- ELSEA Jennifer K., "Detention of U.S. Persons as Enemy Belligerents", *US Congressional Research Service*, January 23, 2014, 56 pp.
- OLSON Laura, "Guantanamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards?", in *Case Western Reserve Journal of International Law*, Vol. 42, No. 1 & 2, 2009, pp. 197-243.
- RONA Gabor, "A Bull in a China Shop: The War on Terror and International Law in the United States", in *California Western International Law Journal*, Vol. 39, Issue 1, 2008, pp. 135-159.

Suggested reading:

- Geneva Academy of International Humanitarian Law and Human Right, "Foreign Fighters under International Law", in *Geneva Academy of International Humanitarian Law and Human Right*, No. 7, 2014.
- DEPREZ Christophe & WITTORSKI Isaline, "Des combattants qui n'en sont pas vraiment : les Européens partis se battre en Syrie et en Irak vu par le droit international humanitaire", in FLORE Daniel & JACOBS Ann, *Les combattants européens en Syrie*, Paris, L'Harmattan, 2015, pp. 43-84.

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.

^ CASES AND DOCUMENTS

- The Issue of Mercenaries [Part D.]
- Montreux Document on Private Military and Security Companies
- ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
- United States, Use of Armed Drones for Extraterritorial Targeted Killings
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2011
- Private Military Security Companies
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [paras 303-310]
- USA, *Al-Shimari v. CACI Premier Technology, Inc.*
- Switzerland, Voluntary Report on Implementation of IHL

^ SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BOLDT Nicky, "Outsourcing War: Private Military Companies and International Humanitarian Law", in *German Yearbook of International Law*, vol. 47, 2005, pp. 502-544.
- BOSCH Shannon, "Private Security Contractors and State Responsibility: Are States Exempt from Responsibility for Violations of Humanitarian Law Perpetrated by Private Security Contractors?", in *The Comparative and International Law Journal of Southern Africa*, Vol. 41, No. 3, 2008, pp. 353-382.
- CAMERON Lindsey, "Private Military Companies: Their Status under International Humanitarian Law and Its Impact on their Regulation", in *IRRC*, Vol. 88, 2006, pp. 573-598.

- CAMERON Lindsey, "New Standards for and by Private Military Companies?", in PETERS A. et al., *Non-State Actors as Standard Setters*, Cambridge, CUP, 2009, pp. 113-145.
- CAMERON Lindsey & CHETAIL Vincent, *Privatizing war: private military and security companies under public international law*, Cambridge, New York, Cambridge University Press, 2013, 720 pp.
- CHESTERMAN Simon & LEHNARDT Chia (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford, OUP, 2007, 287 pp.
- COCKAYNE James, "The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law", in *IRRC*, Vol. 88, No. 863, September 2006, pp. 459-490.
- COCKAYNE James & SPEERS MEARS Emily, "Private military and Security Companies: a Framework for Regulation", in *International Peace Institute*, March 2009, 16 pp.
- COTTIER Michael, "Elements for Contracting and Regulating Private Security and Military Companies", in *IRRC*, Vol. 88, No. 863, September 2006, pp. 637-663.
- COWLING M.G., "Outsourcing and the Military: Implications for International Humanitarian Law", in *South African Yearbook of International Law*, Vol. 32, 2008, pp. 312-344.
- EVGENI Moyakine, *The privatized art of war: private military and security companies and state responsibility for their unlawful conduct in conflict areas*, Cambridge, Intersentia, 2014, 477 pp.
- FRANCIONI Francesco, WHITE Nigel, MACLOED Sorcha, HOPPE Carsten, LEHNARDT Chia, RYNGAERT Cedric & CHESTERMAN Simon, "Symposium: Private Military Contractors and International Law", in *EJIL*, vol. 19, 2008, pp. 961-1074.
- GILLARD Emanuela-Chiara, "Business Goes to War", in *IRRC*, Vol. 88, No. 863, 2006, pp. 525-572.
- KIDANE Won, "The Status of Private Military Contractors under International Humanitarian Law", in *Denver Journal of International law and Policy*, Vol 38, No.3, 2010, pp. 361-419.
- KONTOS Alexis P., "Private" Security Guards: Privatized Force and State Responsibility under International Human Rights Law", in *Non-State Actors and International Law*, Vol. 4, 2004, pp. 199-238.
- KÖRTGEN Yannic, "Outsourcing war : private military and security companies under international humanitarian law", in BASSIOUNI Cherif, *Globalization and its impact on the future of human rights and international criminal justice*, Cambridge, Intersentia, 2015, pp. 253-279.
- LIU Hin-Yan, "Leashing the Corporate Dogs of War: the Legal Implications of the Modern Private Military Company", in *Journal of Conflict and Security Law*, Vol. 15, No. 1, 2010, pp. 141-168.
- MACDONALD Avril, "The Legal Status of Military and Security Subcontractors", in ARNOLD Roberta & HILDBRAND Pierre-Antoine (eds), *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges*, Lausanne, Editions Interuniversitaires Suisses, 2005, pp. 215-253.
- MANDEL Robert, *Armies without States: the Privatization of Security*, Boulder, London, Rienner Publishers, 2002, 169 pp.
- MILLIARD Todd S., "Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies", in *Military Law Review*, Vol. 176, 2003, pp. 1-95.
- ÖSTERDAHL Inger, *The Public-Private in Armed Conflict: The Accountability of private security companies*, University of Uppsala, Sweden, 2010, 33 pp.

- RAASVELDT Robert, "Accountability Problems for Private Military Companies", in *Humanitères Völkerrecht*, Vol. 3, 2004, pp. 187-189.
- SCHMITT Michael N., "War, International Law and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees", in *Chicago Journal of International Law*, Vol. 5, 2005, pp. 511-546.
- SOSSAI Mirko, "Status of Private Military Companies' Personnel in the Laws of War: The Question of Direct Participation in Hostilities", in *The Italian Yearbook of International Law*, Vol. 18, 2008, pp. 89-115.
- STEPHENS Dale & LEWIS Angeline, "The Targeting of Contractors in Armed Conflict", in *YIHL*, Vol. 9, 2006, pp. 25-64.
- TOUGAS Marie-Louise, *Droit international, sociétés militaires privées et conflit armé*, Brussels, Bruylant, 2012.
- TOUGAS Marie-Louise, "Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict", *International Review of the Red Cross*, vol.96; issue 893 (2014), pp.305-358.
- University Centre for International Humanitarian Law, *Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions*, Report, Geneva, 2005.
- WALTHER Pernille, "The Legal Status of Private Contractors under International Humanitarian Law", in *Justitia*, Vol. 31, No. 4, University of Copenhagen, 2008, pp. 1-47.

Further reading:

- BALMOND Louis, "Observations sur le document de Montreux relatif aux obligations juridiques internationales pertinentes et aux bonnes pratiques pour les Etats concernant les activités des sociétés militaires privées", in *RGDIP*, Vol. 113, No. 1, 2009, pp. 113-124.
- CAMERON Lindsey, *The Privatization of Peacekeeping: Exploring Limits and Responsibility Under International Law*, Cambridge University Press, 2017.
- COCKAYNE James, "Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document", in *Journal of Conflict & Security Law*, Vol. 13, No. 3, 2008, pp. 401-428.
- GAMARRO GONZÀLE Javier, *The Use of PMSCs by the United Nations in Times of Armed Conflict*, University of Groningen, 2017, 31 pp.
- LILLY Damian, "The Privatization of Peacekeeping: Prospects and Realities", in *Disarmament Forum*, Vol. 3, 2000, pp. 53-62.
- MACCORMACK Timothy L.H., "The 'Sandline Affair': Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict", in *YIHL*, Vol. 1, 1998, pp. 292-300.
- MACDONALD Avril, "Dogs of War Redux? Private Military Contractors and the New Mercenarism", in *Militair Rechtelijk Tijdschrift*, Vol. 100, No. 7, 2007, pp. 210-228.
- RIDLON Daniel P., "Contractors or Illegal Combatants? The Status of Armed Contractors in Iraq", in *The Air Force Law Review*, Vol. 62, 2008, pp. 199-253.

- SCHMITT Michael N., “Contractors on the Battlefield: the US Approach”, in *Militair Rechtelijk Tijdschrift*, Vol. 100, No. 7, 2007, pp. 264-281.
- TONKIN Hannah, “Common Article I: a Minimum Yardstick for Regulating Private Military and Security Companies”, in *Leiden Journal of International Law*, Vol. 22, No. 4, 2009, pp. 279-299.
- VIERUCCI Luisa, “The role of private military and security companies in non-international armed conflicts: ius ad bellum and ius in bello issues”, in *European University Institute*, Vol. 14, 2009, pp. 1-27.

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)

^ CASES AND DOCUMENTS

- ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
- ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities
- ECHR, Korbely v. Hungary
- Israel, The Targeted Killings Case [Paras 29-40]
- Israel, Detention of Unlawful Combatants [Part A., paras 13, 21; Part B.]
- ICC, The Prosecutor v. Thomas Lubanga Dyilo [Paras 259-267]
- Colombia, Constitutionality of IHL Implementing Legislation [Paras D.3.3.1.-5.4.3, Para. E.1]
- Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 7-15, 42, 52-56]
- “Great March of Return” Demonstrations and Israel’s Military Response

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*

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